

Federal Court



Cour fédérale

**Date: 20220128**

**Dockets: T-775-20  
T-1511-20**

**Citation: 2022 FC 101**

**Ottawa, Ontario, January 28, 2022**

**PRESENT: The Honourable Mr. Justice Fothergill**

**Docket: T-775-20**

**BETWEEN:**

**PAUL KHOURY**

**Applicant**

**and**

**EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA  
AHMED HUSSEN MINISTER  
GRAHAM FLACK DEPUTY MINISTER**

**Respondents**

**Docket: T-1511-20**

**AND BETWEEN:**

**PAUL KHOURY**

**Applicant**

**and**

**EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA  
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**Respondents**

**JUDGMENT AND REASONS**

I. Overview

[1] Paul Khoury has worked at Employment and Social Development Canada [ESDC] since 1997. Before he began a period of extended leave, he was a Senior Program Advisor for the Canada Pension Plan and Old Age Security Pension.

[2] In November 2019, Mr. Khoury made two requests for access to personal information [P-2019-02548 and P-2019-02550] pursuant to ss 12 and 13 of the *Privacy Act*, RSC 1985, c P-21. Mr. Khoury sought a range of computer logs and other information spanning the 23 years of his employment. In December 2019, Mr. Khoury made a third request for access to personal information [P-2019-03018], in which he sought his complete employee file and all related human resources files held by ESDC and the Government of Canada since 1997.

[3] The ESDC Access to Information and Privacy [ATIP] Office refused Mr. Khoury's requests in P-2019-02548 and P-2019-02550 pursuant to ss 12(1)(b) and 13(2) of the *Privacy Act*, because he had failed to provide "sufficiently specific information on the location of the information as to render it reasonably retrievable". Mr. Khoury submitted a complaint to the

Office of the Privacy Commissioner of Canada [OPC]. On June 5, 2020, the OPC determined that his complaint was not well founded.

[4] Mr. Khoury submitted a second complaint to the OPC respecting ESDC's failure to process his request for information in P-2019-03018. On November 17, 2020, the OPC concluded that ESDC had not processed Mr. Khoury's request within the applicable statutory timeframe, and the request was therefore deemed to have been refused. The OPC determined that Mr. Khoury's complaint respecting P-2019-03018 was well founded.

[5] On January 26, 2021, ESDC responded to Mr. Khoury's request in P-2019-03018 with a release package comprising 766 pages.

[6] Mr. Khoury has brought two applications for judicial review. One concerns ESDC's refusal of his requests for personal information in P-2019-02548 and P-2019-02550 [Court File No T-775-20], and the other concerns ESDC's deemed refusal of his request for personal information in P-2019-03018 [Court File No T-1511-20].

[7] The application for judicial review in Court File No T-775-20 must be dismissed because the ESDC ATIP Office reasonably found that Mr. Khoury failed to provide "sufficiently specific information on the location of the information as to render it reasonably retrievable".

[8] The application for judicial review in Court File No T-1151-20 must be dismissed because it is moot. To the extent that Mr. Khoury is dissatisfied with the release package he received on January 26, 2021, his recourse lies with the OPC and not this Court.

## II. Background

*Court File No T-775-20*

[9] Mr. Khoury sought the following information in P-2019-02548 and P-2019-02550:

- (a) logs showing individuals who may have logged into his GC Profile for the duration of his employment;
- (b) logs showing individuals who may have logged into his Microsoft Outlook for the duration of his employment;
- (c) logs showing individuals who may have logged into his “Banyan” e-mail platform for the duration of his employment;
- (d) any video and audio recordings of his work or personal conversations made inside and outside the workplace by employees, management, and union members;
- (e) any photos of Mr. Khoury being circulated by ESDC employees; and

- (f) any and all personal items or documents held by ESDC management, employees or union members.

[10] On November 13, 2019, Mr. Khoury received a telephone call from an ESDC ATIP Officer [Officer]. The Officer requested particulars of Mr. Khoury's requests. Mr. Khoury confirmed that he commenced his employment in 1997, and provided the name of his manager.

[11] The Officer made enquiries respecting whether the information Mr. Khoury had requested could be retrieved. The Officer was informed that the Banyan e-mail system and all associated data were decommissioned in 2003, and accordingly that aspect of Mr. Khoury's request could not be processed. His request for computer logs was too generic, because investigations could be done only in relation to specific users, on a need-to-know basis, and could involve only a limited number of people. The Integrity Services Branch advised that no audio/video of the ESDC workplace existed.

[12] On November 27, 2019, the Officer informed Mr. Khoury by e-mail that his requests would be held in abeyance pending further clarification. In a telephone call the same day, the Officer explained to Mr. Khoury that his requests could not be processed because they were too broad and encompassed 23 years. He was asked to provide additional information regarding the names, dates, or locations that interested him. According to the Respondents, Mr. Khoury refused to provide further clarification, and his requests were eventually deemed to be abandoned.

*Court File No T-1511-20*

[13] In P-2019-03018, Mr. Khoury sought his complete employee file and all related human resources files held by ESDC and the Government of Canada since 1997. He also requested access to the results of an investigation into whether he owned a firearm, training records, disciplinary records, medical evaluations, and other documents.

[14] The ESDC ATIP Office requested information from various government branches, and received approximately 890 pages of documentation. On January 20, 2020, the ESDC ATIP Office requested an extension of time in which to process the volume of records received.

[15] On January 26, 2021, ESDC responded to Mr. Khoury's request with a release package comprising 766 pages.

### III. Issues

[16] These applications for judicial review raise the following issues:

- A. Did ESDC reasonably refuse Mr. Khoury's requests for personal information in P-2019-02548 and P-2019-02550 because he had not provided sufficient particulars for the information to be retrievable?

- B. Should Mr. Khoury's application for judicial review respecting his requests for personal information in P-2019-03018 be dismissed because it is moot or, in the alternative, premature?

IV. Analysis

- A. *Did ESDC reasonably refuse Mr. Khoury's requests for personal information in P-2019-02548 and P-2019-02550 because he had not provided sufficient particulars for the information to be retrievable?*

[17] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] the Supreme Court of Canada held that Parliament is presumed to have intended courts to review administrative decisions against the standard of reasonableness (at para 23). Jurisprudence prior to *Vavilov* that dictated how to conduct reasonableness review will often continue to provide insight, but should be used carefully in light of the Supreme Court's more recent guidance (*Vavilov* at para 143).

[18] In *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227, the Federal Court of Appeal held that the question of whether a requestor has provided sufficiently specific information so as to make the information reasonably retrievable is a heavily fact-based question warranting deference (at para 102). This is consistent with the proposition in *Vavilov* that reasonableness review requires the Court to give respectful attention to a decision-maker's demonstrated expertise (at para 93).

[19] I agree with the Respondents that there is nothing to rebut the presumption that ESDC's refusal of Mr. Khoury's requests for personal information in P-2019-02548 and P-2019-02550 is subject to review by this Court against the standard of reasonableness. The Court will intervene only if it is satisfied that there are sufficiently serious shortcomings in ESDC's decisions such that they cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

[20] Subsections 12(1) and 13(2) of the *Privacy Act* provide as follows:

**Right of access**

**12 (1)** Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to

(a) any personal information about the individual contained in a personal information bank; and

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution. [...]

**13 [...]**

**Request for access under 12(1)(b)**

**Droit d'accès**

**12 (1)** Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont le droit de se faire communiquer sur demande:

a) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux. [...]

**13 [...]**

**Demande de communication prévue à l'al. 12(1)b**



(2) A request for access to personal information under paragraph 12(1)(b) shall be made in writing to the government institution that has control of the information and shall provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

[Emphasis added.]

(2) La demande de communication des renseignements personnels visés à l’alinéa 12(1)b) se fait par écrit auprès de l’institution fédérale de qui relèvent les renseignements; elle doit contenir sur leur localisation des indications suffisamment précises pour que l’institution puisse les retrouver sans problèmes sérieux.

[je souligne.]

[21] In *Oleynik v Canada (Privacy Commissioner)*, 2016 FC 1167, Justice Keith Boswell held that the burden was upon the applicant to provide sufficient information about his requested information to make it “reasonably retrievable” (at para 34). It was not enough for the applicant to identify the location of the information without supplying the dates and recipients of the e-mail messages he sought.

[22] According to the affidavit submitted on behalf of the Respondents:

With respect to request P-2019-02548, ESDC ATIP contacted the Innovation, Information, and Technology Branch (IITB) of ESDC to inquire into the ability to fulfil the request. ESDC ATIP was informed that it was impossible to fulfil the Banyan email element of the request, as the Banyan system and all related data had been decommissioned in 2003. [...]

Regarding the other elements of request A-2019-02548, IITB informed ESDC ATIP that the request was too generic. Investigations can be done into specific users. However, these investigations are done on a need-to-know basis with a limited number of people involved, given the potential impact on the individual being investigated.

With respect to request P-2019-02550, ESDC ATIP contacted the Office of Primary Interest, Integrity Services Branch. They

informed ESDC ATIP that government audio/video does not exist in the workplace at ESDC.

[23] Mr. Khoury cross-examined the Respondents' affiant in writing, but only in relation to two matters: why he was not offered the option of receiving two years of login records, which an exhibit to the affidavit suggested might be possible; and why he was never informed of the further specifications required, or that his requests would be abandoned if he did not provide additional information. Before this Court, he challenges the reasonableness of ESDC's decision on similar grounds.

[24] With respect to the first issue, the Respondents' affiant explained that the excerpt from the exhibit referred to by Mr. Khoury was a note to file written by an ESDC ATIP officer following a preliminary conversation with a manager. The Innovation, Information and Technology Branch subsequently advised that Mr. Khoury's request was too generic, and additional specifications were required in order to retrieve the logs.

[25] With respect to the second issue, the Respondents' affiant explained that the ESDC ATIP Office informed Mr. Khoury that further clarification was required by e-mail and in two separate telephone calls on November 13, 2019 and November 27, 2019. The particulars requested included the names of individuals suspected of logging into Mr. Khoury's computer accounts, dates and locations.

[26] The evidence tendered on behalf of the Respondents to explain the reasons why ESDC refused Mr. Khoury's requests for personal information in P-2019-02548 and P-2019-02550 is

largely unchallenged and uncontradicted. I agree with the conclusion of the OPC expressed in its letter to Mr. Khoury dated June 5, 2020 that his requests were abandoned in accordance with the *Privacy Act* because he did not provide the necessary clarification within the imposed deadline. The OPC held that ESDC responded to Mr. Khoury's requests properly, and did not contravene his right of access under the *Privacy Act*.

[27] The OPC's correspondence to Mr. Khoury included the following additional commentary: "If you would like ESDC's ATIP to process your requests, then we would recommend that you contact their ATIP department in order to facilitate their retrieval of the records that you are seeking". In other words, it remains open to Mr. Khoury to pursue his requests for personal information by providing the necessary specifications of what he is seeking.

[28] The application for judicial review in Court File No T-775-20 must be dismissed because the ESDC ATIP Office reasonably found that Mr. Khoury failed to provide "sufficiently specific information on the location of the information as to render it reasonably retrievable".

B. *Should Mr. Khoury's application for judicial review respecting his requests for personal information in P-2019-03018 be dismissed because it is moot or, in the alternative, premature?*

[29] While the OPC upheld Mr. Khoury's complaint that his request for access to personal information in P-2019-03018 was not processed within the prescribed statutory timeframe, that was the full extent of the OPC's consideration of the matter. The OPC has never been asked to consider whether the release package comprising 766 pages provided to Mr. Khoury on January 26, 2021 was sufficiently responsive to his request.

[30] In *Cumming v Canada (Royal Mounted Police)*, 2020 FC 271, a case that is legally indistinguishable from this one, Justice Patrick Gleeson said the following at paragraph 32:

[...] the Privacy Commissioner's recommendation relates to a deemed refusal [...]. That refusal to respond has been remedied. The controversy that gave rise to the section 41 application has been resolved. The matter is moot. The remedy this Court might award has been provided to the Applicant as it related to the deemed refusal, and there is nothing to indicate that the Court should exercise its discretion to hear the matter in any event.

[31] Justice Gleeson continued at paragraph 33:

Mr. Cumming has not initiated a complaint with the Privacy Commissioner in respect of his concerns with the partial disclosure he has received. Making a complaint to the Privacy Commissioner in respect of a refusal is a condition to a section 41 application (*Heinz* [2006 SCC 13] at para 79). Not having submitted a complaint regarding the adequacy of the information provided and in the absence of an investigation by the Privacy Commissioner, it is premature for Mr. Cumming to seek relief from the Court in respect of these issues.

[32] The Federal Court of Appeal has recently confirmed that a complaint to and a report from the OPC are prerequisites to this Court ruling upon the adequacy of a response to a request for access to personal information under the *Privacy Act* (*Canada (Public Safety and Emergency Preparedness) v Gregory*, 2021 FCA 33 at paras 12-13, citing *Blank v Canada (Justice)*, 2016 FCA 189 [*Blank*]). This requirement is a statutory expression of the common law doctrine that all adequate and alternative remedies must be pursued before resorting to an application for judicial review, barring exceptional circumstances (*Whitty v Canada (Attorney General)*, 2014 FCA 30 at para 8).

[33] The rationale for this approach was further explained by the Federal Court of Appeal (*per de Montigny JA*) in *Blank* at paragraphs 31 and 32:

[...] The independent review of complaints by the Commissioner is a cornerstone of the statutory scheme put in place by Parliament, and the Federal Court is entitled to the considerable expertise and knowledge of that officer of Parliament before reviewing the government's assertions of exemptions and redactions of documents. I agree with the Judge, therefore, that the appellant could not unilaterally ignore this requirement and come directly to the Court.

It is no excuse to assert that the respondent breached its duty to act in good faith by failing to make a complete and timely response to the appellant's access request, and that the attachments should have been caught by the initial access request made by the appellant. [...] Section 41 of the Act makes it clear that the Federal Court may only review a refusal to access personal information after the matter has been investigated by the Privacy Commissioner. Accordingly, the Judge correctly concluded he was without jurisdiction to review the documents disclosed after the Commissioner's report.

[34] The application for judicial review in Court File No T-1511-20 must therefore be dismissed because it is moot. To the extent that Mr. Khoury is dissatisfied with the release package he received on January 26, 2021, his recourse lies with the OPC and not this Court.

## V. Conclusion

[35] The application for judicial review in Court File No T-775-20 is dismissed with costs in the all-inclusive amount of \$500.00.

[36] The application for judicial review in Court File No T-1511-20 is dismissed without costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review in Court File No T-775-20 is dismissed with costs in the all-inclusive amount of \$500.00.
  
2. The application for judicial review in Court File No T-1511-20 is dismissed without costs.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKETS:** T-775-20  
T-1511-20

**STYLE OF CAUSE:** PAUL KHOURY v EMPLOYMENT AND SOCIAL  
DEVELOPMENT CANADA, AHMED HUSSEN  
MINISTER AND GRAHAM FLACK DEPUTY  
MINISTER

**PLACE OF HEARING:** BY VIDEOCONFERENCE IN OTTAWA, ONTARIO

**DATE OF HEARING:** JANUARY 18, 2022

**REASONS FOR JUDGMENT  
AND JUDGMENT:** FOTHERGILL J.

**DATED:** JANUARY 28, 2022

**APPEARANCES:**

Paul Khoury  
(on his own behalf)

FOR THE APPLICANT

Meg Jones

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

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FOR THE RESPONDENTS