

Federal Court



Cour fédérale

Date: 20201210

Docket: T-2064-18

Citation: 2020 FC 1142

Ottawa, Ontario, December 10, 2020

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Respondent brings this motion in writing pursuant to Rule 369 and Rule 312 of the *Federal Courts Rules*, SOR/98-106, seeking leave to file and serve the Supplementary Affidavit of Mr. Neil O'Brien [Supplementary Affidavit], sworn on August 21, 2020. The Respondent also seeks leave to use the Supplementary Affidavit as part of the Respondent's record for the hearing and determination of the underlying Application for Judicial Review [Application] and as part of the Respondent's record for the hearing and determination of outstanding preliminary motions.

The Respondent also seeks leave for both parties to make additional oral or written submissions relating to the Supplementary Affidavit, if necessary, in the Application. Alternatively, the Respondent proposes that the Court issue an Order to permit the Supplementary Affidavit to be used in the preliminary motions, a redacted Supplementary Affidavit to be used in the Application, and a supplementary affidavit of Mr. Arthur Nause to be served, filed and used in both the preliminary motions and the Application to address Mr. Nause's belief that disclosure of the redacted information would cause injury.

[2] The Applicant, Dr. Gábor Lukács [Dr. Lukács], opposes the Respondent's motion, in part.

[3] For the reasons that follow, the alternative relief sought by the Respondent is granted.

I. Background

[4] The following information provides the context without all the details.

[5] Dr. Lukács seeks judicial review of the decision of the Canadian Border Services Agency [CBSA] which refused to grant him access to all the records he had requested pursuant to the *Access to Information Act*, RSC 1985, c A-1 [the Act]. Dr. Lukács seeks the records of three individuals who were denied boarding on flights to Canada from Budapest, Hungary in 2015. Dr. Lukács obtained the signed authority of the three individuals to request the records related to this event. The CBSA provided some records to Dr. Lukács in September 2015 and relied on the

exemptions in the Act, including subsection 16(1), to decline to provide other records and unredacted records.

[6] Dr. Lukács complained to the Information Commissioner of Canada [Information Commissioner] with respect to the undisclosed records. The Information Commissioner considered the complaint and, in October 2018, advised Dr. Lukács that his complaint was not well-founded.

[7] Dr. Lukács then brought the Application pursuant to section 41 of the Act.

[8] In accordance with section 44.1 of the Act, an application under section 41 is to be heard and determined as a new proceeding. The process is referred to as a *de novo* review. The Court's review focuses on the decision to provide or withhold the records. Although the decision of the Information Commissioner is an essential step in the process, which triggers the right to seek judicial review, the decision of the Information Commissioner is not subject to the review. On judicial review, the Court determines whether the original decision-maker correctly applied the exemptions under the Act and whether the decision-maker reasonably exercised their discretion to either disclose or withhold records.

[9] The Act requires that the Court "take every reasonable precaution" to avoid the disclosure of the records that have been withheld pending the Court's determination of the Application. This may include receiving submissions *ex parte* and conducting hearings *in camera* (section 47). The Court may also make a confidentiality order pursuant to Rule 15,

where a motion for such an order is brought and the requisite criteria are established, in order to ensure that the information withheld remains protected pending the Court's determination of the Application.

[10] The Court is also required to determine the Application in a summary way (section 45). In this case, the Application has not proceeded in a summary way due to several motions that remain to be determined. The Respondent brought a motion for a Confidentiality Order in February 2019 because the parties were unable to agree on the terms of a consent order. Dr. Lukács continues to oppose the motion. Dr. Lukács has cross-examined two affiants, Mr. O'Brien and Mr. Nause, who had sworn affidavits in support of the Respondent's motion.

[11] Dr. Lukács then brought a motion in June 2019 to compel answers refused on the cross-examination of Mr. Nause and to compel Mr. Nause to produce an unredacted copy of an Operational Bulletin, which Mr. Nause had referred to in his cross-examination, but which was not part of the records sought or refused by the CBSA.

[12] The Respondent also brought a motion in June 2019 to strike parts of Dr. Lukács' Notice of Application, two affidavits and part of a third affidavit filed in support of the Notice of Application.

[13] The parties agreed, and the Court directed, that Dr. Lukács' motion to compel answers (to the extent that the answers sought were not subsequently answered) and the Respondent's motion to strike parts of the Notice of Application and all or parts of three affidavits would be

heard and determined at an oral hearing on the same date and prior to the determination of the Respondent's motion for a Confidentiality Order. These motions have not yet been determined.

[14] Following the Respondent's production of the redacted Operational Bulletin in February 2020, the Respondent brought a motion for a Second Confidentiality Order to protect the Operational Bulletin in its unredacted form and to file confidential material for consideration by the Court in the context of Dr. Lukács' motion to compel answers from Mr. Nause.

[15] The Respondent subsequently discontinued the motion for a Second Confidentiality Order in July 2020 following the decision in *Kiss v Canada (Minister of Citizenship and Immigration)*, 2020 FC 584 [*Kiss*], and provided Dr. Lukács with an unredacted copy of the Operational Bulletin.

[16] In *Kiss*, in the context of an application for judicial review of the decision of the Minister of Citizenship and Immigration to cancel the applicants' electronic travel authorization [ETA], the Minister sought an order pursuant to section 87 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for non-disclosure of excerpts of the Immigration Officer's notes. The Court granted the motion in part, finding that, with one exception, it was untenable for the Minister to object to the disclosure of the "indicators" relied upon by the Officer to cancel the ETA, noting that this information was already in the public domain.

[17] The Respondent explained that, in light of *Kiss*, the CBSA subsequently reviewed the records that had been provided to Dr. Lukács and prepared a new package of documents for

release. The Supplementary Affidavit of Mr. O'Brien, which is the subject of this motion, describes the new release package, provides information regarding the process for review and release of records in general, and about the release of the records requested by the Applicant. The Supplementary Affidavit also states information believed by Mr. O'Brien regarding Mr. Nause's belief that release of the information, which continues to be redacted, would be injurious to the enforcement of Canadian law.

[18] Mr. Nause and Mr. O'Brien also swore affidavits in two other applications for judicial review brought by Dr. Lukács (T-320-20 and T-321-20) that are being held in abeyance pending the determination of this underlying Application. Dr. Lukács cross-examined both affiants on August 28, 2020, but declined the Respondent's suggestion to also cross-examine Mr. O'Brien on his Supplementary Affidavit at the same time. Dr. Lukács submits that leave of the Court is required for service of the Supplementary Affidavit upon him. Dr. Lukács now opposes such leave being granted.

[19] In addition to the four preliminary motions to be determined before the Application can proceed, Dr. Lukács has given notice by way of letter that he intends to bring a further motion for leave to serve and file two supplementary affidavits. He proposes that this anticipated motion be heard at the same time as his motion to compel answers from Mr. Nause and the Respondent's motion to strike.

[20] The Court has convened several Case Management Conferences over the last two years in an effort to move the Application forward, with little success.

[21] The issue now to be resolved is the Respondent's motion to file the Supplementary Affidavit.

II. The Respondent's Submissions as Moving Party

[22] The Respondent submits that the Supplementary Affidavit should be admitted pursuant to Rule 312 as it meets the test established in *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 [*Oshkosh*] and *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88. The Respondent submits that this evidence is admissible on the Application and is relevant to one or more issues before the Court (on the Application and in the preliminary motions).

[23] The Respondent further submits that the Court should exercise its discretion in favour of granting leave to serve and file the Supplementary Affidavit. The Respondent submits that the relevant factors favour the Court's exercising its discretion, including that: the evidence was not available when the Respondent filed the first Affidavit of Mr. O'Brien; the evidence will assist the Court; and, the evidence will not cause any serious prejudice to the Applicant.

[24] The Respondent submits that Mr. O'Brien is best placed to describe the process that resulted in the release of redacted records to the Applicant and the subsequent release of additional records with fewer redactions following the *Kiss* decision. The Respondent submits that Mr. O'Brien, as Assistant Director of ATIP Operations at the CBSA, and based on his experience, is in a position to attest to the information that is largely corporate in nature. In addition, Mr. O'Brien attests to his personal and direct knowledge regarding the new release

package. With respect to Mr. O'Brien's attestation to his belief in information relayed by Mr. Nause, Senior Program Advisor at the CBSA, the Respondent submits that this reflects the same information Mr. Nause previously attested to and was cross-examined on by Dr. Lukács.

[25] The Respondent submits that the Supplementary Affidavit provides evidence that is directly relevant to the issue before the Court, which is whether the unredacted records should be withheld from Dr. Lukács in accordance with the exemptions in the Act. The Respondent notes that the Court must review the records in their totality, including the records that have been more recently provided to Dr. Lukács. The Respondent notes that the information included in the Supplementary Affidavit, which primarily addresses what has occurred following the *Kiss* decision, could not have been provided in the original affidavit. The Respondent acknowledges that the Supplementary Affidavit includes some background information about the initial release of documents to Dr. Lukács and about the process typically followed by the CBSA, which would have been available earlier, but submits that this information is nonetheless relevant, including for the purpose of comparing the initial release and the new release package.

[26] The Respondent submits that the Supplementary Affidavit will assist the Court by explaining the records that Dr. Lukács has now received and why the balance of the redacted records should remain withheld in accordance with the exemptions in the Act.

[27] Finally, the Respondent submits that the evidence in the Supplementary Affidavit will not cause Dr. Lukács any serious prejudice. The Respondent notes that Dr. Lukács was provided with a copy of the Supplementary Affidavit in August 2020 and, at that time, he declined to

cross-examine Mr. O'Brien, despite that he had an appointment for cross-examination and subsequently cross-examined Mr. O'Brien on the affidavit sworn in support of T-320-20 and T-321-20. The Respondent agrees that Dr. Lukács may still cross-examine Mr. O'Brien on the Supplementary Affidavit.

[28] With respect to Dr. Lukács' objections to the Supplementary Affidavit, including that it includes statements based on Mr. O'Brien's belief, the Respondent submits that Rule 81(1) permits hearsay on motions, such as the outstanding preliminary motions in the present case. Although Rule 81(1) would discourage affidavits on belief for the Application, the Respondent submits that the inclusion of this information, which relates to information from Mr. Nause relayed to Mr. O'Brien, is not problematic in the current circumstances. The Respondent notes that Dr. Lukács has previously cross-examined Mr. Nause about the documents that were withheld.

[29] The Respondent adds that it would not serve any useful purpose to permit Dr. Lukács to again cross-examine Mr. Nause based on the Supplementary Affidavit as this would simply revisit the same questions previously asked and answered. In addition, neither Mr. O'Brien nor Mr. Nause can answer questions that would tend to reveal the protected information.

[30] The Respondent notes that if the Court has any concerns about the inclusion of information received by Mr. O'Brien from Mr. Nause, the Court may take this into account in attributing the appropriate weight to the evidence.

[31] With respect to the use of the Supplementary Affidavit in the motions that have yet to be determined, the Respondent notes that Rule 81(1) permits the receipt of affidavits on information and belief. The Respondent further submits that the Supplementary Affidavit will assist the Court by providing the records at issue in the form they have been made available to Dr. Lukács along with a chronology. The Respondent further submits that granting leave to use the Supplementary Affidavit in the motions will promote the just, expeditious and least expensive determination of the Application on its merits in accordance with Rules 3 and 385(1)(a).

[32] The Respondent also proposes an alternative in the event that the Court declines to grant leave to permit the use of the Supplementary Affidavit in both the motions and the Application. The Respondent proposes that the Supplementary Affidavit, as submitted with this motion, be used as-is for the preliminary motions. The Respondent proposes that a redacted Supplementary Affidavit (which redacts the information based on belief) be used in the Application. In addition, a supplementary affidavit of Mr. Nause could be provided for use in both the preliminary motions and the Application to explain Mr. Nause's continued belief that disclosure of the redacted records would cause injury to the enforcement of the law.

III. The Applicant's Submissions as Responding Party

[33] Dr. Lukács has filed a responding motion record of more than 350 pages that includes 26 exhibits, an affidavit, and a list of affidavits previously filed that he also relies on.

[34] Dr. Lukács agrees that the evidence before the Court must be updated to reflect the subsequent disclosure to him of additional records, following the *Kiss* decision. However, Dr.

Lukács opposes the granting of leave to serve and file the Supplementary Affidavit in its current form. Dr. Lukács consents to only parts of the Supplementary Affidavit; paragraphs 1-3, 22, the last sentence of paragraphs 23 and 26. He indicates that he will also consent to the service, filing and use of a supplementary affidavit of Mr. Nause. Dr. Lukács also reserves his right to cross-examine the affiants.

[35] Dr. Lukács submits that other parts of the Supplementary Affidavit should be rejected because they are inadmissible hearsay, not related to the *Kiss* decision, misstate the facts and/or are irrelevant because Mr. O'Brien has provided additional redacted documents, which signals that he has exercised his discretion anew. Dr. Lukács submits that Mr. O'Brien's attestation to the process followed by the CBSA with respect to the original release is based on speculation and is no longer relevant.

[36] Dr. Lukács notes that the CBSA withheld and redacted the records he requested regarding three individuals who were *en route* to Canada in 2015 and were interdicted before boarding in Budapest. He alleges that this interdiction was based on the advice of a CBSA liaison officer. He submits that, although the Information Commissioner determined that his complaint regarding the disclosure of the records by the CBSA was not well-founded, this determination was based on an incomplete record. Dr. Lukács notes that the CBSA subsequently provided additional documents. He also attests that he has made further complaints to the Information Commissioner regarding the failure of the CBSA to disclose the additional records earlier.

[37] Dr. Lukács describes the procedural history, noting the preliminary motions that remain outstanding (as also noted by the Respondent and the Court). Among his submissions related to the other outstanding motions, Dr. Lukács submits that the Respondent delayed in discontinuing the motion for a Second Confidentiality Order until July, despite that the Court issued its decision in *Kiss* in May 2020.

[38] Dr. Lukács acknowledges that on August 24, 2020, Mr. O'Brien provided him with additional documents that were previously not disclosed, with redactions based on paragraph 16(1)(c) of the Act.

[39] With respect to the factors that the Court should consider in determining whether to permit the Supplementary Affidavit to be served and filed in accordance with Rule 312, Dr. Lukács submits that the parts that he objects to are neither relevant nor admissible.

[40] Dr. Lukács submits that Mr. O'Brien's description of the process followed by the decision-maker who released redacted documents and withheld other documents in 2015-2016 is not relevant because this process has been overtaken by the new release package. He submits that the Application will review only the CBSA's latest release and exercise of discretion.

[41] With respect to admissibility, Dr. Lukács submits that parts of the Supplementary Affidavit, which attest to Mr. O'Brien's information and belief, offend Rule 81(1). He argues that this hearsay is neither reliable nor necessary. First, he submits that Mr. Nause's evidence is not reliable because Mr. Nause previously failed to share information with Mr. O'Brien and,

consequently, Mr. O'Brien cannot base his statements on information he believes is true if relayed from Mr. Nause. Second, Dr. Lukács submits that Mr. O'Brien is not attesting to corporate information because Mr. Nause is not the subordinate of Mr. O'Brien and his expertise is different.

[42] With respect to whether the Court should exercise its discretion to grant leave to the Respondent to serve and file the Supplementary Affidavit, Dr. Lukács argues that the Respondent is engaging in case splitting by now describing a process followed with respect to the initial release that could have been provided in the first Affidavit. He also argues that he will be prejudiced by the Respondent's efforts to shield contentious statements from cross-examination.

[43] Dr. Lukács alleges that he proposed a reasonable compromise to the Court and the Respondent by way of letter to avoid this and other motions, which the Respondent declined. He submits that the within motion was unnecessary and seeks costs.

IV. The Respondent's Motion for Alternative Relief is Granted

[44] The judicial review of decisions made pursuant to section 41 of the Act should be relatively straightforward. As noted above, although the decision of the Information Commissioner triggers the ability of a party to seek judicial review, the Court does not review the decision of the Information Commissioner; rather it reviews the decision, in this case, of the CBSA, to release or withhold the records sought. The Court's review will assess whether the records at issue, which must be provided to the Court and kept under seal by the Court, should be

disclosed or whether exemptions in the Act apply to permit their non-disclosure and whether the CBSA reasonably exercised its discretion to withhold the records.

[45] As noted above, the underlying Application has not proceeded due to several pending preliminary motions. Case Management Conferences, designed to resolve disputes, have also revisited disputes thought to have previously been resolved.

[46] In the present case, Dr. Lukács has received additional records with fewer redactions, which brings him closer to his goal of receiving all of the records he sought. Given the proliferation of contested motions and the conditions requested by Dr. Lukács, with respect to his otherwise agreement to some of the motions, the Court questions whether the goal remains to obtain the records that have been withheld.

[47] Dr. Lukács has raised arguments on this motion that may be more relevant to the other outstanding motions or the Application. The only issue to be determined on this motion is whether to grant leave to the Respondent to serve and file the Supplementary Affidavit and to use the Supplementary Affidavit for the motions that have yet to be determined and in the Application, or whether to grant the alternative relief requested.

[48] I agree with both the Respondent and Dr. Lukács that the evidence must be updated to reflect what has more recently transpired which has resulted in the disclosure of additional documents.

[49] I also agree with the Respondent that the Supplementary Affidavit, for the most part, meets the criteria established in *Oshkosh*.

[50] The Supplementary Affidavit, with the redactions as proposed by the Respondent, is admissible on the Application. This evidence is clearly relevant to one or more issues before the Court on the Application. I disagree with Dr. Lukács that what transpired before the new release package was provided is not relevant. The “matter” that is before the Court on this Application arises from the complaint to the Information Commissioner regarding the initial release of documents. Although the Court is not restricted to reviewing that initial release, it remains the “matter” at issue and evidence that pertains to that release is relevant.

[51] The Supplementary Affidavit, as redacted, will assist the Court as it describes the process that is typically undertaken and the more recent process that was undertaken to release additional records, albeit with redactions based on exemptions in the Act.

[52] There is no dispute that some of the information provided in the Supplementary Affidavit was not available prior to the release of additional documents that followed the *Kiss* decision. While other information in the Supplementary Affidavit could have been provided in the first affidavit, it will still assist the Court. I do not regard this as “case splitting”. I also find that this concept is not applicable in these circumstances, given that the “case” is a *de novo* review of the decision of the CBSA as described above.

[53] In *O'Grady v Canada (Attorney General)*, 2016 FC 9, aff'd 2016 FCA 221 [*O'Grady*], the Court noted the relevant principles regarding affidavits on information and belief, at paragraphs 18-21, including that the jurisprudence has confirmed that in some circumstances an affiant may rely on hearsay evidence and evidence made on belief. The Court concluded that the affiant, who was the Director General of the group responsible for the data cited, was in a position to know that the facts sworn in her affidavit were true. The Court noted at paragraph 19:

19 The Supreme Court of Canada developed a principled approach to the admissibility of hearsay evidence, which has been adopted by the Federal Court of Appeal in *Éthier v Canada*, [1993] 2 FC 659, 63 FTR 29 and by the Federal Court in *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823, 414 FTR 291 [*Twentieth Century Fox*] regarding the admissibility of hearsay evidence given by way of affidavit. In *Twentieth Century Fox*, Justice Phelan held that an affiant is in a position to know that the facts are true where evidence is “corporate” in nature in that the affiant acts in a supervisory capacity and is responsible for his subordinates (at para 22).

[54] Mr. O'Brien, by virtue of his position as Assistant Director, ATIP Operations, is in the best position to describe the process typically undertaken at the CBSA. I do not regard the guidance provided in *O'Grady* as limited to persons who are at particular levels in an organization, as all organizations will differ. The point is that where the affiant is in a position to provide information that is corporate in nature, it can be accepted in appropriate circumstances. The Court will determine on a case-by-case basis based on the affiant's position, responsibilities and other relevant factors, that will vary with the circumstances, whether the affiant is in a position to depose to the statements at issue without having personal knowledge.

[55] The Supplementary Affidavit, if used in its entirety in the Application, would exceed the bounds of Rule 81(1) in that it includes statements based on information and belief relayed by Mr. Nause. I share, to some extent, the Respondent's view that a further affidavit and cross-examination of Mr. Nause on the very issues he has attested to and been cross-examined on previously — coupled with the fact that the affiants cannot provide information that would disclose the information that must be protected pending the determination of the Application — would likely serve no further purpose. If the Supplementary Affidavit were accepted in its entirety for use on the Application, the Court would attribute the appropriate weight to the statements based on information and belief, as it will attribute the appropriate weight to all the evidence. However, foreclosing the Applicant's opportunity to probe Mr. Nause's current belief, within the proper bounds of cross-examination on an affidavit, would not be in the interests of justice. Moreover, I anticipate that this approach may lead to further proceedings, which would further delay the determination of the preliminary motions and, more importantly, the underlying Application.

[56] However, the Supplementary Affidavit, in its entirety, for the purpose of the preliminary motions does not offend Rule 81(1) and it may be part of the Respondent's motion records and used for the preliminary motions.

[57] Dr. Lukács' allegation that he will be prejudiced by not being able to challenge "highly contentious statements" fails to acknowledge that the Respondent, in the alternative proposal, agrees that there can be further cross-examination. The Court also notes that Dr. Lukács has cross-examined both Mr. O'Brien and Mr. Nause on several occasions, including in the context

of other litigation that raises similar issues. Any future cross-examination cannot probe the content of the undisclosed documents due to exemptions in the Act, the disclosure of which the Court will determine on the Application.

[58] The alternative relief proposed by the Respondent is granted.

[59] The Supplementary Affidavit, as submitted with this motion, can be served and filed and used as part of the Respondent's records for the motions that remain to be determined (the Respondent's motion for a Confidentiality Order; Dr. Lukács' motion to compel further answers from Mr. Nause; and, the Respondent's motion to strike parts of the Notice of Application and three affidavits filed in support thereof).

[60] The Supplementary Affidavit in a redacted form, which redacts the statements based on Mr. O'Brien's information and belief, can be served and filed and used as part of the Respondent's record for the Application.

[61] The Respondent may serve, file and use as part of its record for the preliminary motions and the Application a further supplementary affidavit of Mr. Nause, for the purpose of explaining Mr. Nause's own belief that disclosure of the redacted records would cause injury to the enforcement of the law.

[62] I acknowledge that it may be cumbersome to have the Supplementary Affidavit in its entirety for the Respondent's records on the motions and a redacted Supplementary Affidavit for

the Respondent's record on the Application along with an additional supplementary affidavit of Mr. Nause, should the Respondent pursue that option, for both. Regardless, the Court will ensure that the evidence is considered only for the proceedings to which it relates.

[63] Dr. Lukács has also advised the Court that he intends to seek leave to file supplementary affidavits. The Court cannot anticipate the content of the affidavits or their relevance and cannot grant leave in advance, but will endeavour to determine the anticipated motions expeditiously.

V. Costs

[64] Dr. Lukács submits that the Respondent's motion was unnecessary, as he had proposed a streamlined process, which the Respondent declined. However, Dr. Lukács' proposal included conditions that the Respondent could not accept at that time without further information.

[65] Clearly, Dr. Lukács has spent time and effort responding to the Respondent's motion. However, it is not apparent why Dr. Lukács chose to file a 350 plus page motion record, including additional affidavits which do not address the issues raised on the current motion and which pertain to his theory regarding why the records he sought were withheld and/or provided in redacted form. As noted above, the Application will determine whether the records sought should be withheld in accordance with the relevant exemptions in the Act and whether the CBSA exercised its discretion to withhold the records reasonably. The material filed by Dr. Lukács in this and other motions appears to be designed to provide contextual information and arguments about the validity of the CBSA's policies, the relevance of which remains to be determined.

[66] Dr. Lukács has received additional disclosure of records, which brings him closer to his original goal. The Application will resolve whether other records should be disclosed and this should be expedited once the outstanding motions are determined.

[67] The Respondent proposed a reasonable alternative to permit the Supplementary Affidavit to be used for the preliminary motions and to serve and file a redacted Supplementary Affidavit for the purpose of the Application. I anticipate that this will ultimately lead to further cross-examination on the Supplementary Affidavit and on any possible further affidavit of Mr. Nause. Given the current circumstances, this may take additional time, but should be expedited to the extent possible. Any further cross-examination of Mr. O'Brien and Mr. Nause must be limited to the content of their affidavits and not stray into questions about the information that has been redacted and which the Court will address on the Application.

[68] Although the Respondent proposed the alternative relief that the Court has granted, the success of the Respondent's motion is best characterised as divided. Costs are in the discretion of the Court and, in the present circumstances, the Court declines to award costs of this motion.

ORDER

THIS COURT ORDERS that:

1. The Respondent may file and serve the Supplementary Affidavit of Mr. Neil O'Brien, which may be used in the Respondent's record for the purpose of the preliminary motions to be determined.
2. The Respondent may file and serve a redacted Supplementary Affidavit of Mr. Neil O'Brien, which redacts the statements based on Mr. O'Brien's information and belief as relayed by Mr. Arthur Nause, for the purpose of the Respondent's record for the Application.
3. The Respondent may file and serve a supplementary affidavit of Mr. Arthur Nause for use in both the preliminary motions and the Application, which addresses his continued belief in the injury to the enforcement of the law in the event that certain information is disclosed.
4. The Respondent shall serve and file the above-noted affidavits within 30 days of the issuance of this Order.
5. The Respondent and the Applicant may make additional oral or written submissions relating to the Supplementary Affidavit, if necessary, on the Application.
6. There is no order for costs.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2064-18

STYLE OF CAUSE: DR. GÁBOR LUKÁCS v THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 AND RULE 312 OF THE *FEDERAL COURTS RULES***

REASONS FOR ORDER AND ORDER: KANE J.

DATED: DECEMBER 10, 2020

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukács FOR THE APPLICANT

Jan Jensen FOR THE RESPONDENT

SOLICITORS OF RECORD:

None FOR THE APPLICANT

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Halifax, Nova Scotia