Federal Court  Cour fédérale

**Date: 20230313**

**Docket: T-148-22**

**Citation: 2022 FC 1459**

**Ottawa, Ontario, March 13, 2023**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**THE JOHN HOWARD SOCIETY OF CANADA**

**Applicant**

**and**

**MINISTER OF PUBLIC SAFETY**

**Respondent**

# AMENDED JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review pursuant to s 41(1) of the *Access to Information Act*, RSC, 1985, c A-1 [the ATIA]. This judicial review requires the Court to balance the rights that the ATIA and the *Privacy Act*, RSC 1985, c P-21 [the PA] seek to promote and protect.

[2] The John Howard Society of Canada ("JHSC") requested access to anonymized inmate grievances from Bath Institution that relate to Correctional Officers ("CO") not wearing masks. Corrections Service Canada ("CSC") identified 12 grievances. In addition to redactions anonymizing the grievances, CSC redacted **all the handwritten parts** of the grievances. It must be pointed out that the inmates' access to computers is limited and because of this, handwritten grievances are common.

[3] This case focuses on whether **all handwriting** by inmates in grievances amount to personal information for the purposes of s 3 of the PA.

[4] In the Applicant's Motion Record, the Applicant has included "Tab C – Decision to be Reviewed (A-2020-00215)." Tab C is the original CSC Access to Information and Privacy ("ATIP") decision and release of materials provided to the initial requestor, Mr. Murray Fallis, an employee at JHSC. However, s 41 of the ATIA states:

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| **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. |

[5] The Information Commissioner's Report triggers the right to ask this Court to review an institution's refusal to provide records, or parts of records, requested under the ATIA: *Lambert v Canada (Canadian Heritage)*, 2022 FC 553 at paragraph 22. ~~Subsection 37(2) of the ATIA pertains to the Information Commissioner's final report to the complainant. Therefore,~~ The decision that is subject to the judicial review is the CSC's ATIP decision. ~~the Commissioner's Final Report, inclusive of the initial decision. This judicial review considers the Commissioner's Final Report *in light of* the original CSC ATIP decision.~~ As stated in *Imai v Canada (Foreign Affairs)*, 2021 FC 1479 at paragraph 21, the Court has the "benefit of the [Information Commissioner's] report of findings", which carries weight but is not binding upon the Court.

[6] I agree with the Applicant that CSC cannot universally treat all inmate handwriting as personal information under s 19(1) of ATIA. The handwritten grievances must be reviewed the same as the typeset grievances, with the same principles applied. In light of my findings, before release of the handwritten complaints, CSC must review them and complete further redactions if necessary. The evidence in this case does not establish a serious possibility that release of the handwritten grievances will allow identification of inmates who wrote the grievances. Accordingly, there are no grounds to exempt the handwritten grievances from disclosure under s 19(1) of the ATIA.

## II. Background

### A. *Background and ATIP Request*

[7] On October 21, 2020, CSC received an access to information request from a JHSC employee for:

> all inmate grievances at the local level in Bath Institution (anonymized) regarding correctional officers not wearing masks between April 1/2020 and Oct 15/2020

[8] The Executive Director of JHSC explained in a March 4, 2022 Affidavit, that federal prisoners at Bath Institution had relayed concerns to JHSC that CO's were not respecting public health mandates. In light of the JHSC's mandate and concerns regarding COVID-19 in prisons, the charity sought access to the inmate grievances pertaining to masking grievances.

[9] Bath Institution is a federal penitentiary operated by the CSC pursuant to the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA].

[10] In March and April of 2020, the COVID-19 pandemic caused the Respondent to implement public health measures at each of its federal penitentiaries across Canada. The Canadian government's COVID-19 response measures have included physical distancing, increasing hygiene practices, and the mandatory wearing of masks and other personal protective equipment by CO's, other CSC agents, employees, and prisoners.

[11] As the Applicant pointed out, individuals incarcerated in Canadian federal penitentiaries are limited in their ability to practice physical distancing, freely access health care, and obtain access to personal protective equipment and cleaning supplies necessary to reduce the risk of contract and spreading COVID-19.

[12] Inmate grievances are made in accordance with the Commissioner's Directive 081 – Offender Complaints and Grievances ("081-Directive"), and include a written complaint made by the prisoner to the appropriate recipient, depending on the level of grievance. Inmates can make inmate grievances in handwritten or typed format, as some inmates have access to computers.

[13] Inmate grievances "…support the fair and expeditious resolution of offender complaints and grievances at the lowest possible level in a manner that is consistent with the law" (081-Directive). The purpose of inmate grievances is to ensure that the legal obligation to provide timely and impartial resolution of offender grievances is met.

[14] The process for resolving inmate grievances is set out in ss 90 and 91 of the CCRA, ss 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620, and 081-Directive.

[15] On December 3, 2020, CSC provided its response to the ATIP Request, which included a 65-page disclosure package and a cover letter explaining that it had withheld certain records or portions thereof pursuant to s 19(1) of the ATIA.

[16] In response to the JHSC's request for inmate grievances relating to COVID-19 masking, CSC identified a dozen grievances brought by six different inmates and the corresponding CSC responses. Two of the grievances were typewritten, and the remainder were handwritten. The handwritten portions of the remaining eight inmate grievances were redacted because CSC determined it was personal information pursuant to s 19(1) of the ATIA.

B. *The Information Commissioner's Investigation and Dismissal of the Complaint*

[17] On December 15, 2020, the Applicant filed an exemption complaint (the "Complaint") in relation to the ATIP Request with the Office of the Information Commissioner of Canada (the "OIC"). The Complaint alleged that s 19(1) of the ATIA had been "excessively applied".

[18] The OIC investigator contacted the CSC ATIP Analyst who had reviewed and redacted the records, and had her fill out an "Exemption Analysis Worksheet" ("EAW"), explaining her reasons for withholding certain information.

[19] The ATIP Analyst completed the EAW with her reasons and communicated those to the OIC Investigator. The email exchange between the OIC Investigator and the CSC ATIP Analyst also indicates that a phone call discussion took place so that the OIC Investigator could clarify some of the reasons.

[20] Prior to releasing her decision, the OIC Investigator exchanged emails with the JHSC requestor in which she said that the redactions in this case were made pursuant to ss 3(c) and 3(f) of the PA.

[21] On October 21, 2021, the OIC Investigator provided the Applicant with the OIC's "preliminary finding" via email, wherein she found that the Respondent had correctly applied s 19(1) of the ATIA, as the exempted information was personal information as defined in s 3 of the PA. Accordingly, the OIC Investigator held the complaint was not well founded.

[22] Following the OIC Investigator's communication of the preliminary finding, the initial requestor requested clarification and provided submissions on the preliminary findings.

[23] On October 25, 2021, the OIC Investigator provided further representations to the Applicant, stating that the OIC considered the handwritten complaints:

a) identifying information under s 3(c) of the PA;
b) implicitly or explicitly of a private or confidential nature, including the replies to same, under s 3(f) of the PA, and were therefore withheld on the basis of s 19(1) of the ATIA.

[24] The October 25, 2021 communication was the first time that any government representative, whether CSC or the OIC, referenced ss 3(c) and 3(f) of the PA specifically in relation to the redactions.

[25] On November 4, 2021, the OIC Investigator replied to the Applicant's November 2, 2021 email by outlining the OIC's position on whether CSC applied s 19(1) appropriately. The OIC Investigator explained that her conclusion remained the same; that the exempted information falls within the class test of s 19(1), as it is personal information defined in s 3 of the PA.

[26] On November 23, 2021, the OIC Investigator provided the Applicant with a final report (the "Commissioner's Decision") dated November 23, 2021. The Commissioner's Decision concluded the Applicant's grievance regarding CSC's Release was not well founded.

[27] The Commissioner's Decision held that the handwriting is about an identifiable individual, and that the information does not fall under any of the exceptions to the definition of "personal information" set out in the PA. The Commissioner's Decision also found that CSC provided a detailed rationale as to why the circumstances in s 19(2) did not exist in this case to permit disclosure.

## III. Issues

[28] The issues raised in this appeal are:

A. Whether the inmates' handwriting styles constitute a "personal information" exemption in s 19(1) of the ATIA;

B. Whether the redacted CSC correctly refused to release the exempted information under s 19(2) of the ATIA;

C. Whether the Respondent had a duty under s 25 of the ATIA to sever information and provide it to the Applicant.

[29] However, the first issue is dispositive in this appeal and there is therefore no need to turn to the second and third issues.

## IV. Standard of Review

[30] The legislature provides that a judicial review of a decision of the Information Commissioner will proceed on a *de novo* basis, per s 44.1. Section 44.1 states:

| ***De novo* review** | **Révision *de novo*** |
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| **44.1** For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding. | **44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire. |

[31] In a *de novo* review the Court steps into the shoes of the initial decision-maker and determines the matter on its own (*Agraira v Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36 at paras 45-47). The Court's review is not necessarily to determine if the original decision-maker was correct or not: see *Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2021 FC 138 [*Suncor Energy Inc*] at paragraph 64.

[32] *Canada (Health) v Elanco Canada Ltd*, 2021 FCA 191 explained s 44.1 and the Court's powers as follows:

> [23] The wording of section 44.1 makes it clear that when a party, such as Elanco, makes an application under section 44 of the Act for a review of a decision that certain information should be disclosed, the application is to be heard and determined as a new proceeding. This would mean that the Federal Court judge who is hearing the particular application is not reviewing a decision of the Minister per se <u>but rather is making their own determination of whether the exemptions from disclosure as set out in section 20 of the Act are applicable</u>. Any findings of fact or mixed fact and law that would be required to make this determination would be the findings of fact or mixed fact and law made by the Federal Court judge.
>
> [Emphasis added]

[33] The Applicant points to s 48(1) of the ATIA for the proposition that the Respondent bears the burden of establishing that the <u>CSC</u> ~~Information Commissioner~~ was authorized to refuse to disclose a record requested or a part thereof. Subsection 48(1) states:

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| **Burden of proof — subsection 41(1) or (2)** | **Charge de la preuve : paragraphes 41(1) et (2)** |
| **48 (1)** In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned. | **48 (1)** Dans les procédures découlant des recours prévus aux paragraphes 41(1) et (2), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document ou des actions posées ou des décisions prises qui font l'objet du recours incombe à l'institution fédérale concernée. |

[34] I agree with the Applicant that the burden to establish the authorization of the refusal lies with the Respondent. Here, this means that the Respondent must establish that it was authorized to redact the records under s 19(1) under the ATIA.

A. *Subsection 19(1)*

[35] Subsection 19(1) of the ATIA states:

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| **Personal information** | **Renseignements personnels** |
| 19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information | 19 (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels. |

[36] The jurisprudence (*Suncor Energy Inc* at paras 66-68) has previously found a correctness or *de novo* standard to apply to s 19(1). While there are nuanced differences between *de novo* and correctness review, in this situation I am determining whether handwriting constitutes

"personal information" as defined by s 3 of the PA. That is a *de novo* review. However, in this case, elements of this analysis are akin to a correctness review.

[37] Accordingly, the appropriate standard of review for s 19(1) is a *de novo* review.

B. *Subsection 19(2)*

[38] Subsection 19(2) of the ATIA states:

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| **Where disclosure authorized** | **Cas où la divulgation est autorisée** |
| **(2)** The head of a government institution may disclose any record requested under this Part that contains personal information if<br>**(a)** the individual to whom it relates consents to the disclosure;<br>**(b)** the information is publicly available; or<br>**(c)** the disclosure is in accordance with section 8 of the *Privacy Act*. | **(2)** Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :<br>**a)** l'individu qu'ils concernent y consent;<br>**b)** le public y a accès;<br>**c)** la communication est conforme à l'article 8 de la Loi sur la protection des renseignements personnels. |

[39] I am cognizant of the fact that s 44.1 provides a *de novo* standard of review on judicial review. However, as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 24, I must be mindful of the legislature's intent.

[40] The language in s 19(2) indicates that CSC may exercise discretion in determining whether to apply an exception.

[41] The jurisprudence also indicates a reasonableness standard should apply to s 19(2). Recently, in *Suncor Energy Inc*, Justice Heneghan applied a reasonableness standard to s 19(2), relying on *Canada (Information Commissioner v Canada (Minister of Natural Resources)*, 2014

FC 917. Further, the Court has found that "where the exemption provides for discretion to refuse disclosure, the reasonableness standard of review applies" (*3412229 Canada Inc v Canada (Revenue Agency)*, 2020 FC 1156 at para 94).

[42] It is also illogical to apply a *de novo* review to an exercise of discretion. I therefore agree with the Respondent that the standard of reasonableness applies to s 19(2).

## V. Analysis

[43] The Applicant highlights that this Court's powers are broad under s 49 of the ATIA. These powers include "[ordering] the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate": s 49 of ATIA.

[44] In this case I am prepared to grant that the matter be sent back to be re-determined. Re-determination is necessary as although handwriting cannot be blanket redacted, there may be aspects of the handwritten information that falls under s 3 of the PA.

### A. *Legislative Framework*

[45] Before turning to the analysis, it is necessary to outline the applicable legislative framework in the circumstances, especially given the interaction between the ATIA and the PA.

[46] The purpose of the ATIA is to provide the public with a right of access to information contained in records held by the government. This right is subject to exceptions set out in the ATIA, including the mandatory exemption for “personal information” found in s 19.

[47] Section 3 of the ATIA states that “personal information” has the same meaning as s 3 of the PA. Annex A provides s 3.

[48] The Supreme Court of Canada has held that the definition of personal information is “undeniably expansive” and “broad”: *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403, 1997 CanLII 358 at paragraph 68. The Supreme Court of Canada then confirmed this broad interpretive approach applies to the definition of “personal information” in *Canada (Information Commissioner) v Canada (Commissioner of the RCMP)*, 2003 SCC 8 at paragraphs 19-22.

[49] The Applicant and Respondent disagree on the balance between privacy rights and the right of access to information. The Applicant relies on this Court’s jurisprudence of *Blank v Canada (Minister of the Environment)*, 2006 FC 1253 to argue that “any doubt should be resolved in favour of disclosure, with the burden or persuasion resting upon the party resisting disclosure” (at para 31 citing *Maislin Industries Limited v Minister for Industry, Trade and Commerce*, [1984] 1 FC 939, 1984 CanLII 5386 (FC)). However, the Respondent maintains that privacy rights often trump the public’s right to access information, especially where a conflict arises.

[50] I accept the Respondent's submission that privacy rights can and often do trump the public's right to access information. As a society, the role privacy plays is pivotal in the preservation of a free and democratic society: *HJ Heinz Co of Canada Ltd v Canada*, 2006 SCC 13 at paragraph 31 [*Heinz*].

[51] The Respondent bears the burden of demonstrating that its refusal to disclose records was authorized. Section 48(1) states:

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| **Burden of proof — subsection 41(1) or (2)** | **Charge de la preuve : paragraphes 41(1) et (2)** |
| 48 (1) In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned. | 48 (1) Dans les procédures découlant des recours prévus aux paragraphes 41(1) et (2), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document ou des actions posées ou des décisions prises qui font l'objet du recours incombe à l'institution fédérale concernée. |

[52] This demonstrates the way in which the PA and the ATIA operate cohesively alongside one another. The Supreme Court of Canada has made clear that the ATIA and the PA must be read together as a "seamless code", following a "parallel interpretive model" (*Canada (Information Commissioner) v Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 at para 35 [*Safety Board*]).

[53] Both acts strike a careful balance between privacy rights and the right of access to information (*Heinz* at para 31), and although Parliament affords greater protection to personal

information, the Respondent must still be justified in exercising its refusal powers under the ATIA.

[54] In light of my observations on the standard of review, I wish to comment on the Applicant's arguments that pertain to inconsistencies in CSC release and redaction practices. Although I accept that CSC's redaction practices have been inconsistent, this Court's role on this review is to determine whether handwriting is "personal information" exempt from disclosure under s 19 of the ATIA, not to fault CSC's methods, nor compare this ATIP request to other ATIP releases.

[55] It is against this background that the question of whether handwriting, in *these circumstances*, constitutes "personal information" within the meaning of s 3 of the PA arises.

[56] The appropriate test to determine when information is about an identifiable individual is set out in *Gordon v Canada (Health)*, 2008 FC 258 at paragraph 34 [*Gordon*]:

> Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

B. *Whether the Handwritten Information is "about" an Identifiable Individual*

[57] In *Canada (Information Commissioner) v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1279 at paragraph 67 [*MPSEP*], the Court explained that this assessment "will of necessity be dependent on the particular facts, including the type of

information at issue, the context in which it appears in the records at issue and the nature of the other information that is available."

(1) Serious possibility

[58] In *MPSEP*, the Court found that a "serious possibility" means "a possibility that is greater than speculation or a "mere possibility," and does not need to reach the level of "more likely than not" (at para 53).

[59] The Applicant submits that the Respondent has improperly exempted all inmates' handwriting from disclosure based on a "mere possibility." To illustrate JHSC's position, it relies on the ATIP Analyst's cross-examination, where she provided the example of a prisoner writing a letter to loved one or to their lawyers:

> Well, handwriting is a way to identify someone. If an offender writes letters to loved one or their lawyers or things like that, if they handwrite letters, it's easy afterwards to compare the grievance submission to a letter and identify the offender.

[60] The Applicant argues that such reasoning is speculative and at best a mere possibility.

[61] The disagreement of the parties does not concern the legal test but instead arises from the application of the facts to the law in this case. There is no reported decision where a court has considered the issue of whether handwriting is personal information exempt from disclosure under privacy legislation. Alberta, Saskatchewan, and Ontario's' privacy commissioners have considered handwriting as something that **may** qualify as personal information depending on the context: *Ancaster (Town) (Re),* 1999 CanLII 14429 (ON IPC) [*Ancaster*]; *Ontario Parks Board*

*of Directors (Re)*, 2013 CanLII 75976 [*Ontario Parks Board*]; Lethbridge *(City) (Re)*, 2014 CanLII 34105 (AB OPIC) [*Lethbridge*]; *Saskatchewan (Economy) (Re)*, 2017 CanLII 73763 (SK IPC) [*Saskatchewan*]. For example, in *Ancaster*, the Information and Privacy Commissioner of Ontario stated (at 2):

> In situations where identity is an issue, handwriting style has been found to qualify as personal information. (See, for example, Order P-940, which found that even when personal identifiers of candidates in a job competition were severed, their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information)……

[62] However, these circumstances are factually distinct. A key difference between the above decisions and the facts here, is where handwriting amounted to personal information, it arose in the context of a single individual. In *Ancaster*, the concern was a single individual's identity (at 1). Similarly, in *Lethbridge*, the concern was with the investigator's handwritten notes – again a single individual in specific circumstances (at 7-8). Further, *Saskatchewan* dealt with a single page taken from an employee's notebook (at 5). In *Ontario Parks Board*, the assistant commissioner did not find that signatures were personal information in the circumstances (at 7). Aside from *Ontario Parks Board*, the Information and Privacy Commissioner decisions pertain to very specific and narrow factual circumstances. Unlike those decisions, the facts here are significantly broader and involve many people and documents.

[63] What is clear is that any consideration of whether handwriting is personal information is inherently contextual and fact-specific.

[64] The Federal Court of Appeal has held that an identifiable individual is someone who it is reasonable to expect can be identified by combining the information in issue with information from other available sources: *Safety Board* at paragraph 43.

[65] The Respondent contends that handwriting information may not in and of itself qualify as personal information in a record but in this case the handwriting becomes "personal information" when placed in its context. The Respondent points to the request itself, and argues that it narrowed the scope of the inmate population at issue given the inmates were at a single CSC institution, in a six-month period, who had encountered CO's not wearing masks. In the Respondent's view, this significantly narrows those circumstances such that a person could identify the particular inmates who authored the grievances based on their handwriting style.

[66] Identification of inmates from inmate grievances that are handwritten is predominantly speculative. Identification is simply too far removed in the circumstances and the implications of identification should not threaten inmates' personal safety. To identify an inmate, a person would need to have the grievance and the handwritten material in hand to compare the two. In addition, in these circumstances there is no guarantee that the inmate himself wrote the grievance, as there would be a variety of levels of illiteracy and inmate legal assistance with grievances. Even then, if a person had all samples in hand, they would need to have some skill in forensic handwriting analysis to connect the handwriting. This seems remote, even if a person had the desire and incentive to do it.

[67] Here, the Respondent's evidence from the ATIP Analyst merely pointed to the fact that inmates write letters to loved ones and to legal counsel.

[68] In *Gordon*, the evidence provided by the Respondent was a key determination for the Court. There, the Federal Court found the "substantial evidence" demonstrated that release of the information would "substantially increase the possibility that information about an identifiable individual" could be used to identify particular individuals (*Gordon* at para 43).

[69] Though what the ATIP Analyst stated is true, unlike *Gordon*, the evidence here is insufficient and speculative. Beyond the repeated assertions of handwriting allowing identification through letters, there is no concrete evidence, which demonstrates to this Court that releasing the handwriting (subject to redaction) substantially increases the possibility of identification. Cross-referencing against love letters and court records, which are in the hands of third parties, while on the spectrum of possibility, is at most a mere possibility and not a serious possibility.

(2) Available Information

[70] On the second aspect of the test from *Gordon*, the Applicant says that a consideration of "available information" includes "the type of information at issue, the context in which it appears in the records at issue, and the nature of the other information that is available" (*MPSEP* at para 67). The Applicant relies on the Court's comments in *MPSEP* on when information is considered available:

a. information that is kept confidential in the hand of the government is not considered "available" (at para 59);
b. available information is not simply "publicly available information", it is something more than that (at para 65);
c. the fact that an individual may be able to identify themselves does not make that information "personal information" (at para 61).

[71] The Respondent also relies on *MPSEP* for the premise that a person might be identifiable by "…those familiar with the particular circumstances or events contained in the record" (at para 66). I agree with both parties' characterizations of the law from *MPSEP*.

[72] The Applicant speculated as to what available information could be used to improperly identify a prisoner from their handwriting. Whereas, the Respondent contended that an inmate's handwriting is information that is available to others. The Respondent relied on the ATIP Analyst's statement that loved one's letters and court documents could be used to identify an inmate.

[73] *MPSEP* makes clear that what should be considered "available information" for assessing whether the information at issue could identify an individual is inherently fact and context specific (at para 67).

[74] The Court's explanation of what constitutes "available information" in *MPSEP* is relevant here. Justice McHaffie commented:

> [65] That "available information" may go beyond what is in the hands of an "informed and knowledgeable member of the public" is consistent with both *Gordon* and *NavCanada*. Justice Gibson in *Gordon* did conclude that the "province" field at issue in that case could be used in conjunction with other "publicly available information" to identify individuals. However, Justice Gibson does not appear to have intended to limit the analysis to information available to the public at large. At paragraphs 33-34 of his reasons, he referred to the relevant available information as "including" publicly available sources, and adopted the Privacy Commissioner's formulation, which does not include the "publicly available" qualifier:
>
> > Thus, information recorded in any form is information "about" a particular individual if it "permits" or "leads" to the possible identification of the individual, <u>whether alone or when combined with information from sources "otherwise available" including sources publicly available</u>…
>
> [Emphasis in original]

[75] Here, the Respondent is concerned about both publicly available information and information that has been shared privately. The Respondent provides examples of both publicly available information, such as court records, and private communications, such as handwritten letters to loved ones or lawyers.

[76] The affidavit evidence in *Gordon* was directed at demonstrating how disclosure would increase the possibility that the information would be exposed. For example, one of the respondent's witnesses "examined publicly available information from the database in conjunction with obituary information available on the internet" (at para 38).

[77] For much the same reasons as in the first branch of the test, the Respondent's evidence is too remote and speculative. There is no evidence of more than a mere possibility that releasing

the inmates' handwriting will lead to identification. The examples provided by the Respondent, although a small possibility, are too speculative to establish that identification is possible here.

[78] I agree with the Respondent that s 51 of 081-Directive provides confidentiality to the process. Section 51 states:

> 51. An offender's use of the offender complaint and grievance process, including any corrective actions associated with the complaint and grievance process, may not be mentioned in records outside of the offender complaint and grievance process without the authorization of he Institutional Head/District Director, in which case this should be documented on the file.

[79] However, this argument is immaterial on whether there is available information that could identify the inmates' handwritten complaints. Section 51 of 081-Directive does not presumptively shield all handwritten grievances from release. I am of the view that the examples provided by the Respondent are too speculative in these circumstances.

[80] Here, given I am remitting the matter; the handwritten grievances will still be subject to redaction similarly to the typewritten complaints. However, wholesale redaction of handwritten complaints due to CSC qualifying handwriting as personal information is inappropriate in these circumstances.

[81] Accordingly, I find that the Respondent has not established that inmates' handwriting styles are "personal information" within the meaning of s 3 of the PA.

C. *Did CSC Reasonably Exercise its Discretion per Subsection 19(2) of the ATIA in Refusing to Disclose the Handwriting?*

[82] Given my conclusion on s 19(1) of the ATIA, I do not need to turn to whether CSC reasonably exercised its discretion in refusing to disclose the handwritten grievances. As the information in question is not personal information, s 19(2) does not come into play.

[83] Had I concluded otherwise on s 19(1), I would have found the matter should still be sent back to CSC for redetermination, as it is unclear how CSC applied s 19(2), if at all. Although the EAW does appear to indicate that the ATIP Analyst relied on s 19(2), it is difficult to know how or why it was applied. This is unreasonable.

[84] I conclude that handwritten inmate grievances, in these circumstances, are not "personal information" within the definition of s 3 of the PA. Having found this, I direct CSC to review the handwritten information to ensure appropriate portions containing personal information, such as names, FPS numbers, and dates of birth are redacted before release.

## VI. Costs

[85] The Applicant sought lump sum costs without quantifying the amount and the Respondent sought a lump sum of $3,500.00. I will award, inclusive of lump sum, costs payable by the Respondent to the Applicant in the amount of $3,500.00 payable forthwith.

**JUDGMENT IN T-148-22**

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

1. The application is granted and the matter is sent back to be re-determined by a different decision-maker;

2. Costs payable to the Applicant by the Respondent in the lump sum amount of $3,500.00 inclusive of taxes and disbursements.

"Glennys L. McVeigh"
Judge

## ANNEX A – Relevant Legislation

*Privacy Act*, RSC 1985, C P-21

**Definitions**

**3** In this Act

…

**personal information** means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

*Loi sur la protection des renseignements personnels*, LRC 1985, c P-21

**Définitions**

**3** Les définitions qui suivent s'appliquent à la présente loi.

…

renseignements personnels Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la Loi sur l'accès à l'information, les renseignements personnels ne comprennent pas les renseignements concernant :

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

(j.1) the fact that an individual is or was a ministerial adviser or a member of a ministerial staff, as those terms are defined in subsection 2(1) of the Conflict of Interest Act, as well as the individual's name and title,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years; (renseignements personnels)

j.1) un conseiller ministériel, au sens du paragraphe 2(1) de la Loi sur les conflits d'intérêts, actuel ou ancien, ou un membre, actuel ou ancien, du personnel ministériel, au sens de ce paragraphe, en ce qui a trait au fait même qu'il soit ou ait été tel et à ses nom et titre;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

m) un individu décédé depuis plus de vingt ans. (personal information)

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-148-22 |
| **STYLE OF CAUSE:** | THE JOHN HOWARD SOCIETY OF CANADA v MINISTER OF PUBLIC SAFETY |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | SEPTEMBER 14, 2022 |
| **AMENDED JUDGMENT AND REASONS:** | MCVEIGH J. |
| **DATED:** | MARCH 13, 2023 |

**APPEARANCES:**

| | |
|---|---|
| Andrew West | FOR THE APPLICANT |
| Jennifer Lee | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| MCCARTHY TÉTRAULT LLP<br>Calgary, Alberta | FOR THE APPLICANT |
| Attorney General of Canada<br>Edmonton, Alberta | FOR THE RESPONDENT |