Federal Court  Cour fédérale

Date: 20170330

Docket: T-91-09

Citation: 2017 FC 330

Ottawa, Ontario, March 30, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MATTHEW G. YEAGER

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Prof. Matthew G. Yeager is a public criminologist, whose research in public policy requires making requests of federal agencies both to use the requested documents in his research and as part of his research on how such requests are processed and governed. In that respect, he is a self-described public interest litigant with extensive credentials who, as he put it, may be the only criminologist in Canada who litigates under the *Access to Information Act*, RSC 1985,

c A-1 [*ATIA*]. He has had an interest in penal policy for over 40 years and is currently a professor at the University of Western Ontario.

[2] Prof. Yeager states he brings this application for judicial review for the purpose of making new law. His central premise is that when there is a federal government portfolio composed of agencies and review bodies all reporting to the same Minister [Portfolio], then control of government records as understood within the *ATIA* should be determined at the Portfolio level. In this case, it was the Public Safety Portfolio, which was overseen at that time by the Minister of Public Safety and Emergency Preparedness [Minister].

[3] Prof. Yeager also seeks an interpretation of section 8 of the *ATIA*, which deals with transferring a request from one government institution to another. As section 8 has not previously been judicially interpreted, he says that too will involve new law.

[4] Lastly, Prof. Yeager wishes to make new law under the cost provisions of either the *ATIA* or the *Federal Courts Act*, RSC 1985, c F-7. Although self-represented, he seeks both costs and punitive costs of $100,000 for the alleged mishandling by the Minister of his *ATIA* request.

[5] Prof. Yeager presented his arguments, both oral and written, with a professor's precision and with passion for his topic. He clearly feels very strongly about his arguments. Unfortunately, after carefully reviewing the record, the legislation, the oral and written submissions and the existing jurisprudence, I cannot support Prof. Yeager's invitation to make new law. I have determined that existing law and jurisprudence sufficiently address his arguments.

[6] For the reasons that follow, this application will be dismissed. The relevant provisions of any legislation referred to in these reasons can be found in the attached Annex. Limited parts of some provisions have also been set out in the body of these reasons for ease of reference.

II. Background and Procedural History

A. *The Information Request and Complaint to the Office of the Information Commissioner*

[7] On June 7, 2007, Prof. Yeager hand-delivered a request under the *ATIA* addressed to the Access to Information Coordinator [ATIP Co-ordinator] at the Department of Public Safety and Emergency Preparedness [Public Safety], a department of the Government of Canada constituted by the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10, and over which the Minister presides. He sought certain documents, such as the work plan, budget breakdown and appointment papers for members of the recently announced CSC Independent Review Panel [CSC Review Panel]. The panel was established by the Minister to assess the operational priorities, strategies and business plans of Correctional Services Canada [CSC]. The CSC is a service continued under the *Corrections and Conditional Release Act*, SC 1992, c 20. It is controlled and directed by a Commissioner of Corrections under the direction of the Minister. The precipitating event causing Prof. Yeager to file his access request was the refusal of the Secretariat of the Review Panel to allow him to interview panel members prior to completion of their report, which was due at the end of October 2007.

[8] Prof. Yeager received a letter dated June 15, 2007, from the ATIP Co-ordinator at Public Safety. It indicated that a search had been conducted and there were no relevant records in the department. Believing this answer to be incorrect, Prof. Yeager filed a complaint with the Office of the Information Commissioner [OIC] on June 26, 2007, at which time he provided several

examples of why there ought to be records. His letter requested that the OIC take steps under section 41 of the *ATIA* within fifteen days to enable him to proceed to this Court.

[9] No answer was received within fifteen days. On December 10, 2008, eighteen months later, Prof. Yeager received the response from the OIC. The OIC found that Public Safety had conducted a complete and thorough search of departmental records and no responsive records were located. Prof. Yeager's complaint consequently was not substantiated.

[10] Additional information contained in the OIC letter caused Prof. Yeager to bring this application. The letter went on to say that it became apparent during the investigation that CSC might have control of records responsive to the request. The OIC added that if he was still interested in obtaining the requested records, Prof. Yeager might file a request to CSC. The letter also stated that although Public Safety should have considered transferring the request to CSC in accordance with section 8 of the *ATIA*, "this unfortunately was not done."

[11] Thus began what became a nine-year journey at the end of which Prof. Yeager still has not received any of the records he sought. He also has never filed a request with CSC to determine whether it has any documents responsive to his original request.

B. *The Impetus for this Application*

[12] Prof. Yeager says he became intrigued when advised by the OIC that there might be records available at CSC and that Public Safety had failed to transfer his request under section 8 of the *ATIA*. He says that as both CSC and Public Safety are under the same Portfolio, which is also called Public Safety, the Minister in charge of the Portfolio has control of the documents as that term has been defined by jurisprudence under the *ATIA*. The Minister is the head of both

Public Safety and CSC for the purposes of the *ATIA*, so the Minister can obtain any document within his or her portfolio. I shall refer to this argument as the Portfolio Argument.

[13] The Attorney General dismisses the Portfolio Argument on the basis that the *ATIA* is very clear that any request is to be made to the government institution that has control of the record. That is not the case here, as Prof. Yeager simply made his request to the wrong government institution.

[14] The Attorney General also says Public Safety had discretion under section 8 to determine whether to make a referral and they chose not to make one. All Prof. Yeager had to do was ask CSC for the documents, if they existed.

C. *A Short Procedural History*

[15] In this case, it is clear that an irresistible force has met an immovable object. Neither party has budged. The result is seven years of litigation in this Court.

[16] Prof. Yeager filed his Notice of Application for Judicial Review on January 20, 2009. Since then there have been seven orders of this Court on a variety of matters—three by Prothonotaries, one by a Deputy Judge and three by Judges of this Court. The Federal Court of Appeal issued two Orders, the second of which was a refusal to reconsider the first decision.

[17] At the beginning of the hearing, with the consent of the Respondents, I permitted Prof. Yeager to file new evidence, referred to before me and in this decision as the Firman Note. It is a short, undated, handwritten note. Each party claims the note proves their case. More will be said later about this note.

[18] Each party filed affidavits as part of this application. Prof. Yeager was not cross-examined on his affidavit. He cross-examined the Respondents' affiant, Sylvie Séguin-Brant, the former ATIP Co-ordinator at Public Safety who had responded to his original request. Many of the answers she gave were to the effect that "it was seven years ago; I can't remember".

[19] At the conclusion of the hearing, I indicated to the parties that I wished to receive further written submissions with respect to whether subsection 4(2.1) of the *ATIA* applies, as Prof. Yeager was relying on it for some aspects of his arguments but it was not in force at the time of his original request or when his request was denied by Public Safety. The section came into force on Sept. 1, 2007, prior to the OIC report. Consideration of those submissions has been incorporated into these reasons for judgment.

III. Preliminary Issue

[20] The Attorney General raised as a preliminary issue that the Minister at the time of the events in question, Stockwell Day, should not be a personally named party. I agree. Amongst other reasons, as Stockwell Day is no longer the Minister he would not be able to order release of the information sought by Prof. Yeager. Accordingly, Stockwell Day has been removed as a party and the style of cause amended.

IV. Issues

[21] Prof. Yeager seeks an Order requiring the Minister to release to him the information he originally requested. He also seeks his costs plus punitive costs because: (1) he is raising important new principles and (2) there was "excessive delay and obstruction" of his *ATIA* request.

[22] The grounds upon which Prof. Yeager relies are that his request was properly submitted, and in alleging that he had submitted it to the wrong agency, there was an error in law by Public Safety. He also pleads that the Minister failed to "adhere to the dictates of s. 8" of the *ATIA*, because Public Safety ought to have transferred his request to CSC. Finally, Prof. Yeager says that Public Safety failed to make every reasonable effort to assist him with his request pursuant to subsection 4(2.1).

[23] As previously stated, Prof. Yeager seeks both costs and punitive costs of $100,000. The Attorney General seeks costs under Column III of the table to Tariff B.

[24] Having considered the submissions, including those I requested at the end of the hearing addressing subsection 4(2.1), the issues that I find arise for consideration are:

A. What is the appropriate standard of review?

B. Did Public Safety err in saying it held no relevant records?

C. Were the provisions of section 8 of the *ATIA* met by Public Safety?

D. Was Public Safety required to follow subsection 4(2.1) of the *ATIA*?

E. Is either party entitled to costs and, if so, of what nature and amount?

V. Standard of Review

[25] The parties do not agree on the appropriate standard of review. Prof. Yeager submits that when the issue is a denial of records, the standard of review is correctness as established in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25

[*National Defence*]. The Attorney General relies on *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] in submitting both that the ATIP Co-ordinator was interpreting a statute connected to her function and that the absence of relevant records is a finding of fact so the standard is reasonableness for all issues.

[26] In my view, the outcome in this case is the same regardless of the standard of review. This is not the usual case of a refusal to disclose a record based on an exemption under the *ATIA*. When an exemption is relied upon as the reason for not providing access to records, the case law of this court indicates the standard of review is correctness for the determination that an exemption applies and then reasonableness in reviewing the discretionary decision of whether to release the record: *Blank v Canada (Justice)*, 2016 FCA 189 at para 24; *3430901 Canada Inc v Canada (Minister of Industry)*, 2001 FCA 254 at para 47.

[27] There is no exemption relied upon here. This is a true "no records" case. Under section 10(1)(a) of the *ATIA*, where a record does not exist, that fact is required to be stated as a ground of refusal in the response provided pursuant to section 7. In keeping with those requirements, the response to Prof. Yeager clearly stated there were no relevant records. That is, to some extent, a binary question: either the records exist or they do not. The wrinkle is that although Public Safety may not physically have any responsive records, if it has control of responsive records located elsewhere, as alleged by Prof. Yeager, then it does have responsive records.

[28] In determining its own standard of review, the Supreme Court indirectly recognized in *National Defence* that assessing whether or not an institution controls a record under the *ATIA* is the sort of binary question that does not fit in well with conventional standard of review analysis.

Customarily, in an appeal of a judicial review, the appellate court steps into the shoes of the reviewing court and applies the appropriate standard of review itself: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47. However in *National Defence*, the Supreme Court did not "step into the shoes" of the Federal Court, but instead assessed whether the application judge erred on an extricable question of law or committed a palpable and overriding error. In doing so, the Supreme Court treated the Federal Court as the initial forum for deciding the merits, whereas conventionally in a judicial review, the merits are decided by the administrative tribunal, while the Court merely assesses the legality of the tribunal's decision: see, for example, the discussion at paragraphs 14-19 of *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

[29] In my view, whether this is considered a correctness review or whether it is an independent assessment of the evidence by this Court, it leads to the same result: the question is whether or not Public Safety controls the records. Prof. Yeager's Portfolio Argument, which was obliquely but never directly put to either the ATIP Co-ordinator or the OIC, is simply an extension of this question. Prof. Yeager submits his request should have been reviewed at the Portfolio level, not the departmental level. In so arguing, he effectively submits that <u>any</u> record under the control of CSC is also under the control of Public Safety, because both are under the purview of the same Minister.

[30] The same standard of review is applicable to both questions: (1) were the requested documents under the control of Public Safety because all records in the control of CSC are in the control of Public Safety; and (2) if the answer to the first question is no, were the requested

documents nonetheless in the control of Public Safety based on the evidence before me? While I must answer those questions independently of the ATIP Co-ordinator's view, as I said I do not believe the standard of review is determinative. If the appropriate standard of review were reasonableness, then I would find that the outcome falls within a range of possible, acceptable outcomes. Further, since Prof. Yeager did not raise his Portfolio Argument before the ATIP Co-ordinator, I would find that my analysis below constitutes a reasonable justification that could have been offered in support of the ATIP Co-ordinator's decision: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 40.

[31] Finally, Prof. Yeager submits that whether Public Safety had discretion to transfer the request to another government institution under section 8 is reviewable on a standard of reasonableness. In that respect, the law on standard of review is well established that when a decision-maker is interpreting their home statute, the standard is reasonableness unless the issue falls into one of the four categories that have been determined to be reviewable on a correctness standard: *Dunsmuir* at paras 58 – 61; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers'*] at paras 39, 43.

[32] The interpretation of section 8 does not fall into any of the four categories that rebut the presumption of reasonableness established in *Alberta Teachers'*. It does not raise a constitutional question, including one regarding the division of powers between Parliament and the provinces; it does not involve an issue of central importance to the legal system as a whole that is outside the adjudicator's specialized area of expertise; there is no true question of *vires*; and the answer could not have been provided by any competing tribunal. The standard of review of Public

Safety's interpretation of section 8 is reasonableness. Moreover, I agree that the exercise of that discretion, if it arose, is reviewable on such a standard: *Dunsmuir* at para 51.

[33] However, the Federal Court of Appeal has also noted that in matters of statutory interpretation, reasonableness review arises only when the statutory provision at issue is ambiguous. If, on conducting a textual, contextual and purposive analysis of the legislation, the reviewing court determines that there is only one "right" interpretation of the statute, then that is the sole interpretation that the tribunal can validly apply: *Qin v Canada (Citizenship and Immigration)*, 2013 FCA 263 at paras 32-33 [*Qin*]. While in *Qin*, this was called correctness review, it can also be regarded as a case where the range of possible, acceptable outcomes includes only one reasonable interpretation: *Dumsmuir* at para 47. In this case, I have concluded that the only "right" interpretation of section 8 is that it requires, as a prerequisite to a transfer, that the government institution receiving the request have a responsive record. As Public Safety had no responsive records under its control, it was reasonable not to transfer the request to CSC.

VI. Did Public Safety Err in Saying They Held no Relevant Records?

A. *Background Facts*

[34] The records which Prof. Yeager seeks are set out in his initial letter to Public Safety, the two responding letters from Public Safety and, in narrative form, in his appeal letter to the OIC. Prof. Yeager was seeking from Public Safety—as set out in his letter of June 7, 2007—the following documents pertaining to the CSC Review Panel:

> a) A copy of the Panel's recently approved Work Plan and copies of all previous drafts of that Plan;
>
> b) A copy of the Panel's budget breakdown in terms of activities and staffing;

> c) A copy of the appointment papers by the Minister to the Panel Members proper, including their official resumes;
>
> d) All emails, postings, handwritten comments, and blackberry messages pertaining to a decision taken on or about May 4, 2007, not to consent to Panel Member interviews by criminologist Matthew G.Yeager;
>
> e) Copies of all comments sent in by email to info@cscrp-cescc.ca; and
>
> f) Copies of all submissions sent in, to date, from interested parties by mail, courier, hand delivery, or the like.

[35] On June 15, 2007 Public Safety responded by letter to Prof. Yeager that:

> A search was conducted, and it was determined that there are no relevant records in the department.

[36] On June 26, 2007, Prof. Yeager made a complaint about the response from Public Safety to the OIC. He said that he had received a blanket denial in the face of evidence indicating that numerous responsive documents exist. In support of his statement that documents should exist, he enclosed a printout of information from the CSC Review Panel's website. It referred to a budget of approximately $3 million, contained an email address to which persons were invited to make submissions and indicated that the panel members were appointed by the Minister of Public Safety. Prof. Yeager said that to deny the existence of a budget and to not provide to him any submissions that were received or any appointment papers was contrary to the public record. He also referred to a telephone conversation he had with the director of the CSC Review Panel's Secretariat in early May, in which she indicated the Panel would be finalizing their work plan. He therefore concluded that the work plan he sought should exist. In addition, Prof. Yeager submitted to the OIC a copy of an email he had received from the Chairperson of the Review Panel as evidence that, "a federal agency cannot say there are no relevant records 'in the

department,' when I have just produced a 'relevant record' sent to me by the chairperson of the CSC Review Panel!"

B. *Did any responsive records exist at Public Safety?*

[37] The OIC investigated the response made by Public Safety. It found Prof. Yeager's complaint was unsubstantiated and confirmed to him that there were no responsive records at Public Safety. The OIC added that records may exist at CSC. There is no evidence in the record before me that any responsive records do exist at Public Safety. No application to this Court has been made by the OIC under section 42 for a review of the refusal by Public Safety under paragraph 10(1)(a).

[38] Prof. Yeager argues that the Court should use the approach set out in *Canada (Information Commissioner) v Canada (Minister of Environment)* (2000), 187 DLR (4th) 127 (FCA) [commonly referred to as *Ethyl*], in which the Federal Court of Appeal held that in reviewing a refusal decision on the basis that documents do not exist, it is appropriate for an applicant to submit ancillary evidence that can prove the existence of the requested documents.

[39] Several facts put forward by Prof. Yeager arose after he received the response letter from Public Safety. I will evaluate these facts in determining whether responsive records did exist at Public Safety.

[40] Firstly, in his affidavit, Prof. Yeager stated that an OIC investigator told him on October 19, 2007, that, "officials from the Ministry stated Public Safety had nothing to do with the Panel. Your request was sent to the wrong department." He also said that he was previously told by the investigator on August 29, 2007, that the request was being "held up" by the Privy

Council. In neither instance do these statements support the notion that Public Safety possessed any relevant documents at any time. They may support the accuracy of the extensive background information Prof. Yeager put in the record regarding the general way in which the government of the day handled access to information, but that is not an issue before me for determination.

[41] Secondly, Prof. Yeager provided in his complaint letter to the OIC several examples of records to which he already had access and that would be responsive to his request. He argued to the OIC that the existence of these documents proved that Public Safety was incorrect to state that no responsive documents existed. Those documents and others were also before me. All the examples dealt with aspects of the creation or operation of the CSC Review Panel itself. They were either posted on the CSC website or gathered from Prof. Yeager's personal interactions with the staff or Chair of the CSC Review Panel. Prof. Yeager referred to the budget for CSC, his discussion with the director of the Secretariat for the panel, the fact that panel members were appointed by the Minister of Public Safety, the email received from the chair of the Panel and the fact that people were invited to make submissions to the panel (indicating that such submissions should exist).

[42] At the hearing, Prof. Yeager said the documents demonstrated a high likelihood that responsive records existed in CSC. Certainly, I do not think it can be disputed that responsive records existed somewhere. However, that is not the same as showing that the records Prof. Yeager found, or others like them, were either located within Public Safety or controlled by it. There is no evidence that Public Safety had any responsive documents, original or duplicate, under its control rather than in the control of CSC or any other government institution. In *Canada Post Corp v Canada (Minister of Public Works)*, [1995] 2 FCR 110 (CA) [*Canada*

Post], Mr. Justice Létourneau, speaking for the majority, found that if a government institution had possession of records, whether in the legal or corporeal sense, that was sufficient for those records to be subject to the *ATIA*. The majority also held that records collected by a government institution in performance of its official duties or functions were subject to the *ATIA*. The OIC, as the statutory expert on the *ATIA*, is taken to know the various interpretations of "control" in the jurisprudence. After investigating Prof. Yeager's complaint, the OIC determined that Public Safety had no responsive records but, CSC might.

[43] That leaves the question of whether the documents Prof. Yeager adduced into evidence, and other responsive documents that can be presumed to exist at CSC, are subject to any other kind of control by Public Safety that was not considered by the OIC. Resolution of that issue involves addressing the Portfolio Argument put forward by Prof. Yeager.

C. *The Portfolio Argument*

[44] Prof. Yeager complained to the OIC that the statement that there were no relevant records "in the department" was the result of a clearly "defective" search by the Minister. Within that allegation is his premise that "the department" is either the Minister's office or the entire portfolio of agencies controlled by the Minister. At the hearing before me, Prof. Yeager put his concerns, and the reason for his application, this way:

> . . . the point of the matter was this started out as a no-records case, that the government has no records. It turns out that was false. There were records based on [Sylvie Séguin-Brant's] affidavit. So they knew records existed and they decided to play a game of hide and seek . . . That is a violation of the intent of the Act.
>
> (transcript at page 11, lines 17-22) (My emphasis)

[45] Prof. Yeager maintains that whether records exist at the department level is not relevant. The Minister has control of the records in his Portfolio, and that means that Public Safety ought to have provided the records to him even if those records are located in CSC.

[46] Prof. Yeager elaborates by saying that being a public portfolio agency is different from being a separate government institution outside of a ministry. He says that the government conflates the two. To support his position, Prof. Yeager relies on the notion of control. His argument is that although CSC is listed in Schedule I to the *ATIA* as a government institution that is separate from Public Safety, the fact is that the Minister has effective control of any institution that is part of the Minister's portfolio. Once the Minister has control, then CSC is no longer a separate government institution. Prof. Yeager states that to read Schedule I otherwise is a misinterpretation, because in a portfolio ministry, the Minister can reach into any agency in the portfolio and pull out any documents. Put another way, Prof. Yeager argues that the Minister's control of a record within a portfolio agency trumps the listing of government institutions in Schedule I of the *ATIA*.

[47] Prof. Yeager submits that the danger of a portfolio agency is that it is easy to hide a document in a portfolio agency and pretend it doesn't exist. He urges that this "hide and seek" cannot be allowed as it gives licence to the Minister to bury documents and it defeats the purpose of the *ATIA*. He refers to the decision of the Supreme Court of Canada in *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403, to the effect that there is a broad right of access to "any record under the control of a government institution", and when considering whether an exemption to the general right of access should be granted, it is important to consider the overarching purpose of the *ATIA*.

[48] The Attorney General makes the argument that section 6 of the *ATIA* requires a request for access to be made in writing to the government institution that has control of the record and Prof. Yeager made his request to the wrong government institution. Under Schedule I of the *ATIA*, CSC is a separate government institution from Public Safety: each is separately listed in Schedule I. That is the very problem that Prof. Yeager seeks to circumvent with his Portfolio Argument. The Attorney General submits that in order to agree with Prof. Yeager's arguments, Schedule I would have to be disregarded. As further support for that proposition, the Attorney General points to the fact that each department and agency is required to maintain their own Access to Information staff, which indicates that they deal with access matters separately from other departments.

D. *Analysis*

[49] To apply the control argument at the Portfolio level ignores the scheme of the *ATIA*. Schedule I refers specifically to various individual government institutions. Each of the Department of Public Safety and Correctional Service Canada are listed as separate government institutions. The Portfolio of Public Safety is not listed as a government institution, nor is the Minister of Public Safety and Emergency Preparedness.

(1) Delegation of Authority – section 73 of the *ATIA*

[50] Prof. Yeager says the statement from Public Safety that there were no relevant records was a "complete mischaracterization". In doing so, he does not address the fact that the response by Public Safety did not purport to be a blanket, Portfolio-wide, denial; it was only a denial that there were relevant records within Public Safety. Section 7 of the *ATIA* requires that where access to a record is requested, the head of the government institution [Head] to which the

request is made shall provide a written response to the requester within thirty days. Under section 73 of the *ATIA*, the Head has the power to delegate any of their powers, duties or functions to one or more officers or employees of that institution. The Minister delegated his authority at Public Safety to the ATIP Co-ordinator. As a result, she was legally empowered to provide an answer on behalf of Public Safety but not for CSC or any other separate government institution. Indeed, if the Minister had attempted to delegate his authority as institution head of CSC to an employee of Public Safety, such a delegation would have been unlawful.

(2) The Scheme of the Act – Government Institution

[51] The definition of "government institution" in section 3 of the *ATIA* is clear and explicit: it means any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I. Subsection 4(1) provides a right of access to any record under the control of a government institution, subject to certain exemptions provided elsewhere in the *ATIA*.

[52] Section 6 requires a request for access to a record to be made in writing "to the government institution that has control of the record". The notion of "control" and the definition of "government institution" are clearly intertwined in the legislation. Prof. Yeager's focus is on control – the Minister controls all the records in his portfolio. The Attorney Generals' focus is on government institution – Prof. Yeager asked the wrong institution.

[53] In my view, if Parliament had intended control of a record to be the only factor to consider when granting access to a record, Section 6 would have said that a request for access may be made to any government institution. Instead, it specifies that the request is to be made to the government institution with control of the record. Both conditions must be met to create an actionable access request.

[54] In *National Defence*, one of the questions before the Court was whether a government institution includes the office of the Minister who presides over it. The answer was "no"; Parliament had not intended to implicitly include ministerial offices in the *ATIA*: *National Defence* at paras 26 and 43. Similarly, I am not persuaded that a group of separate government institutions, each individually enumerated in Schedule I, can simply be treated as one amalgamated government institution just because they are placed under the same Minister as part of a portfolio. While Parliament could have made a portfolio of agencies a government institution, it chose not to and there is no evidence before me of any implicit intention to do so. If anything, the fact that the *ATIA* requires the head of multiple institutions to delegate his or her powers to separate employees in each institution indicates the opposite: each institution is to be treated as a separate entity in determining what records it controls.

(3) Can Public Safety control a record that it does not physically possess?

[55] Prof. Yeager says it does not matter which government institution receives his access request because both Public Safety and CSC are part of the Minister's portfolio. Focussing on control by the Minister, the question becomes: Does Public Safety have control of a record if it is located in the Minister's office or in another government institution over which the Minister has control? The answer to the question must be no. To decide otherwise would be to ignore both the plain language of the *ATIA* and the decision in *National Defence*.

[56] The Supreme Court considered in *National Defence* whether records located in the Minister's office could be under the control of the office's related government institution. Granting that the word "control" is not defined in the *ATIA* and that it is to be given the broadest possible meaning, the Supreme Court stated that the notion of "control" cannot be stretched

beyond reason. The Information Commissioner [Commissioner] asked the Supreme Court to find that a record was subject to the *ATIA* regardless of its physical form or location. The Commissioner took the position that a function-based approach, in which a dividing line would be created between a Minister's departmental functions on the one hand and non-departmental functions on the other, should govern the interpretation of the *ATIA*. Otherwise, a Minister's office could become a "black hole" and be used to shield sensitive documents which would otherwise be subject to the *ATIA*. This is essentially the same "hide and seek" argument put forward by Prof. Yeager.

[57] In dismissing the function-based approach, the Supreme Court noted that the Commissioner's proposed test for control effectively eliminated the need to consider the definition of government institution found in the *ATIA*, and it rendered the list in Schedule I essentially meaningless. The Commissioner's approach was found to conflate the issue of defining a government institution with the issue of how one determines which entity has control of a specific record.

[58] *National Defence* did confirm that while physical control of a document plays an important role, it is not determinative of whether a department has control of a record. The Supreme Court at paragraphs 55 and 56 stated that a two stage inquiry is to be followed when, as is the case here, documents requested are not in the physical possession of the government institution:

> [55] Step one . . . Asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. . . . If the record requested relates to a departmental matter, the inquiry into control continues.
>
> [56] Under step two, *all* relevant factors must be considered in order to determine whether the government institution could

> reasonably expect to obtain a copy upon request. . . . If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption.
>
> (Underlining added; italics in original)

[59] While *National Defence* was concerned with whether a government institution has control of a record in a Minister's office, the same logic applies in determining whether a government institution has control of a record in the possession of another government institution. In fact, Information and Privacy Commissioners in several provinces have applied the *National Defence* two-part test to information requests involving institutions that are subject to the provincial access legislation where records are not located in government offices: *Vaughan (City)*, 2016 CanLII 7472 (Ont IPC); *Dufferin-Peel Catholic District School Board (Re)*, 2014 CanLII 79896 (Ont IPC); *Vancouver (City) (Re)*, 2015 BCIPC 71; *Eastern Health (Re)*, 2014 CanLII 76059 (NL IPC); *Prince Edward Island (Health) (Re)*, 2016 CanLII 48837 (PEI IPC).

[60] Applying the first step of the test in *National Defence*, the issue of whether Public Safety, as a government institution, has control of a record that might be located in the Minister's office, in CSC or in any other government institution, only arises if the record being sought relates to a departmental matter within Public Safety.

[61] The CSC Review Panel was part of the Portfolio of Public Safety but it was not under the supervision or administrative oversight of Public Safety, the department. It was an independent review panel housed at CSC. None of the evidence Prof. Yeager produced, including newspaper clippings, a video news report and his email exchange with the Chair of the CSC Review Panel, demonstrated any connection at all between the CSC Review Panel and Public Safety.

[62] Prof. Yeager has not been able to show the records he seeks relate to a departmental matter within Public Safety. As a result, his request fails at step one – the "screening device" stage. Step two, whether a senior official at Public Safety could obtain a copy of the record does not arise. Even if step two did arise, there is no evidence that a senior official in Public Safety reasonably should be able to obtain a record, wherever located in the Portfolio, that deals with the independent CSC Review Panel. Nothing in the record supports this notion.

VII. Were the provisions of section 8 of the *ATIA* met by Public Safety?

[63] Prof. Yeager's primary argument is that the records he sought were under the control of Public Safety. His alternate argument is that the Minister refused to exercise his discretion to transfer his request to an appropriate government institution as provided by section 8 of the *ATIA*. Prof. Yeager adds that such refusal was egregious behaviour, as the other government institution, CSC, is in the same portfolio and is also under the Minister's supervision.

A. *The meaning of the Firman Note*

[64] The factual connection to subsection 8(1) is found in the Firman Note. It shows that at an unknown point in time, there was a discussion by Public Safety with a consultant, Terry Firman. Each of Prof. Yeager and the Attorney General submit that the brief note of that meeting proves their case with respect to whether Public Safety erred under section 8 in its handling of the access request.

[65] The Firman Note is a short, handwritten note, the author of which is unknown. It is undated and unsigned. The note is first referred to in a note to file made by ATIP Analyst Amanda Harrington at Public Safety on September 11, 2008, well after the response to Prof. Yeager by Public Safety but before the release of the OIC investigation report. Her note to

file also summarizes the actual Firman Note, which Prof. Yeager eventually obtained through an *ATIA* request. The Firman Note states:

> - Sylvie and Terry met with CSC regarding who the panel fell under . . . determined that was created within CSC and functions within CSC . . . PS nothing to do with it. They have same request.
>
> - funding by CSC
>
> (some abbreviations expanded for clarity, bullets in original, no words omitted)

[66] Prof. Yeager's argument is that the concluding words of the first bullet—"[t]hey have same request"—are, as he puts it, a smoking gun. He submits that those words mean that Public Safety must have given his request to CSC, since Prof. Yeager says he never submitted the request to CSC. The Attorney General says that in that case it means the provisions of section 8 were met by Public Safety: the request was transferred.

[67] There is no evidence to support one particular interpretation or the position of either party. In addition, the OIC report says otherwise: by saying the request should have been transferred, the OIC presumably means that it was not.

[68] The note to file made by Amanda Harrington discusses the Firman Note this way:

> Received call from OIC investigator . . . [w]e discussed the note on file that there was a meeting between CSC and Terry Firman and Sylvie Séuin-Brant [sic] re-who the Review Panel fell under and it was agreed that it fell under CSC… Unclear why file was not transferred at that point… It is possible that the meeting took place after file was closed but there is no indication as to when the meeting was held… Investigator asked if we would be willing to transfer file to CSC out of a show of good faith… spoke with Tony and said if we got the recommendation in writing to do so we would comply but not sure that CSC would be willing to have a closed file transferred to them. Left same message for investigator.

[69] As illustrated by the contradictory positions of the parties and the note to file, the meaning of the Firman Note is far from clear. There are various possible interpretations of the note. Based on the very scant facts in the record at least four interpretations quickly come to mind: (1) the request was referred to CSC and CSC dropped the ball; (2) the request was not referred because Public Safety knew that CSC had already received the request; (3) no referral was made because the file was closed and (4) Public Safety was waiting for a written request from the OIC to transfer the request, but as none was received it was never transferred.

[70] Given the lack of clarity with respect to this evidence, and in the absence of important details such as the author of this note, I am unable to attach the importance to the Firman Note that either of the parties suggest. It does not assist in answering whether Public Safety met any section 8 obligations.

B. *Were the provisions of section 8 of the ATIA met by Public Safety?*

[71] Regardless of the actual meaning of the Firman Note, the question remains as to whether under section 8 of the *ATIA*, there was any legal obligation on Public Safety to consider transferring the request to CSC.

[72] In my view, because Public Safety did not control a record, which we know from the jurisprudence means either physical or legal control, section 8 of the *ATIA* was never triggered. Therefore the question of whether Public Safety should have transferred Prof. Yeager's request to CSC did not arise on these facts.

(1) Legislative Context – Access to Government Records

[73] Prof. Yeager says section 8 must be read in connection with section 2 (Purpose) and subsection 4(2.1) (Responsibility of Government Institutions) to transfer his request from Public Safety to CSC. He also relies upon his Portfolio Argument that the Minister controls the records in both Public Safety and CSC, so the failure to transfer the record was egregious behaviour.

[74] Section 8 must be read together with section 4 (Right of Access), section 5 (Information about Government Institutions), section 6 (Request for Access) and section 7 (Notice where Access Requested). All are found in the part of the *ATIA* dealing with "Access to Government Records". Control of a record is a recurring legislative requirement for access to a government record.

[75] Section 4 provides that the right of access is to a record "under the control of a government institution". Section 6 then requires that a request for access be made to the government institution "that has control of the record".

[76] The correct government institution to receive an access request can be ascertained by consulting the annual publication section 5 requires the minister responsible for the *ATIA* to produce. It sets out the responsibilities of each government institution, including details on how it is organized and the programs and functions of each division or branch.

[77] Section 7, which is expressly subject to the provisions of sections 8, 9 and 11, requires the government institution which received the access request to respond in writing within thirty days indicating "whether or not access to the record or a part thereof will be given". If access is to be given, then section 7 requires the person requesting it to be given such access.

[78] Finally, the legislative scheme stipulates in subsection 8(1) of the *Access to Information Regulations*, SOR/83-507 [*ATIA Regulations*] that the head of the institution considering whether to grant access to a record may give the requester an opportunity to examine the record rather than a copy of the record. The opening words of subsection 8(1) of the *ATIA Regulations* indicate the presumption that the institution considering the access request has control of the record:

Access	**Accès aux documents**
8 (1) Where a person is given access to a record or part thereof under the control of a government institution, . . .	8 (1) Lorsqu'une personne se voit donner accès à la totalité ou à une partie d'un document relevant d'une institution fédérale, . . .

[79] From the foregoing it can be seen that by the time the head of an institution makes a determination under section 8 of whether to transfer an access request, the legislative presumption is that a record is controlled by that institution. That is not the end of the matter though. If the institution receiving the request does control a record to which access should be given, then the question is whether another government institution is better able to answer the request because it has a greater interest in the record. That question is addressed in subsections 8(1) and (3) of the *ATIA*.

[80] The decision of whether or not to transfer a request can put operational pressure on the receiving institution. The institution which receives the request is to make any decision to transfer it within 15 days after receiving the request, and it may only be transferred if the head of the other government institution consents to process the request: *ATIA Regulations*, subs 6(1). Under subsection 8(2) of the *ATIA*, where a request is transferred, the receiving institution is deemed to have received the request on the day the original institution received it. This is

expressly stated as being for the purpose of section 7 which requires a written notice of whether or not access will be given to be given to the requester within 30 days after the request was received. The receiving institution might therefore only have 15 days to respond to the requester, rather than the usual 30 days.

(2) Sections 8(1) and (3) of the *ATIA*

[81] Perhaps in an effort to prevent institutions playing "hot potato" with an access request, the *ATIA Regulations* stipulate in subsection 6(2) that a request that has been transferred shall not be transferred to a third government institution. In addition, subsection 8(1) of the *ATIA* allows the head of an institution to transfer an access request only if certain conditions are met:

Transfer of Request	**Transmission de la demande**
8 (1) Where a government institution receives a request for access to a record under this Act and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, subject to such conditions as may be prescribed by regulation, within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.	8 (1) S'il juge que le document objet de la demande dont a été saisie son institution concerne davantage une autre institution fédérale, le responsable de l'institution saisie peut, aux conditions réglementaires éventuellement applicables, transmettre la demande, et, au besoin, le document, au responsable de l'autre institution. Le cas échéant, il effectue la transmission dans les quinze jours suivant la réception de la demande et en avise par écrit la personne qui l'a faite.

[82] Under subsection 8(1) of the *ATIA*, the question of whether Public Safety should have transferred Prof. Yeager's request is subject to two conditions: (1) Public Safety has control of a

responsive record as required by sections 4 and 6; (2) another government institution has a greater interest in the record as that phrase is defined in subsection 8(3).

[83] Paragraphs 8(3)(a) and (b) of the *ATIA* provide the mechanism to determine which of two or more institutions has a greater interest in a record.

Meaning of greater interest (3) For the purpose of subsection (1), a government institution has a greater interest in a record if	**Justification de la transmission** (3) La transmission visée au paragraphe (1) se justifie si l'autre institution :
(a) the record was originally produced in or for the institution; or	a) est à l'origine du document, soit qu'elle l'ait préparé elle-même ou qu'il ait été d'abord préparé à son intention;
(b) in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.	b) est la première institution fédérale à avoir reçu le document ou une copie de celui-ci, dans les cas où ce n'est pas une institution fédérale qui est à l'origine du document

[84] There is no evidence that Public Safety has or ever had either legal or corporeal control of the records sought by Prof. Yeager. The OIC found that Public Safety did not hold any responsive records involving the establishment of the CSC Review Panel, its funding or the appointment of its members. The OIC did conclude and advise that CSC might hold responsive records but Prof. Yeager did not pursue that avenue.

[85] Other than the CSC, the only other source of the records Prof. Yeager was seeking or other possible location for them was the Minister's office. *National Defence* has established that if the records were in the Minister's office, Public Safety had no control of them, as they do not

concern a departmental matter and therefore any inquiry stops at the first step of the two-step test it established.

[86] Subsection 8(3) of the *ATIA* is clear when read in the context of the legislation as a whole. The head of the institution receiving an access request must have control of the record being sought and then, before it can transfer the request, it must determine whether another institution has a greater interest in the record. If another institution does have a greater interest, then the head also considers whether it is necessary to transfer the record it holds or just the request. That would be the case, for example, if the record held by the transferring institution was an original, not a duplicate, record and transfer to an institution with a greater interest was necessary in order to provide a complete response to the requester.

[87] In summary, the purpose of section 8 of the *ATIA* is to ensure that the government institution with the greatest interest in the record has the opportunity to be given control of the request, and therefore the choice of whether or not to exercise discretionary refusal provisions, before the institution which received the request decides whether or not to disclose the records. To give an example, suppose the Canada Border Services Agency [CBSA] received a request for certain investigation documents it had received from a municipal police force and the Royal Canadian Mounted Police [RCMP]. While the municipal police force would have control over the disclosure of the record by virtue of section 13 of the *ATIA*, it would be the CBSA that would have to decide whether to exercise the discretionary law-enforcement exemption in subsection 16(1). To prevent the suboptimal situation of the CBSA deciding whether to disclose an RCMP record, section 8 allows the CBSA to transfer the record to the RCMP.

[88] The result is that government departments or agencies that produce documents and share them with other government institutions can still control the disclosure of those documents no matter which institution receives the request for access to the record. However, that interest disappears if, as in this instance, the institution receiving the request has no possession or control of the record in the first place. In that event there is no legal obligation requiring the institution, such as Public Safety, to transfer the request as the greater interest consideration does not arise.

(3) Ontario's *Freedom of Information and Protection of Privacy Act*

[89] In support of this analysis I find it is useful to contrast the provisions in subsections 8(1) and (3) of the *ATIA* to subsections 25(1), (2) and (3) of *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*FIPPA*], in which a clear distinction is made between a record in the possession of an institution and one not in its possession:

Request to be forwarded	**Acheminement de la demande**
25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,	25. (1) La personne responsable de l'institution qui reçoit une demande d'accès à un document dont l'institution n'a ni la garde ni le contrôle, fait les recherches nécessaires afin de déterminer si une autre institution en a la garde ou le contrôle. Si la personne responsable détermine que tel est le cas, la personne responsable, dans les quinze jours de la réception de la demande :
(a) forward the request to the other institution; and	a) d'une part, renvoie celle-ci à l'institution concernée;
(b) give written notice to the person who made the request that it has been forwarded to the other institution.	b) d'autre part, avise par écrit l'auteur de la demande du renvoi à une autre institution.

Transfer of request	**Transfert de la demande**
(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.	(2) La personne responsable de l'institution qui reçoit une demande d'accès à un document, lequel, à son avis, intéresse davantage une autre institution, peut transférer la demande, et, si nécessaire, le document lui-même à cette autre institution dans les quinze jours de la réception de la demande. La personne responsable qui effectue ce transfert en informe alors par écrit l'auteur de la demande.
Greater interest	**Ressort d'une autre institution**
(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,	(3) Pour l'application du paragraphe (2), un document intéresse davantage une institution autre que celle qui reçoit la demande d'accès si, selon le cas :
(a) the record was originally produced in or for the other institution; or	a) le document a d'abord été constitué par l'autre institution ou pour son compte;
(b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.	b) l'autre institution a reçu la première ce document ou une copie de celui-ci, si le document n'a pas d'abord été constitué par une institution ou pour son compte

[90] The wording of subsections 25(2) and (3) of *FIPPA* are virtually identical to subsections 8(1) and (3) of the *ATIA*. Subsection 25(1) of *FIPPA* would not be necessary if a request could be transferred under subsection 25(2) by an institution that did not control a responsive record. While *FIPPA* was enacted after the *ATIA*, that the Ontario legislature chose different wording supports my analysis that the language in subsection 8(1) of the *ATIA*,

particularly when considered in the context of the provisions of sections 4 – 7 and the *ATIA Regulations*, anticipates that the institution considering whether to "transfer the request and, if necessary, the record" actually has in its possession or otherwise controls a responsive record. Harkening back to *Canada Post*, for an institution to consider whether to transfer a request, and, if necessary, the record, that institution must first have legal or corporeal possession of a responsive record.

[91] While subsection 25(1) of *FIPPA* has no corresponding provision in the *ATIA*, subsection 4(2.1), which is considered next, does provide for assistance to an information seeker. Prof. Yeager submitted that although the amendment adding subsection 4(2.1) to the *ATIA* was not in force at the time of his request, Public Safety was aware that it would become law and it had a moral obligation to assist him with his access request.

VIII. Was Public Safety required to follow subsection 4(2.1) of the *ATIA*?

[92] On September 1, 2007, subsection 4(2.1) of the *ATIA* came into force when it received Royal Assent. It requires a government institution to make every reasonable effort to assist a person requesting access to a record under the control of the institution, to respond to the request accurately and completely and to provide timely access to the record, in the format requested.

[93] It is not necessary to consider whether subsection 4(2.1) operated retrospectively or prospectively. As I have determined that Public Safety did not have control of any record responsive to the request, the provisions of section 4(2.1), were not engaged in either case.

IX. Summary

[94] In summary, based on the wording of the legislation, particularly the definition of a government institution, and the jurisprudence, I cannot accede to Prof. Yeager's heartfelt argument that the Minister's control of a Portfolio of government agencies is determinative and that to find otherwise is a misinterpretation of the *ATIA*. Nor do I find that it is a factual error for Public Safety to have said it had no records.

[95] The ability to control a record, in this case at the Portfolio level, is not determinative of this matter. A Portfolio is not a government institution. Section 4 of the *ATIA* clearly requires the access request to be made to a government institution as set out in Schedule I. As was said in *National Defence*, if I accept Prof. Yeager's argument, it effectively eliminates the need to consider the definition of government institution found in the *ATIA*, and it renders the list in Schedule I essentially meaningless. While Prof. Yeager would like to start at step two of the two-part test, step one is determinative in this case and step two is not reached.

[96] While Prof. Yeager wishes to make new law, both an evidentiary and a legal basis for his arguments are required before the Court can respond as he would like. Having reviewed the record, the jurisprudence and the legislation, it is my view that Public Safety did not err when it said it had no responsive records. The provisions of the *ATIA* are specifically structured to establish separate government institutions and to require access requests to be made to the relevant government institution. Only Parliament can change that structure.

[97] Having failed to make out his Portfolio Argument, Prof. Yeager's arguments under section 8 and subsection 4(2.1) also fail, as control of a record is at the centre of those provisions as well.

X. Is either party entitled to costs and, if so, of what nature and in what amount?

[98] As I mentioned at the outset of this judgment, this case is a classic instance of an irresistible force meeting an immovable object. Realistically, either side could have resolved this matter without any litigation, let alone that which has stretched over several years. However, I do not find that one party or the other is more or less to blame. I keep this in mind when exercising my discretion with respect to costs.

[99] I will first consider whether Prof. Yeager is entitled to any costs, for any of the issues he has raised. Then I will consider whether the Minister is entitled to costs as the successful party.

A. *Costs sought by Prof. Yeager*

(1) Prof. Yeager is self-represented

[100] Prof. Yeager acknowledges that as a self-represented litigant, he is not generally entitled to solicitor and client costs. He stresses that his position as a public interest litigant is very significant and it is a central feature of his proposition that he should be awarded costs regardless of the outcome. I am aware that even as a self-represented litigant, Prof. Yeager may be entitled to some form of compensation beyond the actual disbursements he has incurred. However, that amount is at best equal to what he could have obtained under the tariff if he had been represented by a lawyer; generally it is a fraction of that amount: *Air Canada v Thibodeau*, 2007 FCA 115 at para 24.

(2) No punitive costs

[101] Prof. Yeager also seeks punitive costs because of, as he puts it, the illegal and prolonged misconduct of the Minister in "undermining" the *ATIA*. Given my findings on the issues raised, I

see no basis upon which to award punitive costs to Prof. Yeager, even after contemplating subsection 53(2) of the *ATIA*, which is discussed below.

(3) No costs for the Portfolio Argument or subsection 4(2.1)

[102] Prof. Yeager has not succeeded with the Portfolio Argument, which is premised on an interpretation of the *ATIA* that attempts to elevate control of a record above the definition of government institution. Although I respect his tenacity, I do not find that the Portfolio Argument raised an important new principle in relation to the definition of control under the *ATIA*. In light of *National Defence* and the wording of the *ATIA*, the existing jurisprudence was fully responsive to his argument. For similar reasons, I do not find he is entitled to any costs with respect to his arguments under subsection 4(2.1).

(4) Modest compensation for the Section 8 issue

[103] However, Prof. Yeager has raised an argument under section 8 that has not previously been before the Court. In that respect, although he did not succeed, he has helped to develop the law as contemplated by subsection 53(2) of the *ATIA*, which permits an unsuccessful litigant to be awarded costs. In addition, under rule 400(1) of the *Federal Courts Rules*, SOR/98-106, the Court has full discretionary power over the amount and allocation of costs. In exercising that discretion, rule 400(3) sets out various factors to be considered, including Rule 400(3)(o): "any other matter that [the Court] considers relevant". I have considered all such factors. I have also considered rule 400(6)(a), which permits the Court to award costs in respect of a particular issue.

[104] In my view, Prof. Yeager is entitled to some modest compensation for his time spent and for his reasonable disbursements incurred in preparing and advancing his argument on the issue of whether section 8 was properly handled. I am bound by the Federal Court of Appeal to award

that compensation only insofar as Prof. Yeager incurred an opportunity cost by foregoing remunerative activity: *Yu v Canada (Attorney General),* 2011 FCA 42 at para 37.

[105] I note that Prof. Yeager indicated he generally engages in public interest litigation under the *ATIA*, and did so with this access request in particular as part of his professorial research. It may well be that he has been remunerated as part of his research for the time spent, but as I do not contemplate a large award, I do not in this case view it as a factor to take into account.

[106] In all the circumstances, recognizing that these figures are in all likelihood not easily extricable from Prof. Yeager's overall time spent and costs involved in pursuing this application, I am satisfied that an all-inclusive award of $1500 for costs, including disbursements, is appropriate to award to Prof. Yeager for the time and disbursements he expended on the sole issue of section 8 of the *ATIA*.

(5) Request to be re-imbursed costs previously awarded against him

[107] I wish to address another costs issue raised by Prof. Yeager. Prior to the hearing, Prof. Yeager had filed a motion in writing in this Court seeking an order for the issuance of a *subpoena duces tecum* to compel production of, amongst other documents, the Firman Note. The motion was unsuccessful before Prothonotary Lafrenière, who awarded costs against Prof. Yeager, which he has paid, in the amount of $750. Prof. Yeager appealed that decision to Mr. Justice Gascon, arguing the documents he sought were vital for the final disposition of his Application. He was unable to persuade Mr. Justice Gascon to issue the *subpoena* or to reverse the costs award. Mr. Justice Gascon awarded costs to the Respondents on the appeal.

[108] At the start of the hearing, I permitted a copy of the note to be filed, since both Prof. Yeager and the Attorney General said it proved their case. The actual note had not been before either Prothonotary Lafrenière or Mr. Justice Gascon.

[109] At the hearing, Prof. Yeager asked to be reimbursed the costs of $750 he has already paid because I permitted the Firman Note to be entered into the record and "thereby reversed the decision of Mr. Justice Gascon". There are three problems with that argument. One problem is that the note entered the record on consent. Another problem is that Mr. Justice Gascon refused the appeal, as he was not persuaded that the Firman Note and other documents Prof. Yeager was seeking to compel raised an issue vital to the outcome of the case. This conclusion has been confirmed from my consideration of this matter. Finally, Mr. Justice Gascon determined that Prof. Yeager used the wrong procedure for obtaining the ATIP file; he should have sought the Tribunal record through rule 317 of the *Federal Courts Rules*, not by way of a *subpoena duces tecum*.

[110] In my view there is no basis upon which I would interfere with the existing cost awards to which Prof. Yeager is subject as part of this litigation.

B. *Costs sought by the Attorney General*

[111] Prof. Yeager has not prevailed with respect to any of his arguments, all of which find their source in his creative but ultimately unsuccessful notion of control as articulated in his Portfolio Argument. As the Attorney General has succeeded, costs are payable by Prof. Yeager to the Attorney General in accordance with column III of the table to Tariff B for all issues other than the section 8 issue. As the costs of the section 8 issue are likely to be difficult to separate, I

direct that in any assessment of the Attorney General's costs, those costs shall be reduced by $1500 to reflect that the Attorney General received no costs on the section 8 issue.

[112] In addition to such deduction, if the parties so agree, Prof. Yeager's cost award of $1500 may be deducted from the amount otherwise found owing by him to the Attorney General.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Costs for one issue are awarded to the Applicant, Prof. Yeager, in the all-inclusive amount of $1500.

3. Costs are awarded to the Attorney General under column III of the table to Tariff B, subject to a $1500 deduction to reflect the absence of a cost award on the issue where costs were awarded to the Applicant.

4. The style of cause of this proceeding is amended by removing Stockwell Day as a named party.

"E. Susan Elliott"

Judge

ANNEX

Access to Information Act
Loi sur l'accès à l'information

Purpose

2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary except-ions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Objet

2 (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

Definitions

3 In this Act,

. . .

government institution means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*; (institution fédérale)

Définitions

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

. . . .

institution fédérale

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la *Loi sur la gestion des finances publiques*. (government institution)

Right to access to records

4 (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

Droit d'accès

4 (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

a) les citoyens canadiens;

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

has a right to and shall, on request, be given access to any record under the control of a government institution

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés

. . .

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

Responsable de l'institution fédérale

(2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

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Publication on government institutions

5 (1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

Répertoire des institutions fédérales

5 (1) Le ministre désigné fait publier, selon une périodicité au moins annuelle, un répertoire des institutions fédérales donnant, pour chacune d'elles, les indications suivantes :

(a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

a) son organigramme et ses attributions, ainsi que les programmes et fonctions de ses différents services;

(b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;

b) les catégories de documents qui en relèvent, avec suffisamment de précisions pour que l'exercice du droit à leur accès en soit facilité;

(c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and

c) la désignation des manuels qu'utilisent ses services dans l'application de ses programmes ou l'exercice de ses activités;

(d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent

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Request for access to record

6 A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

. . .

Notice where access requested

7 Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

Transfer of Request

8(1) Where a government institution receives a request for access to a record under this Act and the head of the institution considers that another government institution has a greater interest in the record, the head of the institution may, . . . within fifteen days after the request is received, transfer the request and, if necessary, the record to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request.

d) les titre et adresse du fonctionnaire chargé de recevoir les demandes de communication.

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Demandes de communication

6 La demande de communication d'un document se fait par écrit auprès de l'institution fédérale dont relève le document; elle doit être rédigée en des termes suffisamment précis pour permettre à un fonctionnaire expérimenté de l'institution de trouver le document sans problèmes sérieux.

Notification

7 Le responsable de l'institution fédérale à qui est faite une demande de communication de document est tenu, dans les trente jours suivant sa réception, sous réserve des articles 8, 9 et 11 :

a) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document;

b) le cas échéant, de donner communication totale ou partielle du document.

Transmission de la demande

8 (1) S'il juge que le document objet de la demande dont a été saisie son institution concerne davantage une autre institution fédérale, le responsable de l'institution saisie peut, aux conditions réglementaires éventuellement applicables, transmettre la demande, et, au besoin, le document, au responsable de l'autre institution. Le cas échéant, il effectue la transmission dans les quinze jours suivant la réception de la demande et en avise par écrit la personne qui l'a faite.

Deeming provision

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was transferred on the day the government institution to which the request was originally made received it.

Départ du délai

(2) Dans le cas prévu au paragraphe (1), c'est la date de réception par l'institution fédérale saisie de la demande qui est prise en considération comme point de départ du délai mentionné à l'article 7.

Meaning of greater interest

(3) For the purpose of subsection (1), a government institution has a greater interest in a record if

(a) the record was originally produced in or for the institution; or

(b) in the case of a record not originally produced in or for a government institution, the institution was the first government institution to receive the record or a copy thereof.

Justification de la transmission

(3) La transmission visée au paragraphe (1) se justifie si l'autre institution :

a) est à l'origine du document, soit qu'elle l'ait préparé elle-même ou qu'il ait été d'abord préparé à son intention;

b) est la première institution fédérale à avoir reçu le document ou une copie de celui-ci, dans les cas où ce n'est pas une institution fédérale qui est à l'origine du document.

Where access is refused

10 (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

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Refus de communication

10 (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

a) soit le fait que le document n'existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

. . .

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 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.

Information Commissioner may apply or appear

42 (1) The Information Commissioner may

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(b) appear before the Court on behalf of any person who has applied for a review under section 41; or

(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

Applicant may appear as party

(2) Where the Information Commissioner makes an application under paragraph (1)(a) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review

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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 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.

Exercice du recours par le Commissaire, etc.

42 (1) Le Commissaire à l'information a qualité pour :

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

b) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;

c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

Comparution de la personne qui a fait la demande

(2) Dans le cas prévu à l'alinéa (1)a), la personne qui a demandé communication du document en cause peut comparaître comme partie à l'instance.

. . .

Costs

53 (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

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Delegation by the head of a government institution

73 The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

Frais et dépens

53 (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

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Pouvoir de délégation du responsable d'une institution

73 Le responsable d'une institution fédérale peut, par arrêté, déléguer certaines de ses attributions à des cadres ou employés de l'institution.

Access to Information Regulations
Règlement sur l'accès à l'information
SOR/83-507

Transfer of Request

6 (1) The head of a government institution may, within 15 days after a request for access to a record is received by the institution, transfer the request to another government institution as provided in subsection 8(1) of the Act, on condition that the head of the other government institution consents to process the request within the time limit set out for such a request in the Act.

(2) A request that has been transferred under subsection (1) shall not be transferred to a third government institution.

Transmission de la demande

6 (1) Le responsable d'une institution fédérale peut, dans les 15 jours suivant la réception d'une demande de communication d'un document, transmettre la demande à une autre institution fédérale conformément au paragraphe 8(1) de la Loi, si le responsable de l'autre institution fédérale consent à donner suite à la demande dans le délai prévu par la Loi.

(2) Une demande qui a été transmise en vertu du paragraphe (1) ne peut être transmise de nouveau à une troisième institution fédérale.

Access

8 (1) Where a person is given access to a record or part thereof under the control of a government institution, the head of the institution may require that the person be given an opportunity to examine the record or part thereof, rather than a copy of the record or part thereof if

(a) the record or part thereof is so lengthy that reproduction of the record or part thereof would unreasonably interfere with the operations of the institution; or

(b) the record or part thereof is in a form that does not readily lend itself to reproduction.

Accès aux documents

8 (1) Lorsqu'une personne se voit donner accès à la totalité ou à une partie d'un document relevant d'une institution fédérale, le responsable de cette institution peut exiger que la personne ait la possibilité de consulter le document ou la partie du document qui l'intéresse, plutôt que de lui en délivrer une copie, si le document ou la partie du document :

a) soit, en raison de sa longueur, ne peut être reproduit sans que le fonctionnement de l'institution soit sérieusement entravé;

b) soit est conservé sous une forme qui ne se prête pas facilement à la reproduction

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-91-09
STYLE OF CAUSE:	MATTHEW G, YEAGER v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 25, 2016 FINAL SUBMISSIONS RECEIVED APRIL 22, 2016
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	MARCH 30, 2017

APPEARANCES:

Matthew G. Yeager	FOR THE APPLICANT (ON HIS OWN BEHALF)
Derek Edwards	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS