

Federal Court



Cour fédérale

Date: 20130604

Docket: T-1423-12

Citation: 2013 FC 595

Ottawa, Ontario, June 4, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PATRICK WHITTY

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
AS REPRESENTED BY
THE MINISTER OF THE ENVIRONMENT**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Patrick Whitty, the Applicant, requested information from Environment Canada (EC) regarding himself and his three companies: RPR Environmental Inc.; 1049585 Ontario Inc., o/a RPR Environmental Services; and 876947 Ontario Ltd., o/a RPR Environmental. In this application for judicial review, Mr. Whitty states that he is seeking:

1. An order for EC to comply with its obligations under the *Access to Information Act*, RSC 1985, c A-1 [ATIA or the Act]; and

2. A writ of mandamus requiring EC to send the Applicant a complete copy of his personal information recorded on the National Enforcement Management Information System (NEMISIS) and a complete copy of a specific document the Applicant initially requested.

[2] The problem with this application is that Mr. Whitty has not met the statutory pre-conditions for bringing an application to this Court. Therefore, the judicial review must be dismissed.

[3] The history of Mr. Whitty's requests to EC for information and his complaints to the Office of the Information Commissioner (OIC) is lengthy. The more important steps in the process are described below.

The 2009 Request

[4] Sometime prior to November 2009, Mr. Whitty submitted his first request under the *ATIA*. He asked for documents relating to "alleged breaches of any applicable law" by himself and his companies in the possession or control of the Public Prosecution Service of Canada or EC.

[5] EC answered this request in November 2009. Some information was withheld by EC in accordance with certain enumerated sections of the *ATIA*. Of particular concern to Mr. Whitty, EC redacted the name of an individual referenced in an e-mail dated February 5, 2009 (the

Specific Document). The Specific Document related to a personal profile in NEMISIS to which an investigator wished to add information.

The 2011 Request

[6] In a second request to EC (the 2011 Request), Mr. Whitty asked for an extensive list of material, including, but not limited to, an un-redacted copy of the Specific Document:

This request is for documents of any kind relating or referring to myself . . . and my companies . . . that is contained in Environment Canada's National Enforcement Management Information System, also known as NEMISIS.

Without limiting the generality of the word "documents", my request is intended to include all drafts and final copies of: records, letters, notes, investigator's notebooks, affidavits, briefs, complaints, reports, information used to obtain search warrants, e-mails (including deleted e-mails), faxes, directives and memoranda, and communications with legal counsel, whether in printed or computer-stored form, as well as audio and videotapes and photographs.

I also request access to a specific document that was previously released to me as per your enclosed letter of November 20, 2009. This specific document . . . has an individual's name redacted. I have reason to believe that I am the individual that was named in this e-mail. If so, I request immediate release of this specific document to me, without redaction and without waiting for any other information to be compiled.

First Complaint to the OIC

[7] The statutory due date for EC's response to the 2011 Request was July 2, 2011. On June 30, 2011, EC issued a "notice of extension" advising that the department would require a 200-day extension (to January 18, 2012) to complete the request. On August 4, 2011, Mr. Whitty

complained to the OIC about the time extension. This complaint was assigned File No. 3211-00503. In a response dated October 27, 2011 (the Extension Report), the OIC advised Mr. Whitty that the extension was “valid” and “reasonable”.

Second Complaint to the OIC

[8] On March 20, 2012, Mr. Whitty complained to the OIC about the delay which had now extended well beyond the 200-day extension. The OIC assigned file number 3212-00017 to this complaint.

[9] On March 30, 2012, EC responded to Mr. Whitty’s 2011 *ATIA* Request (the March 30 Response). Of particular concern to Mr. Whitty is the redaction in the Specific Document; EC had not, as requested by Mr. Whitty, removed the redaction of a name from this document.

[10] In a letter dated June 14, 2012 (the Delay Report), the OIC responded to the March 20, 2012 complaint. The OIC acknowledged that the late response had placed EC “in a state of deemed refusal pursuant to subsection 10(3) of the Act”. However since EC responded on March 30, 2012, the OIC simply recorded the complaint “as well founded, resolved without having made recommendations to the head of the institution”.

[11] On July 23, 2012, Mr. Whitty commenced this application for judicial review.

Third Complaint to the OIC

[12] Although the record is somewhat muddy, I accept that Mr. Whitty made a further complaint to the OIC in or around June 2012 (the Third Complaint). In this complaint Mr. Whitty apparently alleged that:

Environment Canada has improperly applied exemptions, so as to unjustifiably deny access to records, or portions thereof, requested under the *Access to Information Act*.

[13] Of note, the Third Complaint marks the first instance when Mr. Whitty complained to the OIC regarding improper redactions by EC in its March 30 Response. The earlier complaints only addressed the issue of EC's delay. Further, it is also an important fact that Mr. Whitty's Third Complaint was not limited to the redactions in the Specific Document. In other words, Mr. Whitty's complaint extends to all 8000 pages of documents provided by the EC to him. Accordingly, to adequately respond to the complaint, the OIC must review each and every one of those 8000 pages.

[14] The OIC has begun – but not completed – an investigation of the Third Complaint. On June 20, 2012, the OIC sent a document to EC titled “Notice of Intention to Investigate and Summary of Complaint”, pursuant to s. 32 of the *ATIA*. On June 21, 2012, EC forwarded in excess of 8,000 pages, including a working copy of the records gathered by EC in response to Mr. Whitty's request, outlining the particular exemptions claimed by EC. On July 26, 2012, EC was advised that the complaint had not yet been assigned to an investigator. A further update was requested by EC on November 21, 2012, but no response was received by the time the affidavit in the Respondent Record was sworn.

Analysis

[15] I believe that Mr. Whitty is somewhat confused as to what decision is reviewable before this Court. In fact, Mr. Whitty cannot seek review of any alleged “decision” by the OIC; the OIC can only provide non-binding recommendations (*Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] 4 FC 245 at para 12, 168 FTR 49). What Mr. Whitty is really asking for is a decision of this Court to force the EC to disclose information to which he was entitled under the *ATIA*. On this basis, the relevant decision is the March 30 Response by EC.

[16] The problem for Mr. Whitty is that investigation by the OIC is necessary prior to the commencement of a judicial review application (*Statham v Canadian Broadcasting Corp*, 2009 FC 1028 at para 18, [2010] 4 FCR 216, aff'd 2010 FCA 315, [2012] 2 FCR 421). Section 41 of the *ATIA* sets out the conditions precedent for judicial review under the *ATIA*:

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation

[17] The requirement for a complaint to the OIC is clearly stated in *Canada (Information Commissioner of Canada) v Canada (Minister of National Defence)* (1999), 240 NR 244 at para 27, [1999] FCJ No 522 (CA):

The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in ss. 41 and 42 of the Act. [Emphasis added.]

[18] Therefore, in this case, judicial review cannot be sought without a report outlining the investigation of OIC of the relevant subject matter.

[19] Obviously, Mr. Whitty cannot seek judicial review on the basis of the Extension Report since he is out of time.

[20] In his oral submissions, Mr. Whitty identified the June 14, 2012 report regarding the Delay Complaint as the basis for his judicial review application. However, the OIC's investigation of this complaint cannot satisfy the requirements for judicial review since it dealt with delay and not the redactions. The complaint made by Mr. Whitty was only that EC had breached the provisions of the *ATIA* by failing to respond to his request by the extended deadline. The OIC properly answered Mr. Whitty's complaint of delay. The OIC concluded that, because EC had responded to the request on March 30, 2012, nothing beyond an acknowledgment of the lengthy delay was required. The fact that Mr. Whitty did not receive the documents that he wanted was not an issue raised with the OIC at this time. Mr. Whitty had only

complained to the OIC about the delay and not about the redactions. In my view, the OIC addressed the issue before it in a complete and reasonable manner; however, this investigation cannot satisfy the conditions precedent to commence this application for judicial review.

[21] In sum, the only possible reviewable decision is the March 30 Response of EC. However, the problem for Mr. Whitty is that, in the absence of a report from the OIC detailing its investigation of the Third Complaint, the court is precluded from granting – or even considering – this application for judicial review.

[22] In the circumstances, the prerequisites for an application for judicial review have not been met and the application will be dismissed, with costs to the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and
2. costs fixed in the amount of \$500, inclusive of disbursements, are payable by the Applicant to the Respondent.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1423-12

STYLE OF CAUSE: PATRICK WHITTY v THE ATTORNEY GENERAL
OF CANADA AS REPRESENTED BY THE
MINISTER OF THE ENVIRONMENT

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 28, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** SNIDER J.

DATED: JUNE 4, 2013

APPEARANCES:

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(ON HIS OWN BEHALF)

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