

Federal Court



Cour fédérale

Date: 20241009

Docket: T-127-24

Citation: 2024 FC 1595

Toronto, Ontario, October 9, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANDREW CHABURSKY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision (the “Decision”) dated December 22, 2023 made by the Office of the Information Commissioner of Canada (the “OIC”) refusing to investigate the Applicant’s complaint under the *Access to Information Act*, RSC, 1985, c A-1 (the “*ATIA*”).

[2] For the reasons set out below, I dismiss this application.

II. Background

[3] The Applicant's Memorandum at paragraphs 3.1 to 3.15 and the Respondent's Memorandum at paragraphs 3 to 34 provide a detailed chronology of events leading to this judicial review. I highlight the key facts below.

[4] In 2017, the Canada Revenue Agency ("CRA") conducted an audit of the Applicant's income tax returns for the 2010, 2011, and 2012 taxation years.

[5] On August 30, 2017, the Applicant made an access to information request to the CRA to obtain copies of all the documents in CRA's possession in relation to the Applicant's 2008 to 2017 taxation years (the "ATIA Request").

A. *The First and Second Complaints to the OIC*

[6] On December 13, 2021, the Applicant made a complaint to the OIC in relation to the CRA's delay of more than three years in responding to the ATIA Request (the "First Complaint").

[7] On December 17, 2021, the CRA Access to Information and Privacy ("ATIP") Directorate disclosed documents in response to the ATIA Request (the "Disclosure Package") but redacted information, including entire pages, pursuant to subsections 19(1), 24(1) and 16(1)(c) of the *ATIA*.

[8] On April 29, 2022, the Applicant emailed the OIC Investigator assigned to the First Complaint to outline his concerns with the redactions made by the CRA to the Disclosure Package. The Applicant raised concerns about the substance of the Disclosure Package (i.e., the redactions) rather than the fact of non-disclosure, which was the subject of the First Complaint. In response, the OIC Investigator told the Applicant to submit a second formal complaint.

[9] On May 3, 2022, the Applicant made a formal complaint to the OIC (the “Second Complaint”). The Second Complaint raised concerns with the redaction of information from the Disclosure Package. As of April 2024, the Second Complaint was still being investigated.

[10] On May 31, 2022, the OIC issued a final report of its investigation of the First Complaint. The OIC found that, despite providing the Disclosure Package on December 17, 2021, certain facts revealed during the investigation of the First Complaint established that the CRA had not in fact formally responded to the Applicant’s ATIA Request until March 24, 2022. Further, the OIC found that the CRA had not adequately addressed the unreasonable delay in advancing the processing of the ATIA Request.

B. *The CRA’s review of the Notice of Objection*

[11] Throughout the foregoing events, the CRA’s Audit of the Applicant was ongoing. On February 28, 2020, the CRA completed the Audit. The CRA issued Notices of Reassessments to the Applicant for the 2010, 2011, and 2012 taxation years.

[12] On May 12, 2020, the Applicant filed a Notice of Objection to the Reassessments with the CRA Appeals Division.

[13] On August 25, 2022, the CRA Appeals Division informed the Applicant that it had completed its review of the Notice of Objection to the Reassessments. As a result of the review, the CRA issued a proposal letter to confirm the Reassessments and provided the Applicant 30 days to make additional representations.

[14] On October 3, 2022, the CRA Appeals Division released a number of working papers to the Applicant following his request for “copies of all working papers that [CRA] relied on to arrive at the conclusions stated in [its] proposal letter.”

[15] After some back and forth between the Applicant and the CRA Appeals Division, on November 25, 2022, the CRA Appeals Division sent the Applicant the working papers, some of which had been redacted.

[16] From December 16, 2022 to August 17, 2023, the Applicant and the CRA Appeals Division continued to communicate regarding the Applicant’s request for unredacted copies of the working papers and additional requested documents, including a copy of the Applicant’s net worth schedules. Importantly:

- a) On June 28, 2023, the Applicant’s counsel wrote to the CRA appeals officer indicating the working papers that were not yet disclosed, including the CRA

documents required to complete their analysis, and requested a call with the team leader to discuss the file.

- b) On July 14, 2023, the Applicant spoke with the CRA Chief of Appeals. During this call, the CRA Chief of Appeals informed the Applicant that the CRA Appeals Division could not provide digital copies of the net worth schedules.
- c) On August 17, 2023, the Applicant's counsel held a video conference call with the CRA Appeals Division to raise further issues with the Applicant's ongoing Audit, including the missing documents that were not provided in the course of that Audit.

[17] On September 29, 2023, the Applicant submitted a complaint to the OIC alleging that the CRA had (i) improperly applied redactions to the working papers; and (ii) failed to produce digital copies of the net worth schedules (the "Third Complaint").

III. The Decision

[18] On December 22, 2023 the OIC issued the Decision refusing to investigate the Applicant's Third Complaint because:

- A. with respect to the redacted working papers, the concerns raised in the complaint were not within the jurisdiction of the OIC, since the redacted documents complained about were obtained outside the access to information process; and

- B. with respect to the net worth schedules, the complaint was submitted to the OIC after the 60-day limit prescribed by section 31 of the *ATIA*.

IV. Issue

[19] The only issue before the Court is whether the Decision is reasonable.

V. Analysis

[20] The applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25). The burden is on the party challenging the decision to show that an administrative decision is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

A. *The concerns raised are outside the OIC's jurisdiction*

[21] Under section 30(1) of the *ATIA*, the OIC has jurisdiction to receive and investigate complaints pertaining to records requested under Part 1 (Access to Government Records) of the *ATIA*.

[22] The Applicant asserts that the OIC erred in concluding that the request for the redacted working papers was outside the process under the *ATIA* because the Applicant made a written

request to the CRA, which is the government institution with possession and control of the documents requested. The Applicant further submits that CRA has a duty to disclose the redacted working documents as they and the documents requested in the ATIA Request pertain to the same audit information, resulting in the responsibility under the Act to disclose them.

[23] The Respondent argues that the OIC does not have jurisdiction under section 30(1) of the *AITA* to disclose the documents, because the redacted working papers were not provided in the context of an access to information request. The Applicant received the redacted working papers from the CRA Appeals Division in the context of the CRA's review of the Applicant's Objection to the Reassessments, not from the CRA ATIP Directorate in response to an access to information request. The redactions were also applied in accordance with CRA policies and the *Income Tax Act*, RSC, 1985, c 1 provisions, not pursuant to subsections 19(1), 24(1), and 16(1)(c) of the *AITA*. I agree.

[24] The Applicant errs by conflating any request for documents to a government body that falls within section 6 of the *AITA* with a request for documents under Part 1 of the *AITA*. While the CRA is a government body to which access to information requests can be made, not all requests for documents to the CRA are access to information requests. That is the case here.

[25] In this case, the letter referred to by the Applicant in which Applicant's counsel requested the working papers was addressed to the CRA Appeals Division in the context of the Applicant's Objection to the Reassessments. Consequently, the request arose in the context of the CRA's Audit, not in the context of the ATIA Request. While the Applicant initiated the ATIA Request

because of the CRA's Audit, this is insufficient to bring this separate request for documents within the purview of the OIC's jurisdiction. The OIC has jurisdiction over complaints regarding *ATIA* requests.

[26] The OIC reasonably found that the complaint regarding the redacted documents was outside its jurisdiction.

B. *The Third Complaint is outside the 60-day limit*

[27] The OIC refused the Third Complaint regarding the net worth schedules, dated September 29, 2023, for failing to comply with section 31 of the *ATIA*. The OIC found that the Applicant became aware of the absence of the specific documents on June 28, 2023, at the latest.

[28] Under section 31 of the *ATIA*, a complainant must submit their complaint “within sixty days after the day on which the person receives a notice of refusal under section 7; is given access to all or part of the record; or, in any other case, becomes aware that grounds for the complaint exist” [emphasis added].

[29] The Applicant argues that the clock for the 60-day period should have begun to run on August 17, 2023, which is when the Applicant states the CRA categorically decided not to provide the requested documents to the Applicant. The Applicant argues that because the CRA had previously fulfilled similar requests for files and discussions regarding the net worth schedules were ongoing, the request was not “categorically” denied until August 17, 2023.

[30] The Respondent asserts that it was reasonable for the OIC to calculate the 60-day deadline from the date of June 28, 2023 since the Applicant submitted a letter to the CRA dated June 28, 2023 requesting the missing documents complained about, namely the digital copies of the net worth schedules. The Respondent submits that the Applicant must have known he had not received the digital copies if he was still requesting them on June 28, 2023, after allegedly requesting them “several” times. I agree.

[31] Having reviewed the record, I am not convinced that the Applicant was not aware that the grounds for his complaint existed until August 17, 2023. Counsel has represented the Applicant throughout these proceedings, has previously submitted *ATIA* requests on behalf on the Applicant, and diligently sent meeting minutes to the CRA summarizing each of the calls had with the CRA. It was reasonable for the OIC to conclude that as of June 28, 2023, the Applicant was aware of the grounds for his complaint: that the CRA had not provided digital copies of the net worth schedules.

[32] I do not see a difference between what the CRA told the Applicant’s Counsel on July 14, 2023: “the CRA Appeals Division does not give out digital copies of net worth schedules” and what the CRA said on August 17, 2023: “CRA Appeals does not have the authority to release electronic files of the net worth spreadsheets.” Moreover, in the letter regarding the July 14, 2023 call, Counsel for the Applicant wrote “[i]t is unfortunate that we are denied this request [for digital copies of the net worth schedules]”. Thus, I am satisfied that the Applicant was made aware of the CRA’s denial to disclose the digital copies of the net worth schedules by July 14, 2023, at the latest, which still puts the Third Complaint dated September 29, 2023 outside the 60-day period.

[33] The OIC did not err in refusing the Third Complaint regarding the missing documents for falling outside the 60-day period. The Decision was reasonable.

[34] Lastly, the Applicant's argument that the Decision violates subsection 4 (2.1) of the *ATIA* must fail. In this case, the duty to make every reasonable effort to assist the person in connection with a request for access to a record would be on the CRA as the "head of the government institution", not the OIC. The OIC had no statutory duty to investigate the Third Complaint for the reasons stated in the Decision.

VI. Conclusion

[35] The application for judicial review of the OIC's Decision is dismissed.

[36] After the hearing, parties indicated that they agreed on costs in the amount of \$2,000 to the successful party. I agree that this is reasonable and justifiable. Costs in the amount of \$2,000 are awarded to the Respondent.

JUDGMENT in T-127-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Applicant is ordered to pay costs to the Respondent in the amount of \$2,000.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-127-24

STYLE OF CAUSE: ANDREW CHABURSKY v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 27, 2024

JUDGMENT AND REASONS: MANSON J.

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