Federal Court  Cour fédérale

Date: 20220419

Docket: T-220-20

Citation: 2022 FC 553

Ottawa, Ontario, April 19, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

M. LINDSAY LAMBERT

Applicant

and

MINISTER OF CANADIAN HERITAGE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2018, M. Lindsay Lambert requested access to records in the possession of the Minister of Canadian Heritage under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*]. The context for the request was the "Zibi" project for the development of Chaudière Island and Albert Island, small islands in the Ottawa River just west of Parliament Hill. Mr. Lambert's request, as amended, sought copies of Acts of Parliament or statutes in three categories, each pertaining to the legal status of the islands and/or authority to develop them. The framing of the

request made clear Mr. Lambert's view that the islands were "Public Purpose Crown Land" and that it was unlawful for the government to permit their development.

[2] Mr. Lambert was dissatisfied with Canadian Heritage's response to this request. He filed a complaint with the Office of the Information Commissioner of Canada, which concluded after an investigation that the complaint was not well founded. Mr. Lambert now seeks review of the matter pursuant to section 41 of the *ATIA*.

[3] For the reasons that follow, this application will be dismissed. Contrary to the Minister's submissions, I conclude that the Court has jurisdiction to hear Mr. Lambert's application. However, on the merits, I conclude there are no grounds on which to make the orders Mr. Lambert requests. I reach this conclusion for three reasons, each of which would be sufficient to dismiss the application.

[4] First, the *ATIA* permits a requester to request records in the possession of a government institution. It does not permit them to require the government to identify the legislative authority for its actions, a request that effectively amounts to a request for a legal opinion or position. Second, the record establishes that Canadian Heritage concluded it had no records responsive to the request. While this could have been stated more clearly in the written response to the access request, the record provides no basis to question that conclusion, and the Court cannot order the Minister to produce something they do not have. Third, the records requested were in any case Acts of Parliament or statutes. Any such statutes are "published material" and Part 1 of the *ATIA* therefore does not apply to them by operation of paragraph 68(*a*) of the *ATIA*.

II. Issues and Standard of Review

[5] Mr. Lambert's application for judicial review, and the Minister's response to it, raise the following issues:

A. Does the Court have jurisdiction to hear the application?

B. If so, are there grounds to make the orders sought by Mr. Lambert in the circumstances of the case?

[6] With respect to the first issue, the Court's jurisdiction is a matter to be decided by the Court, and no standard of review is applicable.

[7] With respect to the second issue, section 44.1 of the *ATIA* confirms that an application under section 41 is to be conducted *de novo*, that is, "heard and determined as a new proceeding." Given this clear Parliamentary indication, the general presumption that review will be conducted on the standard of review of reasonableness does not apply: *Moshinsky-Helm v Canada (National Revenue)*, 2022 FC 120 at paras 14–15; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 32–35. This is not a case where the Minister exercised a discretion under the *ATIA* and was therefore entitled to deference through review on the reasonableness standard: *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2019 FCA 95 at para 31. I will therefore review the matter without deference to the decisions or actions of the Minister.

[8] As the answers to the above questions turn on the nature of Mr. Lambert's access to information request and the responses he received to it, I will set these out before turning to the questions themselves.

III. Factual and Procedural Background

(1) The Order in Council approving land transactions

[9] On December 15, 2017, the Governor in Council issued Order in Council PC 2017-1684. In the Order in Council, the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, approved a series of land transactions pertaining to the Zibi project. This included approving acquisitions of land by the National Capital Commission [NCC] pursuant to paragraph 15(1)(*a*) of the *National Capital Act*, RSC 1985, c N-4; approving disposals of land by the NCC pursuant to subsection 15(2) of the *National Capital Act* and subsection 99(2) of the *Financial Administration Act*, RSC 1985, c F-11; and approving the granting of an easement by the NCC pursuant to paragraph 15(1)(*b*) of the *National Capital Act*.

[10] Mr. Lambert, who represented himself in these proceedings, is not a lawyer but describes himself as a capable researcher. After conducting extensive research surrounding the Chaudière and Albert Islands, he appears to have concluded the land transactions approved in Order in Council PC 2017-1684 were not lawful.

[11] It is important to stress at the outset that the lawfulness of the Order in Council is not at issue in this proceeding, which pertains only to Mr. Lambert's request for access to information.

However, the Order in Council and Mr. Lambert's views on it form part of the background to the matter and to his access requests, as well as to his requests for remedies. At the same time, the *ATIA* does not require an access to information request to have a particular purpose or justification. It simply requires a request to be in writing and "provide sufficient detail to enable an experienced employee of the institution to identify the record with a reasonable effort": *ATIA*, s 6.

(2) Mr. Lambert's access to information requests

[12] On October 30, 2018, Mr. Lambert filed a request for access to information with the Office of the Minister of Canadian Heritage and Multiculturalism (as the Minister was then known; for ease, I will simply refer to them as the Minister of Canadian Heritage or the Minister in these reasons). The request sought "answers to three questions regarding the application of current Canadian legislation to Chaudière and Albert Islands in the Ottawa River, the proposed site for the Zibi development." After providing an outline of the results of his research, Mr. Lambert posed the following three questions:

> 1. Parliament has the prerogative to revisit old laws, strike them down, and pass new legislation in their place. Please tell me when Parliament rescinded the status of Chaudière and Albert Islands as Public Purpose Crown Lands and approved giving them over for unrestricted private development? I have found no evidence of this.
>
> 2. On October 8th, 2014, the Ottawa City Council re-zoned 3 and 4 Booth Street on Chaudière Island from Parks and Open Space to Downtown Mixed Use to permit private commercial development. On June 13th of this year, the Council approved a $60,000,000.00 brownfields remediation grant application by the developer for the same area. Did Parliament direct them to make these decisions or transfer their exclusive authority over the Chaudière Islands to the City of Ottawa? The City Council lacks jurisdiction otherwise.

> 3. On April 6th, 2017, the National Capital Commission Board of Management voted to approve private development on Chaudière and Albert Islands. Did Parliament direct them to do this, or transfer their exclusive authority over the Islands to the NCC? Their Board lacks jurisdiction otherwise.

[13] After stating these questions, Mr. Lambert gave his view that "If you cannot answer these questions, you must stop the Zibi project. In supporting private development on the Islands, the Government is breaking its own laws and is in breach of Public Trust."

[14] On November 8, 2018, a Director with the Access to Information and Privacy Secretariat at Canadian Heritage wrote to Mr. Lambert seeking clarification of his request. The Director noted that Canadian Heritage could not respond to Mr. Lambert's request as worded, since it was asking questions, rather than asking for documents under the control of a government institution. The Director suggested Mr. Lambert rephrase his questions to ask for documents, providing as an example "All documents or emails exchange[d] between the NCC and Canadian Heritage Canada [*sic*] regarding the Zibi project, or all documents regarding the transfer of the Chaudière and Albert Islands to the NCC." The Director also suggested Mr. Lambert make an access request directly to the NCC as they might hold some records.

[15] Mr. Lambert responded on November 15, 2018, providing revised questions, which are the questions at issue in this proceeding:

> 1. Parliament has the prerogative to revisit old laws, strike them down, and pass new legislation in their place. Please provide copies of the Acts of Parliament or Statutes where Parliament rescinded the legal status of Chaudiere and Albert Islands as Public Purpose Crown Lands and approved giving them over for unrestricted private development. I have found no evidence that this has been done.

> 2. On October 8th, 2014, the Ottawa City Council re-zoned 3 and 4 Booth Street on Chaudiere Island from Parks and Open Space to Downtown Mixed Use to permit private commercial development. On June 13th of this year, the City Council approved a $60,000,000.00 brownfields remediation grant application by the developer for the same area. Please provide copies of the Acts of Parliament or Statutes where Parliament directed them to make these decisions or transferred their exclusive authority over the Chaudiere Islands to the City of Ottawa. The City Council lacks jurisdiction otherwise.
>
> 3. On April 6th, 2017, the National Capital Commission Board of Management voted to approve private development on Chaudiere and Albert Islands. Please provide a copy of the Act of Parliament or Statute where Parliament directed them to do this, or transferred their exclusive authority over the Islands to the NCC. Their Board lacks jurisdiction otherwise.
>
> [Emphasis added.]

[16] Canadian Heritage appropriately took the underlined portions of the above requests to be the operative part of Mr. Lambert's request for access to information. On November 26, 2018, the Director at Canadian Heritage wrote in response to the request. The substantive part of the response consisted of the following two paragraphs:

> Our responsible program has advised that you may wish to contact the National Capital Commission and Public Services and Procurement [PSPC] as they may hold documents related to your request.
>
> The following link for Orders in Council [link to Order in Council PC 2017-1684] will be of interest to you as it is related to the subject you are looking for. We are including two documents that were released in a previous request.

[17] The two documents referred to in the final sentence reproduced above are each dated January 26, 2018 and contain advice and recommendations to the Minister of Canadian Heritage related to, respectively, a legal challenge to government approval of the Zibi project land

transfers, and an agreement for the redevelopment of LeBreton Flats. The hyperlink to Order in Council PC 2017-1684 was also sent to Mr. Lambert by email so he could access it electronically. The response letter advised Mr. Lambert of his right to file a complaint with the Information Commissioner.

[18] Mr. Lambert also filed a separate access to information request with the Privy Council Office [PCO] in February 2019. While this request is not the subject of this application, Mr. Lambert raises it to contrast the response he received from PCO with that received from Canadian Heritage. The request to PCO again provided the context of Mr. Lambert's research on the status of Chaudière and Albert Islands, and asked for "copies of the Acts of Parliament or Statutes where Parliament has rescinded the legal status of Chaudière and Albert Islands as Public Purpose Crown Lands and authorized their transfer for private development." The request asserted that Order in Council PC 2017-1684 was "unconstitutional otherwise." PCO responded to the request on March 29, 2019, advising that "no records relevant to your request and belonging to our institution were found," but providing Mr. Lambert with a link to the *National Capital Act*.

(3) Mr. Lambert's complaint to the Information Commissioner

[19] On December 24, 2018, Mr. Lambert filed a complaint with the Information Commissioner in respect of Canadian Heritage's response to his access request. He identified the type of his complaint as being "Incomplete search/no records response" and contended that the November 26, 2018 letter from Canadian Heritage did not address his access request. He reiterated his concerns about the development of lands he considered Public Purpose Crown

Land, and his allegation that the government was acting illegally unless Parliament had changed its legislation.

[20] On November 4, 2019, an Investigator with the Office of the Information Commissioner advised Mr. Lambert by email that she had completed her investigation. She indicated her intention to recommend that the complaint be recorded as not well founded and invited his representations. An exchange of emails followed, during which the Investigator noted that Canadian Heritage had responded that they did not have responsive records in their possession, and noted that legislation is usually part of the public domain, excluded from the *ATIA* by section 68. The Investigator also noted that even though Canadian Heritage does not have Acts of Parliament or statutes in their records, this does not mean the legislation does not exist. Mr. Lambert wrote referring to his access request to PCO and PCO's response, and noting that he had expected at least to receive the enabling legislation for the Order in Council.

[21] The Information Commissioner issued a final report on the investigation on December 31, 2019. That report made the following findings:

- Canadian Heritage tasked the appropriate sector with the request and no records were found, but documents disclosed as part of another access request with a similar subject matter were shared in good faith;

- Canadian Heritage conducted a reasonable search and no additional records responsive to the request could be located; and

- the Information Commissioner therefore found the complaint to be not well founded.

[22] In accordance with paragraph 37(3)(*b*), the Information Commissioner's report included a statement that section 41 of the *ATIA* gives requesters the right to ask this Court to review an institution's refusal to provide records, or parts of records, requested under the Act. It is worth noting that this application is not an application for judicial review of the Information Commissioner's decision, although that decision triggers the ability to seek review: *ATIA*, s 41; *Lukács v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1142 at para 44.

IV. Analysis

A. *The Court has jurisdiction to hear the application*

[23] The Minister argues this Court has no jurisdiction to entertain this application. Citing this Court's decisions in *Olumide*, *Friesen*, *Tomar*, and *Constantinescu*, the Minister submits the Court has jurisdiction under section 41 of the *ATIA* only when there has been a refusal to release records: *Olumide v Canada (Attorney General)*, 2016 FC 934 at paras 18–19; *Friesen v Canada (Health)*, 2017 FC 1152 at para 10; *Tomar v Canada (Parks)*, 2018 FC 224 at para 45; *Constantinescu v Canada (Correctional Service)*, 2021 FC 229 at paras 47–50, 53–55. The Minister argues Canadian Heritage's response to Mr. Lambert's access request was not a refusal to release records and that the Court therefore does not have jurisdiction under section 41.

[24] For the following reasons, I conclude this Court has jurisdiction to hear this application.

(1) Section 41 of the *ATIA*

[25] Section 41 of the *ATIA* was amended in 2019. Before the 2019 amendments, section 41 stated that "[a]ny person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter […]": *Friesen* at para 8. This was the language of the provision when *Olumide* and *Friesen* were decided. As it then stood, the provision clearly stated that an application to the Court for review was available only to a person who had been refused access.

[26] After the 2019 amendments, subsection 41(1) of the *ATIA* now reads as follows:

Review by Federal Court – complainant	**Révision par la Cour fédérale : plaignant**
41 (1) A person who makes a complaint described in any of paragraphs 30(1)(a) to (e) and who receives a report under subsection 37(2) in respect of the complaint may, within 30 business days after the day on which the head of the government institution receives the report, apply to the Court for a review of the matter that is the subject of the complaint.	**41 (1)** Le plaignant dont la plainte est visée à l'un des alinéas 30(1)a) à e) et qui reçoit le compte rendu en application du paragraphe 37(2) peut, dans les trente jours ouvrables suivant la réception par le responsable de l'institution fédérale du compte rendu, exercer devant la Cour un recours en révision des questions qui font l'objet de sa plainte.
[Emphasis added.]	[Je souligne.]

[27] As can be seen, subsection 41(1) is now no longer limited to a person who has been refused access. However, this does not make review under section 41 available to *any* person

who has made a complaint to the Information Commissioner and received a report. Rather, the person must have made a complaint described in paragraphs 30(1)(*a*) to (*e*). Those paragraphs describe different grounds of complaint that may be presented to the Commissioner:

Receipt and investigation of complaints	**Réception des plaintes et enquêtes**
30 (1) Subject to this Part, the Information Commissioner shall receive and investigate complaints	**30 (1)** Sous réserve des autres dispositions de la présente partie, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :
(a) from persons who have been refused access to a record requested under this Part or a part thereof;	**a)** déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente partie;
(b) from persons who have been required to pay an amount under section 11 that they consider unreasonable;	**b)** déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;
(c) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;	**c)** déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;

(d) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;	**d)** déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent comme contre-indiqué le délai de communication relatif à la traduction;
(d.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;	**d.1)** déposées par des personnes qui se sont vu refuser la communication des documents ou des parties en cause sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;
(e) in respect of any publication or bulletin referred to in section 5; or	**e)** portant sur le répertoire ou le bulletin visés à l'article 5;
(f) in respect of any other matter relating to requesting or obtaining access to records under this Part.	**f)** portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente partie.
[Emphasis added.]	[Je souligne.]

[28] By referring to "[a] person who makes a complaint described in any of paragraphs 30(1)(a) to (e)," subsection 41(1) does not include paragraph 30(1)(*f*) in the list of complaints that may trigger an application for judicial review to the Federal Court. The absence of paragraph 30(1)(*f*) from this list must be considered a deliberate legislative choice. Parliament has decided that those who have filed a complaint with the Information Commissioner regarding

refusals, unreasonable fees or extensions, official languages, accessibility, or publications or bulletins, may subsequently seek judicial review, but not those who have filed a complaint with respect to "any other matter relating to requesting or obtaining access to records."

[29] I pause to note parenthetically that there appears to be a potential for confusion where a complainant makes a complaint pursuant to paragraph 30(1)(*f*) of the *ATIA*. In accordance with paragraph 37(3)(*b*), the Information Commissioner's final report shall include a statement that "any person to whom the report is provided has the right to apply for a review under section 41." Yet subsection 41(1) appears to exclude such complainants from the category of persons who may apply to the Court for review.

[30] Thus while it is no longer the case that the Court only has jurisdiction under section 41 where there has been a refusal to disclose information, as was the case when *Olumide* and *Friesen* were decided, a refusal remains one of the important grounds for complaint that can trigger an application to this Court, and the applicant's complaint to the Information Commissioner must still fall within the scope of paragraphs 30(1)(*a*) to (*e*) for the Court to have jurisdiction.

[31] In *Constantinescu*, which was decided in 2021, Justice Pamel found the 2019 amendments to the *ATIA* did not affect the applicant's rights of review: *Constantinescu* at paras 40–41. While not stated expressly, it can be inferred that this was because none of paragraphs 30(1)(*b*) to (*e*) applied to the complaint in that case, such that there had to be a refusal for the Court to have jurisdiction: *Constantinescu* at paras 47–50.

[32] In the present case, too, Mr. Lambert's complaint to the Information Commissioner raised no issue of unreasonable fees or extensions, official languages, accessibility, or a publication or bulletin issued under section 5 of the *ATIA*. Paragraphs 30(1)(*b*) to (*e*) therefore have no application. As a result, if Mr. Lambert is to be entitled to bring an application for review under section 41, his complaint to the Information Commissioner must have been in respect of a refusal under paragraph 30(1)(*a*). I therefore agree with the Minister's assertion that the Court will only have jurisdiction in this matter if there has been a refusal, even though the scope of section 41 has been widened since *Olumide* and *Friesen* were decided.

[33] The question then becomes whether there was a refusal to provide access in the present case. I conclude there was.

(2) Non-existence of records is a ground of refusal

[34] Subsection 10(1) of the *ATIA* addresses the refusal to provide access, setting out two grounds that may be given for such refusal:

Where access is refused	**Refus de communication**
10 (1) Where the head of a government institution refuses to give access to a record requested under this Part or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)	**10 (1)** En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente partie, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :
(a) that the record does not exist, or	**a)** soit le fait que le document n'existe pas;

(b) the specific provision of this Part on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,	**b)** soit la disposition précise de la présente partie sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.
and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.	
[Emphasis added.]	[Je souligne.]

[35] As can be seen, subsection 10(1) requires the notice given to the requester to advise them that they have "a right to make a complaint to the Information Commissioner about the refusal" [emphasis added] whether the basis for the refusal is non-existence under paragraph 10(1)(*a*) or another provision of the *ATIA* under paragraph 10(1)(*b*). In this regard, I believe the term "does not exist" in paragraph 10(1)(*a*) of the *ATIA* must be understood to mean "does not exist in the records of the government institution" rather than necessarily "does not exist anywhere." If a government institution says, in effect, "we do not have that record," it is saying the record does not exist in its records and it is refusing to give access to the record on that basis pursuant to paragraph 10(1)(*a*): see *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 330 [*Yeager (2017)*] at para 42.

[36] In a 2000 decision that I will refer to as *OIC v MOE*, the Federal Court of Appeal confirmed that a refusal based on non-existence can be judicially reviewed by the Federal Court:

Canada (Information Commissioner) v Canada (Minister of Environment), [2000] FCJ No 480, 2000 CanLII 15247 (FCA), lv to app refused, [2000] SCCA No 275 [*OIC v MOE*] at para 13 (QL). There, the Court was addressing issues of privilege in a case arising from a refusal based on non-existence. Justice Létourneau for the Court stated as follows:

> Under paragraph 42(1)(*a*) of the Act, the Commissioner may apply for judicial review of "any refusal" to disclose a record requested under the Act. Thus, the Court has jurisdiction to review a refusal to disclose based on the allegation of non-existence of documents. However, where documents are alleged by the head of an institution not to exist, the reviewing Court obviously cannot resort to its ordinary method of reviewing a refusal decision. Unlike the situation where an exemption from disclosure is claimed, it cannot review the withheld documents to establish whether these documents truly fall within the exempt category. In such a case, we believe it is proper for the applicant or the Commissioner to proceed to file ancillary documents that are relevant to the existence of the requested documents and that can assist the Court in its independent review function of the government's refusal to disclose. In our view, Parliament cannot have intended that the Court would have the relevant evidence to exercise its supervisory function only in the case of refusals based on statutory exemptions, but not in the case of refusals based on non-existence.
>
> [Emphasis added; *OIC v MOE* at para 13 (QL).]

[37] Justice Pamel cited *OIC v MOE* in his decision in *Constantinescu* for the proposition that one of the grounds on which a government institution may refuse access to a record is that the record does not exist: *Constantinescu* at paras 1, 43, 45. I agree. As the Court of Appeal noted in the passage above, judicial review of a refusal based on non-existence must necessarily proceed in a different fashion than judicial review of a refusal based on, for example, an exemption. In particular, the inquiry on review becomes directed at issues such as whether the record does in fact exist or may be expected to exist in the records of the government institution, or whether the record falls within the definition of records that do not exist but can be produced from a machine

readable record: *OIC v MOE* at para 13; *Yeager (2017)* at paras 26–27, 37–43; *Yeager v Canada (Correctional Service)*, 2003 FCA 30 at paras 37–46; *ATIA*, ss 4(3), 10(1)(*a*). However, this does not mean that the Court has no jurisdiction to review the matter.

[38] As the Minister points out, the Court in *Olumide* reached the opposite conclusion, finding that "where, in response to a request for information […] a department responds that a record does not exist, such a response does not constitute a refusal of access" [emphasis added]: *Olumide* at para 18, citing *Clancy v Canada (Minister of Health)*, 2002 FCT 1331; *Wheaton v Canada Post Corp*, 2000 CanLII 15912 (FC); *Doyle v Canada (Human Resources and Skills Development)*, 2011 FC 471; *Blank v Canada (Minister of the Environment)*, 2000 CanLII 16437 (FC); see also *Tomar* at para 45 and *Friesen* at para 10, each following *Olumide*.

[39] I conclude that I cannot accept this general statement from *Olumide*, for three reasons. First and foremost, I am bound by the Court of Appeal's decision in *OIC v MOE*. That decision appears to me consistent with the language of subsection 10(1) of the *ATIA*, but I would be bound by it even if I had a different view. Like Justice Pamel, I conclude that *OIC v MOE* states clearly that non-existence is a ground of refusal, and one that may be challenged on review under section 41. I note that none of the cases relied on in *Olumide* refer to *OIC v MOE*, and that *OIC v MOE* does not appear to have been brought to the Court's attention in *Olumide* or the later cases of *Tomar* and *Friesen*.

[40] Second, the *Wheaton*, *Blank*, and *Doyle* cases that were cited for the proposition in *Olumide* each rely in turn on the decision of Justice Strayer in *X v Canada (Minister of National*

Defence), [1991] 1 FC 670, 41 FTR 73 (TD) [*X v DND*] regarding deemed refusals under subsection 10(3) of the *ATIA* and the scope of the Court's jurisdiction under section 41 of the *ATIA*: *X v DND* at pp 676–680; *Wheaton* at paras 8–10; *Doyle*, adopting *Blank* at paras 9–11. However, the Federal Court of Appeal in 2015 concluded that *X v DND* should not be followed: *Canada (Office of the Information Commissioner) v Canada (National Defence)*, 2015 FCA 56 at paras 57, 66 [*OIC v DND*]. Again, it appears that *OIC v DND* was not brought to the attention of the Court in *Olumide*, *Tomar*, *Friesen*, or *Constantinescu*.

[41] Third, the Court in *Olumide* stated that it does not have jurisdiction pursuant to section 41 of the *ATIA* "unless there is some evidence, beyond mere suspicion, that records do exist and have been withheld": *Olumide* at para 18. In my view, the assessment of whether the records do exist is better viewed as going to the merits of the application, and not to the Court's jurisdiction to hear the application. It is worth noting that the *ATIA* provides that in a proceeding under subsection 41(1), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested is on the government institution, rather than on the requester, regardless of the grounds for refusal: *ATIA*, s 48(1). Regardless, if the Court is not satisfied on a section 41 application that the refusal was improper, there will be no grounds to grant a remedy. But to determine that question, the Court must of necessity have jurisdiction to hear the application and assess the evidence put forward.

[42] I therefore conclude, as did Justice Pamel in *Constantinescu*, that a response that a record does not exist in the records of the government institution does constitute a refusal of access

under paragraph 10(1)(*a*) and does permit the requester to seek judicial review under section 41 of the *ATIA*.

(3) There was a refusal based on non-existence in this case

[43] Canadian Heritage's response to Mr. Lambert does not state expressly that it did not have any records responsive to Mr. Lambert's request. As set out above, it stated only that Mr. Lambert may wish to contact the NCC or PSPC, that the Order in Council would be of interest to him, and that Canadian Heritage was including two documents released in a previous request. This fact is the subject of some of Mr. Lambert's arguments, discussed below.

[44] Despite this, I conclude Canadian Heritage's response implicitly advised that it did not have records in its control responsive to Mr. Lambert's requests. None of the documents provided were Acts of Parliament or statutes as requested by Mr. Lambert, such that he was given no documents directly responsive to his request. Canadian Heritage did not suggest that a further response was coming or that it was continuing to review its records. To the contrary, it advised that Mr. Lambert was entitled to file a complaint with the Information Commissioner regarding his request.

[45] In any case, to the extent there was any uncertainty regarding the nature of Canadian Heritage's response, it was cleared up during the Information Commissioner's investigation. That investigation confirmed that "no additional records were located pertaining to your request" and that Canadian Heritage "responded that they did not have what you were seeking in their possession." Further, on this application, a Director at the Access to Information

and Privacy Secretariat at Canadian Heritage swore an affidavit confirming that the search for records conducted in November 2018 concluded that the relevant office within Canadian Heritage "does not have any such documents."

[46] As a result, I conclude Canadian Heritage effectively refused to provide documents on the basis that they did not exist as records in their control. Mr. Lambert's complaint to the Information Commissioner challenged this "Incomplete search/no records response," and was a complaint under paragraph 30(1)(*a*) of the *ATIA*. Mr. Lambert received a report under subsection 37(2) in respect of his complaint. He is therefore a person described in subsection 41(1), and the Court has jurisdiction to hear this application.

B. *There is no basis to issue the orders sought*

[47] While I conclude the Court has jurisdiction to hear this application, I conclude that Mr. Lambert has not established any grounds on which to make either of the two orders he seeks, namely (1) an order that the Minister of Canadian Heritage provide copies of the Acts of Parliament or statutes that he requested; or (2) if the Acts of Parliament or statutes do not exist, an order that the Minister provide a "straightforward letter acknowledging this."

[48] As noted above, in a proceeding under subsection 41(1), the burden is on the government institution to establish it is authorized to refuse to disclose a requested record: *ATIA*, s 48(1). The issue in this case is therefore whether Canadian Heritage has established it was authorized to refuse to disclose records to Mr. Lambert. I conclude it has, for the following three reasons.

(1) The *ATIA* does not require government to give a legal opinion or legal position

[49] The *ATIA* provides a right to "access to any record under the control of a government institution": *ATIA*, s 4(1). The *ATIA* does not create a general right to obtain answers to questions. Still less does it create a right to require government to provide a requester with a legal opinion on a topic of interest or to provide a legal justification or position for the actions of government. In my view, Mr. Lambert's requests for records do no more than this.

[50] As set out in paragraph [12] above, Mr. Lambert's initial questions asked when Parliament rescinded the status of Chaudière and Albert Islands, approved giving them over for unrestricted private development, or transferred exclusive authority over the islands to the City of Ottawa or the NCC. The Director at Canadian Heritage advised Mr. Lambert that the *ATIA* provided access to records under the control of a government institution, while his request was simply asking questions. The Director asked that Mr. Lambert's questions be rephrased to ask for documents.

[51] Mr. Lambert's revised questions, reproduced at paragraph [15], facially ask for documents, in the form of "Acts of Parliament or statutes." However, the only way in which a response could possibly be given to these questions, or the requested statutes provided, is by undertaking a legal analysis of whether they meet the criteria in Mr. Lambert's questions. One cannot ascertain whether a statute is one in which "Parliament rescinded the legal status of Chaudière and Albert Islands as Public Purpose Crown Lands and approved giving them over for unrestricted private development" without assessing legally (a) Mr. Lambert's assertion that the

islands had the legal status he contends; (b) whether a particular statute rescinded that status; and (c) whether a particular statute approved giving the islands over for unrestricted private development. In my view, the *ATIA* does not require a government institution to undertake such legal analysis in order to provide a requester with the legal information they seek.

[52] Section 6 of the *ATIA* requires a request for access to "provide sufficient detail to enable an experienced employee of the institution to identify the record with a reasonable effort." While this necessarily entails a degree of consideration as to whether a particular record is responsive to a request, I cannot conclude that a legal analysis required to identify the legal effect of legislation falls within the scope of what is contemplated in section 6.

[53] It is important to underscore that this application is not a challenge to the legality of any actions of government in respect of the Zibi project, the disposition of lands, or the development of Chaudière and Albert Islands. There are avenues for such a challenge. Neither an access to information request nor an application under section 41 of the *ATIA* is such an avenue, and it cannot be transformed into one by requesting legal opinions or positions in the form of requests for copies of legislation.

[54] I therefore conclude that there is no basis in the *ATIA* for the Court to order the Minister of Canadian Heritage to provide copies of the legislation Mr. Lambert requested.

[55] I hasten to point out that there is nothing *preventing* a government institution from providing helpful answers to questions, or even from identifying relevant legislation in response

to an access request. What is at issue in this matter is whether the *ATIA* imposes an *obligation* on a government institution to do so, or more particularly, whether it permits the Court to order a government institution to undertake the legal research and analysis necessary to respond to a request of the nature made by Mr. Lambert.

(2) Canadian Heritage does not have responsive records

[56] As noted above, the Minister filed an affidavit on this application from a Director at Canadian Heritage. That evidence sets out the steps Canadian Heritage took to process Mr. Lambert's request, and states that the result of their searches was a conclusion that the relevant office "does not have any such documents." Mr. Lambert does not challenge this statement. Indeed, his position appears to be that there are no records responsive to his requests, *i.e.*, that there is no legislation that rescinded the status of the Chaudière and Albert Islands or permitted their development. The refusal to provide access based on non-existence in the records of Canadian Heritage is therefore justified.

[57] Mr. Lambert argues that Canadian Heritage's letter did not say it had no records. He contrasts this with the letter he received from PCO, which stated that "no records relevant to your request and belonging to our institution were found." He contends that he was entitled to a similarly clear statement to this effect from Canadian Heritage, a contention that informs his alternative request for relief in the form of an order requiring the Minister to provide a "straightforward letter" confirming that no such legislation exists.

[58] It might well have been clearer for Canadian Heritage's response to state clearly that no responsive records were found. However, for the reasons set out at paragraph [44] above, I conclude that the response cannot reasonably be read in context as being other than a refusal based on non-existence. Mr. Lambert's stated concerns about not receiving a statement equivalent to that in the PCO letter ring hollow. There is no indication Mr. Lambert misunderstood the letter or made any further inquiries with Canadian Heritage to see if further documents were coming. Rather, he filed a complaint with the Information Commissioner complaining of the "Incomplete search/no records response." In any event, any uncertainty was cleared up during the Information Commissioner's investigation. The Investigator advised Mr. Lambert that Canadian Heritage had confirmed that "they did not have what you were seeking in their possession." While Mr. Lambert argues that this statement comes from the Information Commissioner and not from Canadian Heritage, he has presented no basis to doubt the information. Nor does Mr. Lambert provide any basis for questioning the evidence provided by affidavit directly from Canadian Heritage in the course of this proceeding.

[59] Mr. Lambert filed with the Court, without objection from the Minister, an addendum to his record containing documents received in response to a different access request to the Minister of Canadian Heritage. That request asked for all documents leading to the recommendation for approval of Order in Council PC 2017-1684. One of the documents Mr. Lambert received included some background bullet points, including one indicating that "[a]lthough the NCC had reached a tentative agreement with Domtar regarding the Chaudière and Albert islands in 2006, after the company closed its paper-making operations, government authority and funding for the acquisition were not sought after the NCC received Government direction not to pursue the

transaction." I cannot agree with Mr. Lambert's argument that the reference to "Government direction" indicates the existence of particular legislation responsive to his requests, let alone records in the control of Canadian Heritage.

[60] As the evidence shows that the requested records did not exist in the control of Canadian Heritage, there is no basis for the Court to order production of the records. There is also no basis to order Canadian Heritage to make any further statements regarding the existence of the records. While the Court has a broad power to "make such other order as the Court deems appropriate," it can do so only if it "determines that the head of the institution is not authorized to refuse to disclose the record": *ATIA*, s 49.

[61] Before leaving this issue, given the nature of Mr. Lambert's request and arguments, I consider it necessary to clarify the effect of the Court's findings that Canadian Heritage was authorized to refuse access to records on the basis of non-existence. It does not mean that Mr. Lambert's arguments regarding the legal status of Chaudière and Albert Islands are correct or justified. It does not mean that Order in Council PC 2017-1684, or anything else to do with the Zibi project or the land transactions, was unauthorized. Those issues are not before the Court, and no inferences or assumptions can be made about the merits of those issues based on Mr. Lambert's access requests or this application.

(3) The records requested fall within the exclusion in section 68 of the *ATIA*

[62] Paragraph 68(*a*) of the *ATIA* confirms that an access to information request cannot be used to obtain copies of published material or material available for purchase by the public:

Part 1 does not apply to certain materials	**Non-application de la présente partie**
68 This Part does not apply to	**68** La présente partie ne s'applique pas aux documents suivants :
(a) published material, other than material published under Part 2, or material available for purchase by the public;	**(a)** les documents publiés, exception faite de ceux dont le contenu est publié au titre de la partie 2, ou les documents mis en vente dans le public;
[…]	[…]

[63] Canadian federal legislation is published online by the Department of Justice. This includes consolidated Acts of Parliament. Older statutes that may not be available online are nonetheless published by the Queen's Printer: *PS Knight Co Ltd v Canadian Standards Association*, 2018 FCA 222 at para 25. This Court has confirmed that Canadian statutes are exempt from disclosure under paragraph 68(*a*) of the *ATIA*: *Tolmie v Canada (Attorney General)*, [1997] 3 FC 893 at para 10.

[64] Mr. Lambert correctly points out that Canadian Heritage did not rely on or refer to this exclusion in its response to his request. However, the Information Commissioner's Investigator advised Mr. Lambert clearly that legislation is "usually of the public domain and public information is excluded from the Act, as per Section 68."

[65] Since Mr. Lambert's request seeks exclusively records that would, regardless of whether they exist or not, consist of published material excluded from the application of the *ATIA*, there are no grounds in the *ATIA* for the Court to order Canadian Heritage to produce records in

response to the request. Again, this is not to say that a government institution is precluded from providing copies of legislation, or hyperlinks to legislation, in response to an access request. However, there can be no obligation on a government institution under the *ATIA* to provide documents that Parliament expressly excluded from the *ATIA*, and no basis for the Court to order a government institution to provide such documents.

V. Conclusion

[66] The application for judicial review is therefore dismissed. At the hearing of the matter, the Minister advised they were not seeking costs of the application. No costs are awarded.

[67] As a final note, the Court referred during the hearing of this matter to Rule 303 of the *Federal Courts Rules*, SOR/98-106, suggesting the appropriate respondent may be the Attorney General of Canada. On further review of section 41 of the *ATIA*, and in particular subsection 41(5), the Court concludes that Mr. Lambert correctly named as respondent the Minister of Canadian Heritage as the head of the government institution concerned.

JUDGMENT IN T-220-20

THIS COURT'S JUDGMENT is that

1. The application is dismissed, without costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-220-20
STYLE OF CAUSE:	M LINDSAY LAMBERT v MINISTER OF CANADIAN HERITAGE
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 7, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	APRIL 19, 2022

APPEARANCES:

M. Lindsay Lambert	ON HIS OWN BEHALF
Emma Gozdzik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT