

Federal Court



Cour fédérale

Date: 20220405

Docket: T-1219-21

Citation: 2022 FC 464

Ottawa, Ontario, April 5, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

KATHRYN CHIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Kathryn Chin seeks judicial review of a decision by the Canadian Security Intelligence Service [CSIS] to refuse her request for access to personal information pursuant to s 12(1)(a) and 13(1) of the *Privacy Act*, RSC 1985, c P-21.

[2] According to Ms. Chin, since she was at university in 2007 she has been victimized by an unknown assailant who has implanted some kind of miniature or transparent electronic device on her person. She alleges that the device is used to track, harass, and assault her, causing her considerable mental and physical distress.

[3] Ms. Chin has complained to numerous authorities about her circumstances, including to the police. She has consistently been told that, without evidence to support her allegations, they cannot assist her.

[4] On March 18, 2021, Ms. Chin submitted a request for personal information to CSIS. She believes that CSIS must be aware of her difficult circumstances, and has taken insufficient steps to protect her.

[5] Consistent with its long-standing practice, CSIS refused Ms. Chin's request pursuant to s 16(2) of the *Privacy Act*, stating that it would neither confirm nor deny the existence of any records that would potentially be responsive to her request. CSIS noted that if the information did exist, then it would be exempt from disclosure pursuant to ss 21 and/or 22(1)(a) and (b) of the *Privacy Act*.

[6] Ms. Chin filed a complaint with the Office of the Privacy Commissioner [OPC]. On July 6, 2021, the OPC determined that Ms. Chin's complaint was "not well-founded".

[7] CSIS may refuse access to records in accordance with a blanket policy of not disclosing the existence of requested records where “the mere revealing of the existence or non-existence of information is in itself an act of disclosure: a disclosure that the requesting individual is or is not the subject of an investigation” (*Ruby v Canada (Solicitor General)*, [2000] 3 FC 589 (FCA) at paras 65-66 [*Ruby*]). The response Ms. Chin received was the same response that every Canadian or permanent resident would receive to a request for access to CSIS’ investigative records. The response was reasonable.

[8] Pursuant to s 22(1)(a) of the *Privacy Act*, the head of a government institution may refuse to disclose any personal information requested under s 12(1) only if it was obtained or prepared “in the course of lawful investigations”. Records would not be exempt from disclosure if they revealed CSIS’ complicity in an illegal plot to harm Ms. Chin using a miniature or transparent electronic device. This Court has seen no evidence to suggest any involvement or acquiescence by CSIS in attempts to harm Ms. Chin’s physical or mental wellbeing.

[9] The application for judicial review is dismissed.

II. Background

[10] In response to her request for personal information, CSIS conducted a search of information bank CSIS PPU 045. According to the Government of Canada’s “Info Source”, available on-line:

The records described in this bank include personal information on identifiable individuals whose activities are suspected of constituting threats to the security of Canada; on identifiable individuals who are or were being managed as confidential sources of information; on identifiable individuals no longer investigated by CSIS but whose activities did constitute threats to the security of Canada and which still meet the collection criteria stipulated in section 12 of the *CSIS Act*, and on identifiable individuals the investigation of whom relate to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.

[11] CSIS PPU 045 is designated as exempt from disclosure under s 18 of the *Privacy Act*.

CSIS informed Ms. Chin that if any information concerning her request were held in CSIS PPU 045, then it would be exempt from disclosure pursuant to s 21 of the *Privacy Act* as relating to the efforts of Canada towards detecting, preventing or suppressing subversive or hostile activities, or ss 22(1)(a) and/or (b) as relating to law enforcement and investigation.

[12] The OPC provided Ms. Chin with the following explanation for its determination that her complaint was not well-founded:

I wish to inform you that for security reasons, the CSIS has adopted the policy of refusing to neither confirm nor deny whether an individual's personal information is within CSIS PPU 045.

The CSIS relies on section 16(2) of the *Privacy Act* to not disclose whether personal information concerning a requestor exists. CSIS PPU 045 is an exempt bank. For your reference, you may wish to consult Exempt Personal Information Bank Order, No. 14 (CSIS) online at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-92688/FullText.html>, which designates the information bank in question as an exempt bank on the basis of section 21 and paragraphs 22(1)(a) and (b) of the *Privacy Act*.

Section 16(2) of the *Privacy Act* states that a government institution is not required to reveal whether personal information

exists. Section 16(1) states that the institution must indicate the sections of the *Privacy Act* which could reasonably be used to exempt such information if it did exist. As required by section 16(1), the CSIS has indicated that if information were to exist it could reasonably be expected to be exempted under one or more of sections 21 and/or 22(1)(a) or (b) of the *Privacy Act*. The *Privacy Act* also prohibits the Office of the Privacy Commissioner from either confirming or denying the existence of requested records, where the institution has relied on section 16(2). My Office is of the stance that the CSIS has correctly cited these provisions in its response and dealt with your request appropriately and in accordance with the *Privacy Act*.

III. Issues

[13] This application for judicial review raises the following issues:

- A. Was CSIS' refusal of Ms. Chin's request for access to personal information reasonable?
- B. Did CSIS' refusal of Ms. Chin's request for access to personal information violate her rights under the *Canadian Charter of Rights and Freedoms*?

IV. Analysis

[14] Judicial review of a government institution's refusal to disclose information involves a two-step process (*Russell v Canada (Attorney General)*, 2019 FC 1137 [*Russell*] at para 24). The first step requires the Court to consider if the requested information, whether actual or hypothetical, falls within the legislative provisions relied upon. The second step requires the

Court to consider the government's exercise of its discretion not to disclose the requested information.

[15] Prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the first step was understood to be reviewable against the standard of correctness, while the second step was reviewable against the standard of reasonableness (*Braunschweig v Canada (Public Safety)*, 2014 FC 218 [*Braunschweig*] at para 29; *Llewellyn v Canadian Security Intelligence Service*, 2014 FC 432 [*Llewellyn*] at para 23).

[16] However, in *Vavilov* the Supreme Court of Canada held that the standard of review must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness (*Vavilov* at para 23).

[17] There is nothing to rebut the presumption of reasonableness review for both steps of the analysis, and accordingly the Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). A decision not to release information that falls within a claimed exemption is heavily fact-based with a policy component, and the Court therefore owes deference to a government institution's exercise of discretion (*Martinez v Canada (Communications Security Establishment)*, 2018 FC 1179 at para 13).

[18] Ms. Chin also argues that CSIS' refusal of her request for access to personal information violated her rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* [Charter]. She did not raise any constitutional arguments in her request to CSIS or her complaint to the OPC, and so this aspect of her application is being considered for the first time.

A. *Was CSIS' refusal of Ms. Chin's request for access to personal information reasonable?*

[19] Pursuant to s 18(2) of the *Privacy Act*, the head of a government institution may refuse to disclose any personal information requested under s 12(1) that is contained in an exempt bank. CSIS PPU 045 is an exempt bank that consists predominantly of sensitive national security information of the kind described in s 21 and ss 22(1)(a) and (b) of the *Privacy Act*.

[20] The Respondent filed both a public and a secret affidavit in this proceeding. The affidavits explain the manner in which the CSIS Access to Information and Privacy [ATIP] Section processed Ms. Chin's request. The secret affidavit apprised the Court of the results of the search of CSIS PPU 045.

[21] Subsection 16(2) of the *Privacy Act* permits a government institution not to confirm whether personal information exists within an exempt information bank. The Deputy Chief of the ATIP Section explained in her public affidavit that the response to a request seeking personal information from CSIS PPU 045 must be the same regardless of whether or not any personal information actually exists. Responding in any other manner would jeopardize CSIS' ability to

carry out its mandate of investigating and advising the government on threats to the security of Canada.

[22] The Federal Court of Appeal has confirmed that CSIS may refuse access to records in accordance with a blanket policy of not disclosing the existence of requested records where “the mere revealing of the existence or non-existence of information is in itself an act of disclosure: a disclosure that the requesting individual is or is not the subject of an investigation” (*Ruby* at paras 65-66). Numerous decisions of this Court stand for the same proposition (see, e.g., *Russell* at para 26; *VB v Canada (Attorney General)*, 2018 FC 394 [VB] at para 43; *Braunschweig* at paras 45-46; *Llewellyn* at para 37).

[23] As Justice Patrick Gleeson observed in *VB*, “[t]he response the applicant received to the request for investigative records was ... the response every Canadian or permanent resident would receive” (*VB* at para 48).

[24] Having reviewed the public and secret evidence filed by CSIS in this application, I am satisfied that any actual or hypothetical records in question were reasonably found by CSIS to be exempt from disclosure. This is a significant finding, because records would not be exempt from disclosure if they revealed CSIS’ complicity in an illegal plot to harm Ms. Chin using a miniature or transparent electronic device (*Russell* at para 31; *Khadr v Canada (Attorney General)*, 2008 FC 549 at paras 86-90).

[25] In making this finding, I am neither confirming nor denying the existence of records in CSIS PPU 045 that may pertain to Ms. Chin and her ongoing challenges with her mental and physical health. I am merely giving effect to s 22(1)(a) of the *Privacy Act*, which states that the head of a government institution may refuse to disclose any personal information requested under s 12(1) only if it was obtained or prepared “in the course of lawful investigations”. I am satisfied that CSIS’ decision to apply the exemptions in this case was reasonable.

[26] While this may not give Ms. Chin complete satisfaction, she may rest assured that this Court has seen no evidence to suggest any involvement or acquiescence by CSIS in attempts to harm her physical or mental wellbeing.

B. *Did CSIS’ refusal of Ms. Chin’s request for access to personal information violate her rights under the Canadian Charter of Rights and Freedoms?*

[27] Ms. Chin asserts that CSIS’ refusal to disclose information in response to her request has endangered her health and safety. She says that living with an unknown and unregulated technology infringes her rights and freedoms, and creates dangerous living conditions for herself and others.

[28] A Charter challenge to government acts or omissions must be supported by evidence (*Fraser v Canada (Attorney General)*, 2020 SCC 28). In this case, there is no evidence to suggest any acts or omissions by CSIS that may have caused harm to Ms. Chin’s physical or mental wellbeing.

[29] The constitutional challenge must therefore be rejected.

V. Conclusion

[30] The application for judicial review is dismissed.

[31] The Respondent seeks costs in the modest sum of \$250.00, noting that the reasons for CSIS' refusal of Ms. Chin's request for investigative records were fully explained in the OPC's letter informing her that her complaint was not well founded.

[32] The courts have repeatedly upheld CSIS' blanket policy of refusing to disclose the existence of investigative records, and for good reason. However, CSIS must understand that in some situations, the unyielding application of this policy may have the unintended effect of exacerbating mental health challenges faced by Canadian citizens and permanent residents who are seeking access to their personal information (see, e.g., *Russell; Canada (Attorney General) v Hutton*, 2021 FC 750 (under appeal)).

[33] In all of the circumstances, I exercise my discretion not to award costs against Ms. Chin.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1219-21

STYLE OF CAUSE: KATHRYN CHIN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN CALGARY AND EDMONTON, ALBERTA, AND OTTAWA, ONTARIO

DATE OF HEARING: MARCH 28, 2022

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: APRIL 5, 2022

APPEARANCES:

Kathryn Chin
(on her own behalf)

FOR THE APPLICANT

Jennifer Lee

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Edmonton, Alberta

FOR THE RESPONDENT