

Federal Court



Cour fédérale

Date: 20230201

Docket: T-189-19

Citation: 2023 FC 150

Edmonton, Alberta, February 1, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

PREVENTOUS COLLABORATIVE
HEALTH

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

AMENDED CONFIDENTIAL ORDER AND REASONS

I. Overview

[1] The proceeding underlying the present motion involves an Application under section 44 of the *Access to Information Act* [ATIA]. The Applicant seeks an order directing that an audit report of that Applicant and other records not be disclosed by the Respondent under an access request made by a Requestor under the ATIA.

[2] In the present motion, the Applicant seeks an Order declaring three classes of records (Requested documents) relevant to the issues in the Application and for production of those records from the Respondent pursuant to Rules 4 or 313 of the *Federal Courts Rules* [Rules] or pursuant to the plenary jurisdiction of the Federal Court to control its own processes.

[3] The Applicant also seeks an Order permitting it to file an Amended Memorandum of Fact and Law and an Amended Record following receipt of any materials produced in response to this motion.

[4] Pursuant to a Confidentiality Order issued May 10, 2020, the parties filed a public version and a confidential version of their respective motion materials. It is to be noted that while this matter refers to only one Application, the motion records filed herein are deemed to be filed on Court File Nos. T-190-19 and T-191-19.

[5] The Applicant submits that the Requested documents are relevant to the proceedings, are in the possession of the Respondent and relate to the issue of whether the Respondent's possession of the audit report is lawful. This the Applicant argues goes directly to their argument on the Application of whether the Respondent is in "control" of the audit report for the purposes of the *ATIA*.

[6] The Respondent opposes the motion advancing several arguments. First, it argues that the Requested documents are not relevant to the issues in the Application because the affidavits filed by the Respondent and cross-examined on by the Applicant effectively answer the issue of

Canada's control and possession of the audit report. In short, the Respondent says the Applicant has all the material it requires to argue its position. Second, the Respondent says that the Applicant has failed to meet the test of establishing relevance: that is, showing how the Requested documents will directly or indirectly advance its case or damage that of the Respondent. Finally, the Respondent claims that the current request is simply a fishing expedition by the Applicant.

I. Procedural Background

[7] In so far as this motion is the Applicant's third attempt to have this Court order production of the Requested documents, a review of its lengthy procedural history is warranted.

[8] The underlying Application was brought pursuant to section 44 of the *ATIA* for a review of a decision of the Access to Information and Privacy Division of Health Canada to disclose a partially redacted version of an audit report of the Applicant in response to an access to information request by a Requestor. As noted above, similar Applications have been brought by two other Applicants in Court File Nos. T-190-19 and T-191-19.

[9] In response to the Applications, the Respondent filed two affidavits, that of Pamela Martin and that of Lisa Praine, both affirmed July 16, 2019. On November 7 and 8, 2019, the Applicant cross-examined both affiants. During the cross-examination, the Applicant sought undertakings from both affiants to produce the Requested documents. The Respondent objected and the Applicant brought a motion to compel production.

[10] In that motion, the Respondent continued its objection, in part, on the same basis that it now objects to the production of the same documents: namely that they are not relevant to the issues on the Application.

[11] On March 25, 2020, Associate Judge Ring dismissed the motion primarily on the basis that neither the Rules nor the jurisprudence supported the Applicant's claim that the affiants were required to provide the undertaking to produce the Requested documents. Noteworthy for the purposes of the present motion, the Applicant advanced an alternative argument claiming that the Court should compel production of the Requested documents pursuant to Rule 313; the same Rule that the Applicant relies on in the present motion.

[12] Associate Judge Ring rejected the Applicant's argument noting "It is premature for the Court to consider whether Canada's application is incomplete when neither party has yet filed its application record" (*Preventous Collaborative Health v Canada (Health)*, 2020 CanLII 32965 (FC) at para 26).

[13] Thereafter, the Applicant brought a further motion seeking an Order pursuant to Rule 318 for production of the Requested documents. By Order dated October 20, 2020, Associate Judge Ring dismissed the motion, holding that Rule 317 does not apply to applications brought pursuant to section 44 of the *ATIA: Preventous Collaborative Health v Canada (Health)*, 2020 CanLII 103848 (FC). In her Order, Associate Judge Ring noted at paragraph 24 that "the *ATIA* establishes its own process for the disclosure of documents to the Court. In particular...section 46 of the *ATIA*

provides that the Court may, in the course of a section 44 application, examine any record to which Part I of the *ATIA* applies that is under the control of a government institution.”

[14] The Applicant successfully appealed Associate Judge Ring’s Order to the Federal Court which ordered disclosure of the Requested documents under Rule 317. On appeal to the Federal Court of Appeal, that Court quashed the disclosure decision and restored Associate Judge Ring’s Order: *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 [*Preventous*].

[15] In its decision, the Federal Court of Appeal reiterated that an application under section 44 is not a judicial review but is a fresh review of the issue of whether the information sought by the Requestor should be disclosed. That fresh review permits the parties to provide a new evidentiary record and make submissions to the Federal Court on the disclosure of the records. Under section 44.1 (recently amended), the Court is free to “apply the provisions of the Act and the existing jurisprudence to that evidentiary record, and ultimately decide whether the information should be disclosed” (*Preventous* at para 14).

[16] To add clarity, the Court issued guidance “on how the evidentiary record is to be developed ...in future section 44 applications” (*Preventous* at para 16). That guidance recognizes that section 44.1 is a summary proceeding where “the parties must work quickly, diligently and cooperatively, communicating with each other to determine how they can jointly best ensure that a complete evidentiary record is placed before the Court” (*Preventous* at para 19).

[17] Citing Rules 4 and 313 as well as the Court's plenary jurisdiction to control its own processes, Stratas, J.A. identified the sources available to parties by which evidence necessary for meaningful review can be obtained. In their written representations, the Applicant relies on those sources to purport to obtain production of the Requested documents.

A. *Issue*

[18] Against the procedural backdrop referred to above, the sole issue on this motion is whether the Requested documents should be ordered produced.

II. Analysis

[19] For the reasons that follow, I am not persuaded that the disclosure should be ordered and therefore, the motion must be dismissed. It is to be noted that in view of the Court's disposition of the motion, it was not necessary to refer to or redact any confidential information from this Order.

[20] As noted in the procedural history section of this Order, this is the third attempt by the Applicant to secure production of the Requested documents. Section 44.1 is a summary proceeding and as cautioned by Justice Stratas, must be undertaken quickly. The reason for that is obvious, the *ATIA* is quasi-constitutional legislation and its purpose "is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society..." (*ATIA* section 2(1)). It is axiomatic that as long as the proceeding remains outstanding, the Requestor's request goes unanswered.

[21] The present Application was filed in January 2019, some four years ago. The history of this proceeding does not reflect any sense of urgency. Indeed, it was only on June 22, 2022, 18 months after the Notice of Application was filed and 3 months after Associate Judge Ring's March 25, 2020 Order, that the Applicant served its Rule 317 request. The Federal Court of Appeal issued its Reasons for Judgment on September 6, 2022, but the present motion was not filed until November 4, 2022, and only after this Court sought a status update.

[22] While the Federal Court of Appeal declined to rule on whether the materials are relevant to the section 44 application and whether the Applicant has been timely, it reserved that decision to this Court (*Preventous* at para 22).

[23] In all of the circumstances, I am not satisfied that the motion has been brought in a timely manner and on that basis alone, I would dismiss this motion.

[24] Even if I were wrong on the issue of timeliness, I would dismiss the motion because I am not satisfied that the Requested documents are relevant to the section 41 application.

[25] The parties devoted considerable argument in their written representation to the meaning of "control" and whether the Respondent is in control of the audit report for the purposes of disclosure of the report to the Requestor. That is the central issue on the section 41 application and is a matter for the Applications Judge. It is not a matter for this Court to address and it is not germane to the issue of disclosure.

[26] For present purposes, the parties have availed themselves of the opportunity to present a fresh record for the reviewing Court. Each side filed affidavits, cross-examinations were conducted and records have been served and filed. Indeed, a Requisition for Hearing was filed by the Applicant on August 31, 2020. While the Applicant baldly asserts that the Requested documents are central to its argument concerning the lawfulness of the Respondent's possession of the audit report, it does not address how the record that is currently before the Court is deficient. The Applicant's Reply Representations, citing the Supreme Court of Canada in *Canada (Transportation Safety Board) v Carroll-Byrne*, 2022 SCC 48 argues that evidence which is crucial to a central issue in a case must be disclosed in the interests of a fair trial. I agree. Nevertheless, I am not persuaded, based on the material before me that all of the relevant evidence is not already before the Court.

[27] As a final point, and as referred to in the October 20, 2020 Order of Associate Judge Ring, section 46 of the *ATIA* provides that the Applications Judge may examine any record for the purposes of an application under section 44. If the Applications Judge is persuaded that the record is deficient, the Applicant's remedy lies in that section.

III. Costs

[28] The Respondent seeks its costs in this motion. The general rule is that costs follow the event. Given its success on this motion, the Respondent is entitled to its costs. Further, given my view that this motion was entirely unnecessary, I am setting costs at \$2,500.00, inclusive of disbursements and taxes, payable by the Applicant forthwith in any event of the cause.

AMENDED ORDER in T-189-19

THIS COURT ORDERS that:

1. The Applicant's motion is dismissed.

2. The Applicant shall pay to the Respondent its costs of this motion, hereby fixed in the amount of \$2,500.00, inclusive of disbursements and taxes, payable forthwith.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-189-19

STYLE OF CAUSE: PREVENTOUS COLLABORATIVE HEALTH v
CANADA (MINISTER OF HEALTH)

**MOTION IN WRITING CONSIDERED AT EDMONTON, ALBERTA PURSUANT
TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: COUGHLAN A.J.

DATED: JANUARY 17, 2023

AMENDED: FEBRUARY 1, 2023

APPEARANCES:

Gerald D. Chipeur, K.C. FOR THE APPLICANT
D. Bronwhyn Simmons

Kerry E.S. Boyd FOR THE RESPONDENT
Andrew Cosgrave

SOLICITORS OF RECORD:

Miller Thomson LLP FOR THE APPLICANT
Barristers and Solicitors
Calgary, Alberta

Attorney General of Canada FOR THE RESPONDENT
Edmonton, Alberta