Federal Court  Cour fédérale

Date: 20220606

Docket: T-346-20

Citation: 2022 FC 829

Ottawa, Ontario, June 6, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CLINT KIMERY

Applicant

and

DEPARTMENT OF JUSTICE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant asks the Court to review a response from the Department of Justice [DOJ] to an access to information request, in which DOJ stated that a search of the records under their control revealed that no records exist in response to the request. Following a complaint to the Office of the Information Commissioner, which was dismissed with a finding that DOJ had conducted a reasonable search, the Applicant seeks an order compelling DOJ to provide the records he seeks.

[2] As explained in more detail below, this application is dismissed, because the evidence before the Court does not support a basis in fact and law for the Court to grant the Applicant relief that amounts to an order that DOJ conduct a further and better search for the record he seeks.

II. **Background**

[3] On August 6, 2016, the Applicant, Mr. Clint Kimery, submitted to DOJ a request under the *Access to Information Act*, RSC 1985, c A-1 [the Act], seeking accounting records related to a Crown prosecutor's time and expenses in connection with a Canada Revenue Agency [CRA] investigation and prosecution of Gunner Industries Ltd., a company in which the Applicant is interested. In his request, the Applicant indicated that he was seeking information regarding Crown Prosecutor Horst Dahlem's time and expense charge amounts, starting with the date of his very first activity charge, which the Applicant believed to have occurred as early as 1993. Based on his submissions at the hearing of this application, I understand that the Applicant considers this information, to the extent it reveals the timing of investigative activities, to be relevant to advancing a *Charter* defence in the prosecution.

[4] DOJ subsequently responded to the Applicant by letter dated September 22, 2016, communicating that a search of the records under the control of DOJ revealed that no records existed in response to his request [the DOJ Response]. This letter also stated that the Department of Public Prosecution Service of Canada [PPSC] may have a greater interest in the request.

[5] On September 26, 2016, the Applicant submitted a complaint to the Office of the Information Commissioner [OIC], alleging that, despite its claim that no records existed in response to his request, DOJ did have in fact hold responsive records. In a response dated February 21, 2020, the OIC concluded that the complaint was not well founded, stating that it was satisfied that DOJ's search for the records was reasonable and that no records could be located. The OIC response informed the Applicant of his right to apply to the Federal Court for a review under s 41 of the Act.

[6] On March 5, 2020, the Applicant filed a Notice of Application in the Federal Court, naming DOJ as the Respondent and seeking review by the Court of the DOJ Response.

III. **Issues**

[7] The Applicant, who is self-represented, does not expressly articulate a set of issues for the Court's determination in this matter. The Respondent submits that the sole issue is whether the Court may order DOJ to conduct a further search for records that it has already confirmed do not exist in its possession.

[8] Based on the parties' respective written and oral submissions, I would identify the issues for the Court's determination to be materially the same as those identified by Justice McHaffie in his recent decision in *Lambert v Minister of Canadian Heritage*, 2022 FC 553 [*Lambert*]. I would articulate these issues as follows:

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

B. If so, are there grounds to grant the relief sought by the Applicant in the circumstances of this case?

IV. **Analysis**

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

[9] In its Memorandum of Fact and Law, the Respondent takes the position that a refusal to disclose a record is a condition precedent to this Court having jurisdiction to conduct a review under the Act and grant requested relief. The Respondent argues that, as the DOJ Response does not represent a refusal to disclose a record, but rather an explanation that no records exist in its possession, the Court has no jurisdiction and should therefore dismiss this application.

[10] The Court's jurisdiction to review matters of this sort under the Act is conferred by s 41 of the Act. The provision relevant to the present application is s 41(1), which currently provides 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.

[11] As noted in *Lambert* (at para 25), s 41 was amended in 2019. Before the amendments, s 41 read somewhat differently:

Review by Federal Court	**Révision par la Cour fédérale**
41 Any 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 within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	**41** La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[12] Neither of the parties advanced arguments as to which version of s 41 applies to the present application, which was commenced in 2020 but relates to events that occurred in part prior to the amendments. However, in my view, it is not necessary to consider this point. The earlier version of s 41(1) conferred the right to apply for review upon a person who has been refused access to a record. The current language confers this right upon a person who made a complaint described under various paragraphs of the Act. This includes paragraph 30(1)(a), which relates to a complaint to the OIC by a person who has been refused access to a record.

[13] Consistent with the analyses in *Constaninescu v Canada (Correctional Service)*, 2021 FC 229 [*Constaninescu*] (at paras 40-41) and in *Lambert* (at paras 25-32), the question, which will determine whether the Court has jurisdiction in the context of the present application, is whether the circumstances of this application involve refusal of access to a record. This analysis does not depend on which version of the legislation is applied.

[14] The Respondent's position, that the Court has no jurisdiction to review the DOJ Response that DOJ was not in possession of any records responsive to the Applicant's request, is based on authorities that suggested (or were capable of being read as suggesting) that a response of that nature did not represent refusal of access to a record (see, e.g. *Olumide v Canada (Attorney General)*, 2016 FC 934 at para 18). However, in *Lambert*, Justice McHaffie considered the relevant authorities and concluded that a response, that a record does not exist in the records of the relevant government institution, does constitute a refusal of access and does permit the requester to seek judicial review under s 41 of the Act (at paras 33-42).

[15] As previously noted, *Lambert* is a recent decision. It was issued after the Respondent's submission of its Memorandum of Fact and Law in this proceeding. At the hearing of this application, the Respondent's counsel argued that, if the jurisprudence has shifted to broaden the understanding of the circumstances in which the Court has jurisdiction to review decisions under the Act, it remains the Respondent's position that, in the absence of concrete evidence that records do exist and have been withheld, this application should still be dismissed on its merits.

[16] I will turn momentarily to the arguments on the merits. However, in relation to the jurisdictional issue, in the absence of submissions challenging the analysis or conclusion in *Lambert*, I need not repeat that analysis and am content to adopt that conclusion. I am therefore satisfied that the Court has jurisdiction to hear this application.

B. *Are there grounds to grant the relief sought by the Applicant in the circumstances of this case?*

[17] Section 44.1 of the Act provides that an application under s 41 is to be heard and determined as a new proceeding. As explained in *Lambert*, a s 41 review is to be conducted *de novo*, meaning that the general presumption that review will be conducted on the standard of reasonableness does not apply. This is different from a review of an exercise of discretion, which is entitled to deference under the reasonableness standard of review (at para 7).

[18] That said, the Court also has the benefit of jurisprudential guidance as to its role in reviewing matters where an applicant takes issue with a government institution's position that there are no records in its possession responsive to the applicant's request. In support of its position that there are no grounds for the Court to grant the relief sought by the Applicant, the Respondent relies on the following excerpt from the decision of the Federal Court of Appeal in *Blank v Canada (Minister of Justice)*, 2016 FCA 189 [*Blank*] (at paras 35-36):

> 35. As noted by the Court below, the appellant has filed 96 access requests and the DOJ had reviewed 61,312 pages as of January 2010. In that context, it is not surprising that some documents may have been missed in the early stages of the gathering process or been discovered on an ongoing basis. I also note that the appellant has repeatedly asked for a more thorough search and disclosure over the last 15 years on the basis that documents were missing, and that such allegations and requests have been dismissed on

> every occasion by this Court and the Federal Court: see e.g. *Blank 2000*, at paras. 9, 15 and 19; *Blank 2004*, at paras. 76-77; *Blank v. Canada (Minister of Environment)*, 2006 FC 1253, [2006] F.C.J. No. 1635, at para. 33(g), aff'd 2007 FCA 289, [2007] F.C.J. No. 1218; *Blank v. Canada (Minister of Justice)*, 2015 FC 956, [2015] F.C.J. No. 949, at para. 56 (*Blank 2015*).
>
> 36. Once again, the primary oversight role under the Act remains with the Commissioner. The Federal Court's role is narrowly circumscribed; section 41, when read in conjunction with sections 48 to 49, confines its reviewing authority to the power to order access to a specific record when access has been denied contrary to the Act. Unless Parliament changes the law, it is not for the Court to order and supervise the gathering of the records in the possession of the head of a government institution or to review the manner in which government institutions respond to access requests, except perhaps in the most egregious circumstances of bad faith. On the basis of the confidential record that is before me, I have been unable to find evidence that would lead me to believe, on reasonable grounds, that there has been any attempt to tamper with the integrity of the records. Accordingly, the Judge did not err in concluding that he lacked jurisdiction to order a further search of the records.
>
> [Emphasis added]

[19] I note that I read the above reference to jurisdiction to relate to the nature of the remedy that s 41 authorizes the Court to impose and the circumstances in which such imposition is appropriate, not to the Court's jurisdiction to hear an application for review. The Federal Court of Appeal has explained that, other than potentially in egregious circumstances such as a demonstration of records-tampering or other bad faith on the part of a government institution in responding to an information request, this Court's role under the Act does not extend to ordering the government institution to conduct a better or more thorough search. This principle has been captured in other authorities (see, e.g., *Doyle v Canada (Human Resources and Skills Development)*, 2011 FC 471; *Tomar v Canada (Parks)*, 2018 FC 224 at paras 53-54)).

[20] Against this jurisprudential backdrop, the Respondent submits that the Applicant has provided no concrete or substantial evidence of records-tampering or otherwise that records responsive to his request exist in the possession of DOJ and have been withheld. The Respondent emphasizes that mere suspicion on the part of the Applicant that such records exist does not suffice to support a remedy in this application.

[21] The evidence before the Court consists of the Applicant's affidavit and exhibits thereto, as well as two affidavits sworn by Lise Léon, the Assistant Director for the DOJ Access to Information and Privacy [ATIP] Office, along with accompanying exhibits. Ms. Léon's first affidavit explains the steps taken by DOJ before sending the DOJ Response. These steps include the following:

A. Stefany Hollingsworth, Senior ATIP Advisor with DOJ, requested information from DOJ's Tax Litigation Section;

B. The Tax Litigation Section wrote to counsel in DOJ's Prairie Region Office, indicating that the regional office should be responding to the request;

C. Ms. Hollingsworth requested information from both the Prairie Regional Office and DOJ's National Litigation Section;

D. The National Litigation Section responded that, as the request related to a prosecution, it would have to be addressed by PPSC (Prairies); and

E. The Prairie Region Office similarly advised Ms. Hollingsworth that, as the request related to a prosecution, it should be responded to by PPSC Prairies.

[22] DOJ then sent the DOJ Response to the Applicant, communicating that a search of the records under the control of DOJ revealed that no responsive records existed. As previously noted, this letter, which was authored by Francine Farley, the Director for the DOJ ATIP Office, also stated that the PPSC may have a greater interest in the request.

[23] In her second affidavit, Ms. Léon explains that, after she provided the relevant files to the Respondent's counsel in this application, counsel was concerned that the responses to the inquiries by the DOJ ATIP Office did not clearly indicate whether searches had been performed for the records that were the subject of the Applicant's request. Ms. Léon explains that, upon her instructions, subsequent steps were then undertaken by Maria Cammara, a Senior ATIP Advisor:

A. Ms. Cammara contacted the National Litigation Section, Tax Law Services Portfolio and the Prairie Regional Office of DOJ, requesting that they conduct another record search with respect to the Applicant's information request;

B. Ms. Cammara received a response from a paralegal with the National Litigation Section, indicating that she could not locate any files related to Gunner Industries Ltd.;

C. Ms. Cammara received a response from counsel with the DOJ Tax Law Services Portfolio, indicating that the business management team, internal ATIP coordinator, and Financial Management Advisor had been consulted, and that searches have been conducted, and that no information had been identified related to the request;

D. Ms. Cammara received a response from the Prairie Regional Office, indicating that there were no records located in response to the request, but also indicating that all Federal Prosecution Service records, files and data are property of the PPSC and are no longer accessible by DOJ.

[24] In support of his position on this application, the Applicant's evidence includes a copy of an email he received on June 29, 2016 from the Manager, ATIP with PPSC, apparently in response to a previous information request, which includes the following paragraph:

> Cost recovery between PPSC and CRA for individual files occurred after the MOU was signed. Therefore, the data provided to you covers the period of 2012 to present. However, it should be noted that prior to the creation of the Public Prosecution Service of Canada (PPSC) in 2006, cost recovery was handled by the Department of Justice Canada. It is my understanding that they did not cost recovery with CRA on individual files during the period that you are seeking. However, you may wish to submit a request directly to them.

[25] The information conveyed in this paragraph relates in part to the point, which I understand not to be in dispute between the parties, that responsibility for tax-related prosecutions transitioned from DOJ to PPSC in or about 2006. While acknowledging that there appears to be a grammatical or typographical error in the penultimate sentence of this paragraph, the Applicant relies on this email to support his position that DOJ possesses accounting records responsive to his request, for the period before PPSC assumed responsibility for tax-related prosecutions.

[26] The Applicant's affidavit also attaches certain documents that I understand he received in response to one or more requests under the Act. These include documentation commencing with a page entitled "Client Slip", dated July 20, 2005, which references Gunner Industries Ltd., a file number 1-25284, and Horst Dahlem as lead lawyer, and appears to relate to travel disbursements. I understand the Applicant to argue that this documentation evidences the existence of accounting records of the sort he is seeking, related to the period when DOJ, rather than PPSC, had responsibility for tax prosecutions. However, there is very little evidence explaining this documentation. The Applicant's affidavit explains only that these are sample documents provided in a reply by PPSC to a request under the Act.

[27] I understand the Applicant's reasoning, as well as his frustration in the lack of documentation provided by DOJ. However, returning to the jurisprudence guiding the Court's review in this application, there is no evidentiary support for a conclusion of bad faith, tampering, or other such egregious behaviour on the part of DOJ in responding to the Applicant's request. The Applicant's position amounts to mere speculation that responsive documents exist in DOJ's possession.

[28] At the hearing of this application, the Respondent's counsel submitted that a possible explanation, for why accounting records of the sort the Applicant is seeking do not exist in relation to the period before responsibility for tax prosecutions passed from DOJ to PPSC, is that cost recovery was not being pursued during that period. However, I understand this submission to represent speculation on the Respondent's part. Indeed, the response received by Ms. Cammara from the Prairie Regional Office, to the effect that all Federal Prosecution Service

records, files and data are property of the PPSC and are no longer accessible by DOJ, could support an alternate conclusion that, if any accounting records did once exist, they simply aren't in DOJ's possession any more.

[29] Regardless, in my view, the Court's role in this application does not require a finding as to why DOJ would not be in possession of records responsive to the Applicant's request. The result in this application turns on my conclusion that, taking into account the evidence before the Court, including the evidence of DOJ's efforts to search for responsive information, there is simply no basis in fact and law for the Court to grant the Applicant relief that amounts to an order that DOJ conduct a further and better search.

[30] As such, this application must be dismissed. In its Memorandum of Fact and Law, the Respondent sought costs in the event that the application was dismissed. At the hearing, the Respondent made no submissions in support of costs other than referencing the Tariff in the *Federal Courts Rules* as a means of quantifying any costs award. Any award of costs is ultimately in the discretion of the Court and, in the particular circumstances of this case, I decline to award costs against the Applicant.

JUDGMENT IN T-346-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-346-20
STYLE OF CAUSE:	CLINT KIMERY v DEPARTMENT OF JUSTICE
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	MAY 24, 2022
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 6, 2022

APPEARANCES:

Clint Kimery	FOR THE APPLICANT (Self represented litigant)
Amanda Neudorf	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Regina, Saskatchewan	FOR THE RESPONDENT