Date: 20090402

Docket: T-2257-07

Citation: 2009 FC 339

Ottawa, Ontario, April 2, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

AMIR ATTARAN

Applicant

and

MINISTER OF FOREIGN AFFAIRS

Respondent

and

CANADIAN JOURNALISTS FOR FREE EXPRESSION

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 41 of the *Access to Information Act* (ATIA), seeking review of the respondent Minister's decision dated November 15, 2007, to redact portions of the Department of Foreign Affairs and International Trade's (DFAIT) annual human rights reports on Afghanistan from 2002-2006 before releasing them to the applicant in response to a request pursuant to the ATIA.

FACTS

[2] The applicant is a professor in both the Faculty of Law and the Department of Epidemiology and Community Medicine at the University of Ottawa, and holds a Canada Research Chair in law and global development.

[3] The applicant states that he sought disclosure of the reports as an academic researching human rights and international development. The applicant states that he has been consulted on these issues in relation to Canada's mission in Afghanistan by media outlets, government departments and politicians, as well as by the Manley Panel in the preparation of its recommendations to the government. The applicant submits that disclosure of the reports will assist in forming and expressing his views on this topic which is a matter of significant public concern and debate. The applicant further submits that there is an important public purpose in publicly acknowledging evidence of torture and human rights violations in Afghanistan so as to better foster the rule of law in Afghanistan.

[4] The intervener, the Canadian Journalists for Free Expression were granted leave to intervene in support of this application. The association is a non-profit organization supported by Canadian journalists and other advocates of free expression. Its mission is to "defend the rights of journalists and contribute to the development of media freedom throughout the world".

The Access Request

[5] On January 24, 2007, the applicant, Dr. Amir Attaran, requested access to the respondent's country reports on human rights in Afghanistan for 2001-2006. The request was acknowledged on February 5, 2007.

[6] On April 23, 2007, the applicant received a letter from the Jocelyn Sabourin, Director of the Access to Information at DFAIT, enclosing the annual human rights documents for Afghanistan from 2002-2006 (no report for 2001 exists). The applicant states that the documents were heavily redacted. The applicant complained to the Director of the Access to Information and Privacy Protection Division (Access Division) about the redactions that same day, but no changes were made. The applicant then filed a request for investigation with the Information Commissioner on April 25, 2007.

~~[7]~~ On November 15, 2007, the applicant received a letter from Monique McCulloch, who had replaced Ms. Sabourin, enclosing less-redacted versions of the documents. These less-redacted versions had been produced in an unrelated proceeding before the Federal Court.

[8] The Information Commissioner sent a letter to the applicant on November 19, 2007 reporting the conclusions of his investigation. The letter stated that the Information Commissioner had asked the respondent to reconsider certain redactions and the respondent had agreed to do so, and that the additional information was forwarded to the applicant on November 15, 2007 as a result of the Information Commissioner's request. Due to these additional disclosures, DFAIT was no

longer relying on subsections 21(1)(a) and (b) of the ATIA to withhold any information. The remaining redactions were justified under subsections 13(1), 15(1) and 17 of the ATIA.

[9] As all the redactions that relied on subsection 13(1) of the ATIA were also withheld under subsection 15(1), the Information Commissioner restricted his findings for these portions to subsection 15(1). The Information Commissioner found that the remaining redactions properly fell under subsections 15(1) and 17 of the ATIA.

Disclosures of the 2006 Report Subsequent to the Applicant's Request

[10] Some of the redacted passages from the 2006 report have been disclosed to the public since the applicant's initial request. On April 25, 2007, the national newspaper *The Globe and Mail* published a story entitled "What Ottawa Doesn't Want You to Know," printing some of the redacted disclosures given to the applicant alongside another copy with the wording of the redacted portions, which the journalists obtained from a confidential source. The disclosed passages related to human rights violations by government officials in Afghanishtan.

[11] On July 11, 2007, an employee of the respondent, Scott Proudfoot, was cross-examined in another Federal Court proceeding and authenticated under oath one excerpt of the disclosure in *The Globe and Mail*. Mr. Proudfoot confirmed that the 2006 report contained the words:

> Extra-judicial executions, disappearances, torture and detention without trial are all too common.

Other Federal Court Proceeding

[12] On February 7, 2008, Madam Justice Anne Mactavish found as fact in *Amnesty International Canada v. Canadian Forces*, 2008 FC 162, that the respondent's 2006 Afghanistan human rights report stated that "Extra-judicial executions, disappearances, torture and detention without trial are all too common." She further held at paragraphs 102 to 107:

> **7. Afghanistan's Human Rights Record**
>
> 102 All of the foregoing concerns must also be considered in the context of Afghanistan's human rights record.
>
> 103 In this regard, entities such as the Department of State of the United States, the Afghan Independent Human Rights Commission, the United Nations High Commissioner for Human Rights and the United Nations Assistance Mission in Afghanistan have all recognized the serious systemic problem of detainee torture and abuse in Afghan prisons.
>
> 104 These problems are noted as being particularly prevalent in Kandahar and Paktia provinces.
>
> 105 Moreover, Canada's own Department of Foreign Affairs and International Trade has recognized the pervasive nature of detainee abuse in Afghan prisons in its annual reviews of the human rights situation in Afghanistan. For example, DFAIT's 2006 report, released in January of 2007, concluded that "Extra-judicial executions, disappearances, torture and detention without trial are all too common".
>
> 106 The Afghan National Directorate of Security is often singled out for particular attention in the country reports, as being responsible for the torture and mistreatment of prisoners. Of particular note is the fact that Louise Arbour, the United Nations High Commissioner for Human Rights, has described torture in NDS custody as being "common".
>
> 107 Many of the detainees turned over to Afghan authorities by the Canadian Forces are in fact handed over to the NDS.

Affidavit of H.G. Pardy

[13] The applicant submitted an affidavit from H.G. Pardy, a retired foreign service officer, ambassador and senior executive with DFAIT from 1967 to 2003. Mr. Pardy deposed that he has been informed and believes that the redacted portions of the documents detail information that Afghani officials are involved in torture and other human rights violations.

[14] Mr. Pardy states that there is no basis for DFAIT to conclude that redacting general statements about torture and human rights abuses is necessary or desirable for Canada to conduct its international affairs. Mr. Pardy states that Canada is party to a number of international agreements, including the *UN Convention Against Torture,* that oblige Canada to respect and promote certain human rights norms. One of these norms is that torture is never part of a state's legitimate international affairs and therefore cannot be privileged as diplomatic communications.

[15] Mr. Pardy states that the United States and Britain routinely publish reports emphasizing their concerns about human rights abuses and torture in Afghanistan and that there is no evidence that there has been any injury to their relations with Afghanistan or any other country as a result.

Respondent's Affidavits

Affidavit of Monique McCulloch

[16] The respondent provided a public affidavit from Monique McCulloch, the acting Director of the Access Division since July 2007. Ms. McCulloch deposed that she had reviewed the comments made by the Deputy Minister of Foreign Affairs to the Standing Committee on Access to

Information, Privacy and Ethics on June 19, 2007 about the confidentiality of the Afghan Human Rights Reports. The Deputy Minister stated that:

1) the reports are prepared by the DFAIT staff in Afghanistan;

2) the reports are internal working documents used to advise the Minister and develop instructions to Canadian delegates to various international organizations;

3) the reports are expected to be "full and frank in their content" on human rights, and draw on "information gleaned from various sources; and

4) the documents are not drafted with the purpose of informing a public audience.

Affidavit of Lillian Thomsen

[17] The affiant Lillian Thomsen is the Director General, Consular Policy and Advocacy at DFAIT. Ms. Thomsen provided public evidence relating to Canada's role in Afghanistan and the nature of the injury to Canada's international relations that would result from disclosure of certain types of information.

[18] Ms. Thomsen deposed that she was advised by Christopher Gibbins, Deputy Director in the Afghanistan Task Force at DFAIT, with respect to certain statements relating to Canada's involvement in Afghanistan.

[19] Ms. Thomsen's affidavit sets out that Canada's involvement in Afghanistan takes place in a multi-national context and that the need to collect and share information is critical to Canada's foreign relations. Ms. Thomsen states that while some information is available from public sources, Canada also relies on its ability to obtain information from other states, both formally and

informally, in conducting its foreign relations. Ms. Thomsen states that confidentiality is fundamental to this information-sharing process and that Canada has an obligation to maintain confidentiality of information shared by other sates absent their consent to disclose it.

[20] Ms. Thomsen states that if Canada was considered unreliable in terms of its ability to guarantee the protection of information given in confidence, Canada's ability to obtain such information would be limited. Ms Thomsen further states that it is important for Canada to maintain a diplomatic presence in order to constructively engage with countries on human rights and other sensitive issues, and that without this presence and the leverage gained through engagement on a range of issues, including trade and development assistance, Canada would be in a weaker position to protect Canadians and promote Canadian interests and values.

The Application at Bar

[21] The applicant states that he is only seeking disclosure of the references to torture in the reports, and that he accepts that references to individuals or agencies or allies in Afghanistan are exempt under the Act because such disclosures could reasonably be expected to be injurious to Canada's international relationships concerning those individuals or agencies.

ISSUES

[22] The applicant raises two issues in this application:

a. As a matter of statutory interpretation, can general information about torture be exempted from disclosure as information that could reasonably be expected to be injurious to the conduct of international affairs; and

b. Did the respondent err in exempting certain information from release pursuant to subsection 15(1) of the ATIA?

[23] Additionally, the intervener, Canadian Journalists for Free Expression, raises the following issues:

3. Is there a right of access to information under section 2(b) of the *Charter of Rights and Freedoms*?;

4. How is subsection 15(1) of the ATIA properly interpreted in light of *Charter* values?; and

5. Is the Minister required to consider section 2(b) of the *Charter* in exercising his discretion under subsection 15(1) of the ATIA?

RELEVANT LEGISLATION

[24] Subsection 13(1) of the ATIA provides that the government institution shall refuse to disclose information obtained in confidence:

Information obtained in confidence	Renseignements obtenus à titre confidentiel
13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from	**13.** (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements obtenus à titre confidentiel :
(*a*) the government of a foreign state or an	*a*) des gouvernements des États étrangers

institution thereof;

(*b*) an international organization of states or an institution thereof;

(*c*) the government of a province or an institution thereof;

(*d*) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or

(*e*) an aboriginal government.

ou de leurs organismes;

b) des organisations internationales d'États ou de leurs organismes;

c) des gouvernements des provinces ou de leurs organismes;

d) des administrations municipales ou régionales constituées en vertu de lois provinciales ou de leurs organismes;

e) d'un gouvernement autochtone.

[25] Subsection 15(1) of the ATIA provides that a government institution may refuse to disclose information injurious to the conduct of international affairs and defence:

International affairs and defence

15. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information

(*a*) relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

(*b*) relating to the quantity, characteristics, capabilities or deployment of weapons or

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15. (1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment:

a) des renseignements d'ordre tactique ou stratégique ou des renseignements relatifs aux manoeuvres et opérations destinées à la préparation d'hostilités ou entreprises dans le cadre de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

b) des renseignements concernant la quantité, les caractéristiques, les capacités ou le déploiement des armes ou des

other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

(*c*) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

(*d*) obtained or prepared for the purpose of intelligence relating to

(i) the defence of Canada or any state allied or associated with Canada, or

(ii) the detection, prevention or suppression of subversive or hostile activities;

(*e*) obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

(*f*) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (*d*) or (*e*) or on sources of such information;

(*g*) on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international

matériels de défense, ou de tout ce qui est conçu, mis au point, produit ou prévu à ces fins;

c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense, des forces, unités ou personnels militaires ou des personnes ou organisations chargées de la détection, de la prévention ou de la répression d'activités hostiles ou subversives;

d) des éléments d'information recueillis ou préparés aux fins du renseignement relatif à:

(i) la défense du Canada ou d'États alliés ou associés avec le Canada,

(ii) la détection, la prévention ou la répression d'activités hostiles ou subversives;

e) des éléments d'information recueillis ou préparés aux fins du renseignement relatif aux États étrangers, aux organisations internationales d'États ou aux citoyens étrangers et utilisés par le gouvernement du Canada dans le cadre de délibérations ou consultations ou dans la conduite des affaires internationales;

f) des renseignements concernant les méthodes et le matériel technique ou scientifique de collecte, d'analyse ou de traitement des éléments d'information visés aux alinéas *d*) et *e*), ainsi que des renseignements concernant leurs sources;

g) des renseignements concernant les positions adoptées ou envisagées, dans le cadre de négociations internationales

negotiations;

(*h*) that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

(*i*) relating to the communications or cryptographic systems of Canada or foreign states used

(i) for the conduct of international affairs,

(ii) for the defence of Canada or any state allied or associated with Canada, or

(iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

présentes ou futures, par le gouvernement du Canada, les gouvernements d'États étrangers ou les organisations internationales d'États;

h) des renseignements contenus dans la correspondance diplomatique échangée avec des États étrangers ou des organisations internationales d'États, ou dans la correspondance officielle échangée avec des missions diplomatiques ou des postes consulaires canadiens;

i) des renseignements relatifs à ceux des réseaux de communications et des procédés de cryptographie du Canada ou d'États étrangers qui sont utilisés dans les buts suivants :

(i) la conduite des affaires internationales,

(ii) la défense du Canada ou d'États alliés ou associés avec le Canada,

(iii) la détection, la prévention ou la répression d'activités hostiles ou subversives.

[26] Section 41 of the ATIA provides for judicial review by the Federal Court of the Minister's decisions under the ATIA:

Review by Federal Court

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

Révision par la Cour fédérale

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

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.

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.

[27] Section 52 of the ATIA provides, inter alia, that the Minister may make *ex parte* submissions on applications relating to international affairs or defence:

Applications relating to international affairs or defence

52. (1) An application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason of paragraph 13(1)(*a*) or (*b*) or section 15 shall be heard and determined by the Chief Justice of the Federal Court or by any other judge of that Court that the Chief Justice may designate to hear those applications.

Special rules for hearings

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard *in camera*; and

(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

Ex parte representations

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

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52. (1) Les recours visés aux articles 41 ou 42 et portant sur les cas où le refus de donner communication totale ou partielle du document en litige s'appuyait sur les alinéas 13(1) *a*) ou *b*) ou sur l'article 15 sont exercés devant le juge en chef de la Cour fédérale ou tout autre juge de cette Cour qu'il charge de leur audition.

Règles spéciales

(2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; celle-ci a lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale* si le responsable de l'institution fédérale concernée le demande.

Présentation d'arguments en l'absence d'une partie

(3) Le responsable de l'institution fédérale concernée a, au cours des auditions, en première instance ou en appel et sur demande, le droit de présenter des arguments en l'absence d'une autre partie.

STANDARD OF REVIEW AND BURDEN OF PROOF

[28] In *3430901 Canada Inc. v. Minister of Industry*, 2001 FCA 254, 282 N.R. 284, the Federal Court of Appeal ruled that the reviewing Court must apply different standards of review at different stages in determining the legality of a refusal of a government institution to disclose a record. Justice Evans stated at paragraph 47:

> **¶47** In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption. However, when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness.

[29] The applicant and respondent agree that in light of the Supreme Court's ruling in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there are now only two standards of review, correctness and reasonableness, and that as a result, if a reviewing Court determines the *ATIA* does confer discretion on the Minister to refuse to disclose a particular record, the Minister's use of that discretion must be reviewed on a reasonableness standard.

[30] Justice Evans further held at paragraph 89:

> **¶89**…when in review proceedings instituted under section 41 or 42 the Minister has discharged the burden of establishing that a document falls within an exemption, the proceeding must be dismissed unless the applicant satisfies the Court that the Minister failed lawfully to exercise the discretion to refuse to disclose an exempted document.

[31] Thus, initially the burden of proof is on the respondent to show that the record falls within the exemption. If the respondent's evidence meets this burden, the obligation shifts to the applicant to rebut this evidence by showing that the Minister's exercise of his discretion was unreasonable.

[32] The intervener raises issues that were not before the decision-maker. However, the question of whether the *Charter* includes a right of access to information is a question of law attracting a correctness standard, while issues pertaining to the exercise of the Minister's discretion attract the reasonableness standard.

ANALYSIS

The Access Law

[33] The general principle of the access to information law is that there is a presumption that the government information must be disclosed. If there is an exemption from disclosure, it must be narrowly construed. When an applicant seeks disclosure, there is a reverse onus (section 48 of ATIA) on the government to show that the documents are exempt and should not be disclosed.

The documents in issue

[34] The documents in issue are the 2002 to 2006 DFAIT Annual Reports on Human Rights in Afghanistan. The applicant has advised the Court that the applicant only seeks the disclosure of general statements relating to torture in the documents and that redactions about particular individuals or agencies in Afghanistan are not in dispute.

[35] These documents consist of 103-pages, of which only a small percentage are redacted (less than 10%). The Court has examined these records, in particular the redacted parts of these records pursuant to section 46 of the ATIA, and has heard *ex parte* representations from the respondent *in camera* with respect to the basis for these redactions.

[36] The confidential information on the record shows that the Information Commissioner performed a thorough investigation, asked a number of probing questions, and secured a number of further disclosures from the respondent. At that point, the Information Commissioner was satisfied that the documents disclosed with redactions, which are now before the Court, were in compliance with the ATIA.

Confidential *Ex Parte* Affidavit Evidence

[37] The Court has received confidential *ex parte* affidavit evidence from a Commander with the Canadian Forces and from a senior official of the Department of Foreign Affairs and International Trade with responsibility for Afghanistan. This evidence states that there is a likelihood of damage to Canada's international relations with Afghanistan if the redacted portions of the documents are disclosed to the public. The Court identified 13 redacted portions and sought submissions from the respondent as to whether these portions could be disclosed to the public.

[38] The confidential evidence, which the respondent agrees can be generally referred to in public, is that Canada has established relationships with political, security and police authorities in Afghanistan which are critical for Canada to be able to accomplish its mission in Afghanistan and

that negative references or criticisms of Afghan political, security and police authorities would undermine those relationships and become a hurdle for the Canadian government representatives on the ground in Afghanistan.

[39] The confidential affidavit evidence provided a concrete example of a critical comment made by a Canadian government official which negatively impacted Canada's bilateral relationship with Afghanistan for a period of time. The affidavit evidence also referred to other examples involving other countries where the disclosure of criticism by the Department of Foreign Affairs and International Trade officials caused a strong reaction from the countries affected, and in some cases, strained bilateral relations with those countries.

[40] The evidence stated that Canada works in public and private meetings with Afghan officials to accomplish certain human rights objectives and that publicly criticising specific Afghan authorities would undermine Canada's work in achieving through private meetings the objective of improving human rights in Afghanistan.

[41] The affidavit evidence explained that Canada works with different Afghan groups, community leaders and authorities and requires a personal relationship to accomplish Canada's objective. Disclosure of the redacted portions identified by the Court would hurt those relationships and make Canada's job in Afghanistan more difficult. Public allegations against Afghan authorities would damage Canada's ability to conduct its international affairs in Afghanistan.

[42] The Court has examined the redactions in the 2002 to 2006 annual reports on Human Rights in Afghanistan. Almost all the redactions are comments about different agencies and officials in the Afghan government, as well as about Canada's allies. The redactions provide a frank commentary. The evidence is that disclosure of this information could reasonably be expected to be injurious to Canada's international relations and defence and would prevent Canadian officials in Afghanistan from reporting candidly to their superiors in headquarters. The applicant takes no issue with this type of redaction.

The Evidentiary Requirement

[43] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 FC 427, Mr. Justice Rothstein (then with the Trial Division) held at page 32 that the party seeking to maintain confidentiality has a heavy onus to satisfy the Court on the balance of probabilities through clear and direct evidence that there will be a reasonable expectation of probable harm from disclosure of specific information. Justice Rothstein held at page 33:

> In order to distinguish between confidentiality justified by the Act and that resulting from an overly cautious approach, specific detailed evidence is required.

[44] At page 33 Justice Rothstein held:

> … Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.

[45] Justice Rothstein continued that if the information sought to be disclosed is already in the public realm, the burden of justifying confidentiality is more difficult to satisfy. Justice Rothstein held at page 37:

> The jurisprudence indicates, and it stands to reason, that once information is public from another source, the release of the same or similar information by the Government will be less likely to cause harm. If there were harm from disclosure, that harm could reasonably be expected to have arisen from the prior disclosure by others. In such circumstances the Government would have to show specific reasons why its release of the same information would cause harm.

Applying the Standard of Review

[46] Since subsection 15(1) of the ATIA provides the Respondent with the discretion to refuse the disclosure, the court must review this discretion on a standard of reasonableness. The Court cannot substitute its opinion for that of the decision-maker. In this case, the Court is satisfied that the decision not to disclose portions of the reports was reasonably open to the decision-maker under sub-section 15(1) of ATIA, so that the Court cannot set aside this decision, except as indicated below.

[47] There is clear and direct evidence from a senior officer of the Canadian Forces and from a senior official at the Department of Foreign Affairs and International Trade that disclosure of the redacted portions of the documents involving the Afghan military, the Afghan intelligence agency, and the Afghan police forces could reasonably be expected to be injurious to the conduct of Canada's international affairs with these agencies of the Afghan government. The confidential evidence points to specific examples of where public criticisms by a Canadian official have strained Canada's ability to work with the Afghan authorities for some time thereafter. Accordingly, there is

evidence of repercussions or reactions from the Afghans when Canada has publicly and officially criticised an Afghan official or Afghan agency.

[48] The Court cannot ignore, discount or substitute the Court's opinion for the clear evidence and opinion of a commander in the Canadian forces and a senior official at the Department of Foreign Affairs and International Trade that public disclosure of the redactions in these documents can reasonably be expected to be injurious to the conduct of Canada's international affairs with Afghanistan. The fact that other countries and the Afghanistan Independent Human Rights Commission have repeatedly reported on torture in Afghanistan, that does not diminish the likelihood of serious negative criticism of Afghanistan by Canada in an official report could reasonably be expected to be injurious to Canada's relationship with Afghan officials, and that these relationships are necessary for Canada to conduct its affairs in Afghanistan.

[49] If reports of torture in Afghanistan from the U.S., the United Nations and the Afghan Independent Human Rights Commission are on the public record, this does not mean that such comments from Canada in an official report, would not be injurious to Canada's relationships in Afghanistan.

[50] The fact that other countries, the United Nations, and the Afghanistan Independent Human Rights Commission have reported on torture in Afghanistan, does not diminish the likelihood that serious negative criticism of Afghan authorities by Canada in an official report could reasonably be

expected to be injurious to Canada's relationships with Afghan officials and that these relationships are necessary for Canada to conduct its affairs in Afghanistan.

[51] However, Justice Mactavish found in *Amnesty International Canada, supra*, the respondent's 2006 Afghan Human Rights Report stated that:

> Extra-judicial executions, disappearances, torture and detention without trial are all too common.

This same excerpt is redacted at page 117 in the 2005 Report, as well as at page 140 in the 2006 Report. This disclosure was on the front page of the *Globe & Mail* newspaper and certainly would have come to the attention of the Afghan Ambassador in Canada or other Afghan officials. There is no evidence that there were any repercussions or reaction from Afghanistan against Canada from this general disclosure about torture. It was not related to any particular Afghan authority or official. Accordingly, the Court cannot find that this disclosure, which is already in the public realm, could reasonably be expected to cause probable harm to Canada's international relations with Afghanistan. The Court will order that these two redacted portions of the documents be disclosed. The Court does not accept the respondent's submission that the reason there has been no repercussions or reactions from this disclosure is because the Afghan government did not notice the disclosure. This is unlikely since it was front page news in Canada's national newspaper, and attracted a great deal of attention.

[52] At this stage, I will review the issues raised by the applicant and intervener.

Issue No. 1: Can general information about torture be exempted from disclosure as information that could reasonably be expected to be injurious to the conduct of international affairs?

[53] The applicant submits that as a matter of statutory interpretation, the words "the conduct of international affairs" in subsection 15(1) cannot be read to include matters related to torture, as torture cannot be part of any state's legitimate international affairs. The applicant relies on Mr. Pardy's evidence that there is no basis in Canadian foreign policy for concealing human rights violations in other states. Mr. Pardy states in his affidavit at paragraphs 6-7:

> …The censorship of information about torture as ostensibly necessary to protect Canada's international affairs is based on the mistaken premise that international affairs can include internationally criminalized acts. There is no basis in Canada's foreign policy for such a conclusion. Canada has long recognized that the international attainment and enforcement of human rights norms, such as the norm against torture, often requires Canada to publicize evidence on the human rights breaches of other states…It is compatible with Canada's approach to international affairs to be forthright about the human rights failures of other states.

Thus, according to the applicant, the respondent cannot properly refuse to disclose any matters relating to torture under section 15(1). The applicant submits that it would be an error of law to interpret the phrase "the conduct of international affairs" to allow the respondent to exempt information about torture from disclosure.

[54] The Court cannot agree. There may be cases where disclosure of torture in a public report would be injurious to Canada's international affairs or defence. The Court cannot speculate. It depends on the evidence in each case. However, the Court agrees that Canada should not condone torture by failing to disclose it. The U.S. has a practice in its annual country reports on human rights

of publicly disclosing torture and other inhumane treatment in most countries around the world where such torture exists. Moreover, the Afghan Independent Human Rights Commission (AIHRC) monitors and reports incidents of torture by the Afghan authorities. For example, an unredacted portion of DFAIT's 2004 report cites an AIHRC report that states that the Afghan police forces engage in torture and describes a specific incident, at p. 102:

> The monitoring reports of AIHRC state that torture continues to take place as a routine part of police procedure, particularly at the investigation stage in order to extort confessions from detainees. A recent example is that of Qajkol, arrested by the Kabul police following the abduction of three UN workers in late October 2004, who died while in police custody. AIHRC investigated and concluded that Qajkol died as a result of police torture, while the Minister of Interior's investigation cited "death due to natural causes". Qajkol's five year old son interviewed by the medial following Qajkol's death in custody said, "Somebody had taken out my father's finger nails.

[55] Canada can refer to such public statements by other countries and by AIHRC without expecting any injury to Canada's international relationship with Afghanistan. This is because these statements cannot be attributed to Canada if they are public statements by other countries or by the AIHRC.

[56] The applicant submits that the respondent has, in exercising his discretion, failed to have due regard for the public interest in the issues and freedom of expression in general. The applicant states that the Supreme Court of Canada has held that the *Canadian Charter of Rights and Freedoms* protects the right to government information regarding public institutions and that the Ontario Court of Appeal has concluded that section 2(b) of the *Charter* protects the right to public

information. Thus, the applicant submits that the same *Charter* principles must be applied in the exercise of discretion under subsection 15 of the *ATIA.* This is issue No. 2 for the applicant.

[57] As the intervener's submissions raise and elaborate on the same issue, I will deal with this submission with issues raised by the intervener.

Issue No. 3: Is a right of access to information protected under section 2(b) of the *Charter*?

[58] The intervener, Canadian Journalists for Free Expression, submits that access to information is an aspect of the freedom of expression guarantee in section 2(b) of the *Charter,* because access to information is necessary to achieve the core purposes of political expression and discussion of public institutions. The intervener cites the Supreme Court's decision in *Edmonton Journal v. Alberta (Attorney General),* [1989] S.C.R. 1326, 64 D.L.R. 4th 577, dealing with the issue of open courts, wherein Justice Corey stated at paragraph 3:

> It is difficult to imagine a guaranteed right more important to a democratic society than...the freedom to express new ideas and to put forward opinions about the functioning of political institutions.

[59] The applicant points to paragraph 10 of the same judgment:

> There is another aspect to freedom of expression which was recognized by this Court in *Ford v. Quebec (Attorney General),* [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts.

[60] The intervener also relies on the Federal Court of Appeal's decision in *International Fund for Animal Welfare, Inc. (IFAW) v. Canada*,[1989] 1 F.C. 335, wherein the Court held that regulations barring IFAW from attending or publicizing a seal hunt were unconstitutional. Justice MacGuigan held at paragraph 16:

> In my view there can be no doubt that the Trial Judge was right in his "expansive and purposive scrutiny" of the Charter guarantee of freedom of expression. In so doing I believe he was also right in his conclusion that "freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed.

[61] Finally, both the intervener and the applicant make reference to the Ontario Court of Appeal's recent decision in *The Criminal Lawyer's Association v. Ontario (Public Safety and Security)*, 86 O.R. (3d) 259. In that case, the Criminal Lawyer's Association sought disclosure of a police report from the Ontario government. The Court held that there was "expressive content" within the meaning of section 2(b) at issue in that case. Justice LaForme stated at paragraphs 28-29:

> 28 The Divisional Court held (and I agree) that there is expressive content at issue here: the CLA requested the information in order to comment publicly on the discrepancies between Glithero J.'s reasons and the brief response from the OPP. This interpretation accords with the generous and liberal application of the s. 2(b) right as expressed in Irwin Toy. As the Supreme Court of Canada noted at p. 968 S.C.R. of that case, expression "has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content."
>
> 29 In this case, the CLA was attempting to comment on the discrepancies between the OPP report and Glithero J.'s scathing rebuke of the police and the Crown. The request for information is therefore not the form of the content, contrary to the Ministry's arguments. Rather, the wording of the request is merely the means by which the CLA seeks to gain the information that will enable it to express itself. This expression is not possible if the information

> is not provided. In other words, if the CLA does not receive the requested information, it is incapable of commenting on the discrepancy.

[62] The respondent submits that the Supreme Court's judgment in *Edmonton Journal* is distinguishable because the open courts principle has been held by the courts to be a constitutionally protected right under s. 2(b) of the *Charter* that is not dependant on legislation. The respondent submits that the right to access information held by the government is, in contrast, a purely statutory creation. Likewise, the respondent submits that the *IFAW* case, supra, is not applicable on these facts, citing the Federal Court of Appeal's decision in *Travers v. Canada et al.* (1994), 171 N.R.158, wherein Mr. Justice James Hugessen stated:

> The appellants seek to take some comfort from this Court's decision in *IFAW v. Canada*. That case had to do with a regulation whose effect was to deny the media and others access to an open, public, commercial seal hunt carried out on the ice of the Gulf of St. Lawrence. To attempt to read it as creating a general journalistic right of access to anything which may be of interest to the media is to rip it from its context and to confound journalistic interest with public interest. By the same token we can see nothing in any of the differing opinions given in *Committee for the Commonwealth of Canada v. Canada* which would turn section 2(b) of the Charter into a key to open every closed door in every government building and requiring a section 1 justification to keep it closed.
>
> (Emphasis added)

Mr. Justice Hugessen's learned judgment in this matter makes clear sense, and I adopt it for this case.

[63] With respect to the intervener's reliance on the *Criminal Lawyer's Association* case, the respondent states that the Ontario Court of Appeal's decision was appealed to the Supreme Court of Canada, whose decision is currently under reserve. The respondent submits that the jurisprudence

of the Federal Court of Appeal differs from the Ontario Court of Appeal's position, citing *Yeager v. Canada*, 2003 FCA 30, [2003] 3 F.C. 107, wherein the Court held that the Research Branch of the Correctional Services of Canada had not infringed the s. 2(b) rights of the respondent, a criminologist and critic of the penal system of Canada, by refusing to produce certain records. Justice Isaac stated at paragraph 65:

> The Motions Judge considered the decision of the *Ontario Divisional Court in Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197, which held that paragraph 2(b) does not provide a general right of access to information. Without endorsing all the reasons for decision given in that case, I am in respectful agreement with the conclusion of the Motions Judge that the respondent's Charter right was not contravened here.

[64] I agree with the respondent that s. 2(b) of the *Charter* does not encompass a general right to access any information held by government institutions. The Federal Court of Appeal jurisprudence is clear that access to information does not, in general, fall within the purview of s. 2(b). The Supreme Court cases relied upon by the intervener both involve exceptional circumstances where there is a clear link between freedom of expression and the access sought. I also agree that the right to access information held by the government is grounded in the statutory scheme of the *ATIA* and, as such, the purpose and function of the statute, including the statutory exemptions, must be considered in determining whether the claimed exemptions are justified.

Issues No. 4 and 5: How is subsection 15(1) of the ATIA properly interpreted in light of *Charter* values? Is the Minister required to consider section 2(b) in exercising his discretion under subsection 15(1)?

[65] The intervener has dealt with these issues concurrently in its submissions and the Court will do so as well. The intervener submits that because the right of access to information engages s. 2(b) of the Charter, any limits on that access must be "demonstrably justified" under section 1 of the *Charter*. As I have found that section 2(b) of the *Charter* is not engaged, I need not deal with these submissions.

[66] The intervener also submits that the Minister should exercise his discretion bearing in mind the "*Charter* values" of section 2(b). The respondent argues that the approach of interpreting statutes to conform with Charter values is appropriate only in narrow circumstances that are not present in this case. The respondent cites the Supreme Court's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, 212 D.L.R. (4th) 1, wherein Justice Iaccobucci stated at paragraphs 62-64 that statutes are to be interpreted in accordance with the intent of the legislator and "Charter values" should be applied only when the statute is ambiguous:

> **62** Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
> …
> **64** These cases recognize that a blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory

> construction. Moreover, another rationale for restricting the "Charter values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:
>
> > [T]o consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional [page598] validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the Charter, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

[67] In this case, there is no ambiguity in subsection 15(1) of the ATIA that requires the application of Charter values in its interpretation. The exemptions should be read in context with the rest of the ATIA. Thus, the Minister does not specifically need to consider s. 2(b) values in exercising his discretion under subsection 15(1).

Conclusion

[68] The Court has concluded:

a. the respondent has released to the applicant 90% of the DFAIT Annual Human Rights Reports on Afghanistan from 2002 to 2006;

b. most of the redactions are about different agencies and officials in the Afghan Government, as well as Canada's allies in Afghanistan. The Court has found, and the applicant agrees, that disclosure of this type of information could be injurious to Canada's international relations and should not be disclosed; and

c. there are 2 redactions in the Reports which describe torture in general in Afghanistan. This information has already been made public in Canada without any evidence of injury. Accordingly, the disclosure of this same information again could

> not reasonably be expected to be injurious to Canada's international affairs or defence.

Accordingly, the Court will order that the respondent disclose to the applicant the 2 redacted portions of the Report which have already been publicly disclosed by both the *Globe & Mail* newspaper and the Federal Court Judgment in *Amnesty International, supra.* These redacted portions of the Report are found in the documents at page 117, paragraph 1, and at page 140, paragraph 1.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed except for the disclosure of 2 redacted portions of the Reports which previously have been publicly disclosed;
2. The respondent disclose to the applicant the 2 redacted portions of the Reports which are set out in the preceding paragraph above and which have already been disclosed; and
3. There is no order as to costs.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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