Federal Court  Cour fédérale

Date: 20110609

Docket: T-1679-09

Citation: 2011 FC 664

Ottawa, Ontario, June 9, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

AMIR ATTARAN

Applicant

and

MINISTER OF NATIONAL DEFENCE

Respondent

and

INFORMATION COMMISSIONER

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Professor Amir Attaran brought under s 41 of the *Access to Information Act*, RS, 1985, c A-1 (ATIA) challenging a decision by the Respondent refusing to disclose requested information.

Background

[2] Professor Attaran is an Associate Professor in the Faculties of Law and Medicine at the University of Ottawa where he also holds the Canada Research Chair in Law, Population Health and Global Development Policy. Since 2001 he has been involved in the study of the law of armed conflict and human rights law, focussing on Canada's development and military mission.

[3] On July 10, 2006 Professor Attaran made an access to information request to the Department of National Defence (DND) seeking information concerning detainees who had been transferred by Canadian Forces to the Afghanistan Ministry of Defence. The records sought contained certain personal and operational information including the physical description and medical condition of each detainee and the location and circumstances of their capture.

[4] On November 29, 2006 the Respondent disclosed 416 pages of documents in response to Professor Attaran's request (the disclosure package). The Respondent advised Professor Attaran that some information had been withheld from disclosure under ss 15, 16, 17 and 19 of the ATIA. Professor Attaran believed that the Respondent's decision to withhold some of this information was "arbitrary and unjustified" and on January 18, 2007 he made a complaint to the Office of the Information Commissioner (Commissioner) concerning two specific documents – a medical report and a photograph of one of the detainees. Professor Attaran acknowledged that these documents contained personal information but he argued for their disclosure on public interest grounds. He pointed out that the records concerned a prisoner who had apparently been injured while in the custody of Canadian Forces and he speculated that the prisoner may have been beaten or tortured by a Canadian interrogator. He also noted that partially redacted medical records for 13 other detainees

had been released to him and he questioned why the same had not occurred for the one detainee who was apparently injured. He sought the photograph for this detainee on the basis that it would likely depict the injuries that had been sustained. Professor Attaran concluded his request for assistance in the following way:

> I note that disclosing the medical report and photograph in full would mean disclosing the identity of the detained person. This is as it should be. Not only is disclosure warranted in the public interest, but in the words of s. 8(2)(m)(ii) of the *Privacy Act*, disclosure "would clearly benefit the individual to whom the information relates". Disclosing the detainee's identity makes it possible for the detainee to receive appropriate medical treatment or [compensation] for his injuries. Conversely, keeping the detainee's identity secret could lead to future abuse. This was among the clear lessons of the Maher Arar case, where Mr. Arar was tortured in secrecy, but disclosure and publicity of his case led to redress.
>
> Finally, DND will resist the disclosure of a medical report or photograph if it could be construed as detainee abuse. Theirs is not a valid objection. The United States disclosed photographs of detainee abuse, including torture, at Abu Ghraib prison. I see no legitimate reason why Canada cannot act with similar transparency, even if the medical report and photograph are shocking.
>
> For the foregoing reasons of the public's and detainee's interest, please consider this matter as extremely urgent. I would be grateful if you could please take this matter up with DND in the coming week and keep me informed of progress. Many thanks indeed for your assistance.
>
> [Emphasis in the original]

[5] On February 22, 2007 the Respondent produced to Professor Attaran what it described as a clearer copy of the medical report he had requested, subject to certain severances containing personal information about the detainee.

[6] Professor Attaran continued to be suspicious of the Respondent's motives and wrote to the Commissioner expanding the scope of his complaint to "absolutely every withholding in this file and for all statutory exemption [sic] that DND cited". At almost the same time the Commissioner had concluded her initial investigation into Professor Attaran's complaint but, in the face of his new request, she agreed to continue with the investigation.

[7] On January 15, 2007 Professor Attaran made an ATIA request to the Correctional Services of Canada seeking photographs of Afghan detainees and on February 22, 2007, he was given several photographs depicting persons whose faces had been partially blacked out. According to the Correctional Services' reply this severance was carried out in accordance with s 25 of the ATIA to protect the privacy interests of the persons depicted.

[8] On January 29, 2007 Professor Attaran wrote to the Military Police Complaints Commission (Police Commission) seeking an investigation into the treatment of three Afghan detainees. On the basis of the information he had been given through his access to information requests, Professor Attaran was concerned that these individuals may have been mistreated while in the custody of Canadian Forces. The Police Commission initiated an investigation and concluded in its final report that two of the detainees had minor and non-suspicious abrasions and contusions which had not warranted any investigation at the time of their capture. The third detainee, whose photographs are the principle subject of this proceeding, was more seriously injured. The Police Commission described his injuries as startling and "suggested the strong possibility of him having been subject to the deliberate application of physical force in a close-contact encounter with his CF captors". This cause of the prisoner's injuries was, in fact, acknowledged by the CF capturing unit as having

occurred during his apprehension but in response to resistance. The Police Commission noted that, while its mandate did not include a determination of the cause of the detainee's injuries at the time of capture, it had seen no evidence to contradict earlier findings that those injuries were justified by the military rules of engagement. The Police Commission also found that no harm had come to the detainees at the hands of the Military Police and that prompt and appropriate medical care had been administered. The Police Commission did, however, conclude that the Military Police had failed to properly investigate the origins of the injuries to the injured detainee at the point of their custodial involvement.

[9] On September 15, 2008 the Commissioner wrote to Professor Attaran indicating that the Respondent had invoked the "defence of Canada" exception set out in s 15 of the ATIA as a fresh ground for withholding the disputed photograph of the injured detainee. Professor Attaran was invited by the Commissioner to respond and he did so. This exchange was followed up by an email from the Commissioner on December 15, 2008 indicating that the Respondent had the right to add to the grounds for withholding information provided that this was done before the Commissioner had concluded her investigation. Professor Attaran responded to this in an email dated January 22, 2009 deriding the Commissioner's view of the law as shocking and shameful. In a subsequent email to the Commissioner dated March 19, 2009 Professor Attaran complained about "disturbingly poor performance" and threatened to take his claim to the public. He also demanded that he be called every two weeks to be informed about the status of the Commissioner's investigation.

[10] On August 25, 2009 Christian Picard, writing on behalf of the Commissioner, advised Professor Attaran of the results of the access to information investigation. With respect to the

disputed detainee medical report, the Commissioner found that its partial disclosure was sufficient to comply with the ATIA. The Commissioner also found that the Respondent's withholding of the detainee photographs and other personal information was justified for the following reasons:

> Subsection 19(1) allows the head of an institution to withhold personal information about another individual. This is a mandatory exemption subject to the provisions of subsection 19(2). None of the exceptions described in subsection 19(2) applies: that is, there is no consent for disclosure, the information is not publicly available, and none of the conditions described in section 8 of the **Privacy Act** which permit disclosure exist. It is my view that, within the spirit of subparagraph 8(2)(m)(i) which permits disclosure when public interest to do so clearly outweighs any invasion of privacy that could result from disclosure, ND safeguarded the individual's privacy by withholding personal information recorded in any form - in this case, a photograph - on related records. The withheld information relates to an individual other than yourself, and I am satisfied that subsection 19(1) was properly applied.
>
> When an institution uses more than one exemptive provision as a basis for withholding the same information, I need not inquire into the applicability of the other provision, as long as I am satisfied that there is justification for the application of one of the exemptions.
>
> Based on the above, I will record your complaint as resolved.

[11] In dealing with Professor Attaran's expanded requested for disclosure of all other withheld or redacted documents, the Commissioner concluded that the Respondent's discretion was properly exercised on the basis that disclosure could be injurious to the defence of Canada. It was, accordingly, unnecessary to consider the Respondent's remaining grounds for withholding.

[12] Professor Attaran then brought this application under s 41 of ATIA seeking a judicial review of the Respondent's withholding decision. The parties agree that the only records which continue to be the subject of disagreement on this application are 28 photographs of Afghan detainees withheld

in their entirety by the Respondent. Included among the disputed photographs are three which depict a detainee with facial contusions, swelling and abrasions. The remaining photographs are of detainees with no apparent signs of injury. When the matter was argued before me, Professor Attaran also requested a review of the Respondent's decision to partially redact several pages of the documentary record on the grounds set out in s 15 of the ATIA. In a letter to the Court dated May 26, 2011 Mr. Champ advised that the only remaining issue on this application "related to severance and the exercise of discretion with respect to [28] photographs of prisoners in the custody of the Canadian Forces". Accordingly, the Respondent's redactions to the documentary record made under s 15 of the ATIA are no longer in issue.

Issues

[13] What is the appropriate standard of review for the decisions taken by the Respondent to withhold information from the Applicant?

[14] Did the Respondent err in refusing to release information to the Applicant?

Analysis

Standard of Review

[15] Sections 49 and 50 of the ATIA set the standard of review for proceedings brought to the Federal Court under s 41. Those provisions provide:

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in	49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou

section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.	partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.
50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.	50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

[16] The parties are in agreement that the threshold standard of review for determining whether information withheld falls within a statutory exception to disclosure is always correctness. If, after that determination is made, there remains a discretion to weigh the benefits of disclosure against some other interest (eg. privacy) the standard of review is reasonableness.

[17] Because both parties agree that the detainee photographs contain personal information and are, therefore, *prima facia* prohibited from being released under s 19 of the ATIA, I need not consider the standard of review which would otherwise apply to that part of the withholding decision. Rather, the issues that are in dispute are: a) the Respondent's unwillingness to redact the detainee photographs to remove personal information, and b) the Respondent's decision to refuse to release the photographs to Professor Attaran on public interest grounds. It is with respect to those issues that an appropriate standard of review must be applied.

[18] I accept that the issue of "whether severability has been duly considered" is to be assessed on the standard of correctness: see *3430901 Canada Inc. v. Canada (Minister of Industry),* 2001 FCA 254, [2002] 1 FC 421 at para 39 [*Telezone*]. I do not agree, though, that the application of that obligation to the evidence is to be judged on that same basis. In my view, deciding whether photographs are severable is an exercise which requires the application of some professional judgment, and thus the standard of reasonableness applies. Notwithstanding the Court's obligation to pay deference to the decision-maker's approach to redaction, I am satisfied that the reasonableness standard is sufficiently robust to deal with situations of clearly unwarranted overreaching by the government.

[19] Section 49 of the ATIA deals with the judicial review of withholding decisions made, *inter alia,* under s 19 of that Act. In *Canada (Information Commissioner) v Canada (Commissioner of the Royal Canadian Mounted Police),* 2003 SCC 8, [2003] 1 SCR 66, the Supreme Court of Canada carried out a detailed standard of review analysis in connection with this provision and held that the determination of what was or was not "personal information" under s 19 of the ATIA should be

reviewed for correctness and that the burden of the proof on that point rests with the government[1]. Once it is determined that the decision-maker has correctly exercised that authority, the Court held that the *de novo* review power is "exhausted". I take that to mean that in the subsequent assessment of a possible redaction of a record authorized by s 25 of the ATIA or in the balancing of privacy rights against the public interest authorized by ss 8(2)(m)(i) of the *Privacy Act*, the decision-maker's discretion is reviewable on the standard of reasonableness: see *Attaran v Canada*, 2009 FC 339, 342 FTR 82 at paras 28-32 and *Telezone*, above, at para 47. It follows that the Respondent's decisions not to redact the detainee photographs and to refuse the release the photographs on public interest grounds are reviewable on the basis of reasonableness.

General Approach to the ATIA

[20] I agree with Professor Attaran that the ATIA expresses a Parliamentary intent that there be a broad right of public access to government records and this right is of a quasi-constitutional character. But the presumption in favour of access is not unrestrained. The statute also recognizes necessary exceptions including, in s 19, a prohibition on the release of any record or part thereof that contains personal information: see *Information Commissioner of Canada v Minister of National Defence*, 2011 SCC 25, at para 41.

The Photographs and the Right to Privacy

[21] It is indisputable that photographs of the Afghan detainees and, in particular, the photograph of the injured detainee identified at p 355 of the disclosure package, contain "personal information"

[1] In light of the recent decisions of the Federal Court of Appeal in *Attaran v Minister of Foreign Affairs*, 2011 FCA 182 I accept that, in situations where an applicant does not have access to the records in dispute, the onus rests upon the government throughout.

as that term is defined in s 3 of the *Privacy Act*, RSC 1985, c P-21. It is clear from that definition that the term was intended to include personal identifiers recorded in any form and bearing on such matters as one's name, ethnicity, colour, religion, age, martial status, address and biometrics. This type of information cannot be disclosed unless it falls within one of the exceptions described in s 8 of the *Privacy Act*.

[22] In this case Professor Attaran concedes that the photographs he seeks do contain personal information. He argues, though, that the Respondent had an obligation under s 25 of the ATIA to consider the severance of the detainee photographs to effectively remove the risk of identification. In simple terms, if a detainee is not "identifiable" what remains is no longer "personal information" and can thus be released. Professor Attaran also argues that the photographs ought to have been disclosed to him under the public interest exception found in ss 8(2)(m) of the *Privacy Act* which provides:

8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	…
(m) for any purpose where, in the opinion of the head of the institution,	m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation

from the disclosure, or	de la vie privée,
(ii) disclosure would clearly benefit the individual to whom the information relates.	(ii) l'individu concerné en tirerait un avantage certain.

[23] I agree with Professor Attaran that the severance of personal identifiers contained within a government record is often an available option which will permit access to otherwise inaccessible data. He is also correct in saying that s 25 of the ATIA requires the decision-maker to consider whether any part of the requested material can be reasonably severed to permit what remains to be released: see *Rubin v. Canada (Minister of Health)*, 2001 FCT 929, 210 FTR 84 at para 13.

[24] In this case, the Respondent successfully removed personal information from the documentary records and no particular controversy has arisen around that exercise. With photographs, however, the process of redaction may be more difficult if the material information they contain cannot be preserved without compromising a person's *prima facie* right to the protection of identity. Such is the situation here, where the principle photographs in dispute depict facial injuries to a detainee.

[25] In my view, the process of redaction under s 25 of the ATIA to remove personal identifiers from any government record requires that the exercise be carried out in a way that fully protects a person's right to privacy. This is not a balancing exercise. It requires an approach to severance that leaves no room for error or risk of disclosure of one's identity. This approach is consistent with the overall treatment of personal information under the ATIA, which is to protect it from disclosure

unless it can be shown to fall within an exception recognized by s 8 of the *Privacy Act*. It is in the application of recognized exceptions to non-disclosure of personal information, such as under ss 8(2)(m) of the *Privacy Act*, where a balancing of interests may arise. That provision permits the disclosure of personal information only where the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure. In *H.J. Heinz Co. of Canada Ltd. v Canada (Attorney General)*, 2006 SCC 13, [2006] 1 SCR 441, the Supreme Court of Canada discussed the interplay between the ATIA and the *Privacy Act* and stated in unequivocal terms that in the careful balancing between privacy rights and the right to access the former is afforded greater protection than the latter: see paras 25, 26, 29 and 31.

[26] I do not agree with Professor Attaran that in the exercise of the authority to sever personal information from a government record the test to be applied is one of mere probability of disclosure or, as Mr. Champ put it in argument, "Is it more probable than not that an individual be disclosed?". This is an exercise that requires a high degree of certainty which may, of course, be overcome under ss 8(2)(m) of the *Privacy Act* where the public interest clearly demands access.

[27] I would add that in a situation like this one where there is a reasonable apprehension that the personal safety of the individual or his family may be at risk from the disclosure of his identity, extreme caution is justified. This is an exercise very similar to that which would apply to the protection of the identity of a confidential police informant where no responsible person would argue for a balance of probabilities approach to severance.

[28] A cautious approach to the severance of photographs of this type is consistent with what was done by the United States District court in *ACLU v Department of Defence,* 04-CV-4151, when considering the release of infamous photographs depicting the abuse of prisoners held at the Abu Ghraib prison in Iraq. There the Court was satisfied that redactions which removed all identifying characteristics were adequate to protect privacy interests of the subjects. The Court described the careful process it undertook in the following way:

> The procedures I adopted and the rulings I made in the in camera sessions embody the principles set out in Rose and Reporters Committee. I examined each of the Darby photographs, in both its original and redacted forms. Where I determined that the government could better mask identifying features, I ordered it to do so. Furthermore, in the case of a certain small number of photographs, mainly of female detainees, and one of the videos, where the context compelled the conclusion that individual recognition could not be prevented without redaction so extensive as to render the images meaningless, I ordered those images not to be produced.

[29] In my view, the application of s 25 of the ATIA in the context of the removal of personal information from a photograph involves an element of judgment and, as noted above, it is a process that should err on the side of protecting the subject's privacy interests.

[30] Professor Attaran argues that the Respondent failed to consider the possibility of severance with respect to the detainee photographs and, in particular, with respect to the three photographs of the injured detainee. I accept Professor Attaran's point that the record before me does not provide a substantive justification for each redaction or withholding decision. He argues that, in the absence of such justification, I should assume that redaction of the photographs was either overlooked or not considered.

[31] There is, however, sufficient evidence in the record to satisfy me that the application of s 25 of the ATIA was considered by the Respondent with respect to the detainee photographs, albeit the rationale for declining to redact was not well developed.

[32] I cannot lose sight of the practicalities of the process that is engaged by requests like this one involving the careful analysis of hundreds of pages of government records. What is clear is that the Respondent severed many of the requested documentary records to remove protected military and personal information. With respect to photographs, Major Gagnon also testified under cross-examination that the placing of a black bar across the eyes of a subject will not typically afford sufficient protection. His evidence on that point was as follows:

> We have to understand that just blacking out the eyes may not be enough in protecting those source or those individuals. A scar that's on the face. Different type of shaving that may not be usual for a specific tribe. May be indicators that by themselves for especially North American, may not be obvious, but for the tribal society in Afghanistan, maybe come to be very great detail by which they can all identify either the individual, the location of the source, or the activity in which that happened.

Surprisingly this line of questioning was not further pursued by counsel for the Applicant. Major Gagnon went on to explain the approach adopted by the Respondent to the removal of personal identifiers from detainee photographs:

> Q. What's your perspective?
>
> A. Now, our perspective is that we'll protect the entire face.
>
> Q. So you black out the entire face?
>
> A. Yes.

> Q. So there's sort of a difference between the perspectives of CSC apparently, anyway, and DND on that issue?
>
> A. Yes.
>
> Q. Thank you. Why is it that you feel that the entire face has to be removed?
>
> A. As I explained earlier and throughout the Affidavit, that we do feel that we have to protect the entire identity of the individual as they are most likely going to be targeted, for good or bad reasons, by the Taliban as potential collaborators.

Major Gagnon summed up the position of the Respondent in his affidavit at para 26:

> In the context of the current on-going armed conflict in Afghanistan, I am of the opinion that the risks to and the impact on the individuals involved as well as the harm to the conduct of military operations in the Afghan theatre of operations make it clear that there is a need not to disclose such information. As the protection of personal information is paramount in this case, DND has decided to safeguard individual privacy by withholding personal information that has been redacted in the documents.

[33] On this record, where multiple text documents were appropriately severed, it is not reasonable to assume that the Respondent overlooked the obligation to consider severance with respect to the detainee photographs simply because the decision to withhold them was not supported at the time by a detailed explanation.

[34] On the basis of the evidence before me, I am satisfied that the Respondent considered that possibility and determined that severance of the detainee photographs with a view to the removal of all potentially identifying characteristics could not be carried out in any meaningful way.

[35] Severance is, after all, a process to be undertaken with some consideration of the informational value of what remains. This point was well expressed by Associate Chief Justice James Jerome in *Canada (Information Commissioner) v Canada (Solicitor General),* [1988] 3 FC 551, 20 FTR 314, in the following passage:

> 14 …One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt words or phrases.
>
> 15 Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfillment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:
>
> > 25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and [page559] can reasonably be severed from any part that contains, any such information or material.
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

Also see *Murchison v Export Development Canada,* 2009 FC 77, 354 FTR 18 , at para 64.

[36] Professor Attaran contends that the fact that Correctional Services Canada released partially redacted detainee photographs to him proves that the Respondent's decision to withhold similar photographs in their entirety was unreasonable. He says that the Respondent ought to have exercised his s 25 authority in the same way. The problem with this argument is that the severances executed by Correctional Services were fundamentally deficient in meeting the obligation to withhold personal information. Those severances were attempted by the application of a modest black line across the eyes of the persons depicted, leaving many distinct and recognizable facial features in place. Many of the individuals depicted in the Correctional Services photographs would be easily recognized by others known to them. These photographs actually support the Respondent's position that the removal of personal identifying information from a photograph is not as simple as it may initially seem.

[37] My own examination of the detainee photographs satisfies me that a severance sufficient to eliminate the potential of personal identification would, in the words of the United States District Court in *ACLU*, above, be "so extensive as to render the images meaningless". The Respondent's decision not to redact and to withhold all of the detainee photographs was, therefore, reasonable.

[38] Because I have found that the Respondent was justified under s 19 of the ATIA in withholding of the detainees' photographs, it is unnecessary to consider whether the withholding of the injured detainee's photograph at p 355 was also justified under s 15. It is also unnecessary for me to decide whether the Respondent was entitled to add a s 15 justification for withholding that photograph after the initial decision was made but before the Commissioner had completed her investigation. Suffice it to say that there is much to be said for the views expressed by

Justice Russel Zinn in *Murchison*, above, to the effect that the grounds for withholding information under the ATIA may be changed or supplemented provided that the Commissioner has had an opportunity to consider the point. Mr. Champ argued that even if an honest error in the initial citation of grounds for withholding information had been made, there would be no possibility for later rectification, in effect "trapping" the decision maker. I do not agree that such a drastic result would be consistent with what Parliament intended in drafting the ATIA. Such an estoppel could lead to the release of information that was clearly exempt from disclosure and it would undermine the careful balance that Parliament fashioned. Such an approach would undoubtedly lead to the undesirable practice of overclaiming out of a fear that if anything is missed the mistake cannot later be remedied. A better approach may be to examine late amendments with a healthy degree of initial skepticism but, in any event, the Court is not placed at any insurmountable disadvantage by having to examine the merits of a withholding decision whatever its initial basis may have been. I would also add that it was entirely unjustified for Professor Attaran to describe the Commissioner's legal interpretation of this question as shocking and shameful.

The Balancing of the Right to Privacy and the Public Interest in s 8 of the Privacy Act

[39] In assessing the reasonableness of the Respondent's decision not to release the detainee photographs on the basis of an asserted overriding public interest, the Court is again placed at a disadvantage by the absence of detailed reasons. All that the Commissioner reported was that "none of the conditions described in section 8 of the *Privacy Act* which permit disclosure exist".

[40] Professor Attaran contends that the Respondent ought to have released the detainee photographs on the basis that the public interest clearly outweighs the detainees' rights to privacy,

an exception provided for in ss 8(2)(m)(i) of the *Privacy Act*. Before the Commissioner, Professor Attaran maintained that release of the photographs of the injured detainee would benefit the individual by ensuring medical treatment and compensation, appealing to s 8(2)(m)(ii), which allows for disclosure if it would "clearly benefit the individual to whom the information relates"..

[41] In this situation there are no consents from the persons depicted in these photographs to release the information and there is no reasonable expectation that their consents could be obtained. In the absence of the views of the individuals whose personal information is at stake, the Respondent was being asked to speculate to some degree about how they might respond to Professor Attaran's request. There is before me uncontradicted evidence from Major Gagnon that the disclosure of the identity of these detainees could put them or their families in harm's way because of a suspicion of collaboration. It was this concern that supported the Respondent's decision not to release the detainee photographs.

[42] It is exceedingly difficult to assess a risk like this, but where the context is one of ongoing hostilities involving an opposing force whose respect for life and adherence to accepted international and humanitarian norms is in profoundly short supply, it is reasonable to accept the validity of Major Gagnon's concern. In such a context, Professor Attaran's argument to the Commissioner that these detainees would necessarily benefit from the public disclosure of their identities constitutes unwarranted and potentially dangerous speculation.

[43] Three of the disputed photographs depict a detainee with facial injuries. It is a matter of public record that these injuries were sustained in an attempt by Canadian Forces to subdue the

person who was ostensibly resisting arrest. The fact and extent of the injuries suffered have been fully described in medical records that have been released to Professor Attaran and have been the subject of a Military Police Complaints Commission report. What has already been disclosed fairly and accurately describes what is depicted in the disputed photographs. That is to say that the photographs show a variety of soft tissue facial injuries that are not inconsistent with the circumstances described by the Canadian Forces members who arrested the detainee.

[44] Where, as in this case, the interests of the persons most affected by disclosure cannot be ascertained, caution by the Respondent was clearly warranted. With the exception of the detainee with facial injuries, no arguable public interest would be advanced by the disclosure of their photographs and identities. This information has no inherent public value in the sense that it might be useful in the assessment of the conduct of Canadian Forces or officials. It is simply a request for a record containing personal information for the sake of having it. For these photographs the assumed right to privacy of the persons depicted must be respected and the Respondent did not err by withholding them under s 19 of the ATIA.

[45] In the context of ongoing hostilities, with the inherent risks to personal safety that exist in Afghanistan and where the public is already privy to most of the evidence about what took place when one of the detainees was injured (including the nature and extent of his injuries) the practical significance of what little remains is substantially diminished. From the evidence before me, I am satisfied that in withholding the photographs of the injured detainee the Respondent was cognizant of the need to consider the public interest but nevertheless concluded that the risks to the detainee and to the conduct of Canadian military operations were paramount. In all respects this was a

reasonable conclusion and it was one that the Commissioner agreed with. Indeed in the context of armed conflict the tactical significance of factual and personal information is, in many instances, better left to the good faith judgment of those who are equipped to understand it and who are cognizant of the risks that may arise from its release.

[46] I do agree with the sentiments expressed by the United States District Court in *ACLU*, above, about the desirability of putting photographs of prisoner abuse into public circulation. However that was a situation markedly different from this one. The Abu Ghraib photographs depicted systemic and depraved abuse of prisoners at the hands of United States forces, the disclosure of which was deemed essential in the public interest. In addition, the disclosure of what was considered material to the public interest did not require that the identities of the persons photographed be compromised. In the few instances where personal identity could not be protected with certainty the Court refused to order production.

[47] In this case, if the disputed photographs had depicted similar abusive treatment by members of the Canadian Forces a stronger case for disclosure would have arisen. Here all that is represented by the three photographs in issue is the after-the-fact manifestation of an event that has been well described in the public record and where the person's privacy interests would necessarily be compromised by the disclosure of the photographs. In this context, the Respondent's decision to withhold the three photographs of the injured detainee was amply supported by valid concerns for the safety of the individual and there is no basis for the Court interfering with the exercise of that discretion.

Costs

[48] Each party is seeking costs against the other. The Respondent says that costs should follow the event. Professor Attaran argues that even if he is not successful, he should recover costs against the Respondent on the strength of the public interest he is advancing.

[49] There is some merit to the argument that a party who, in good faith, is seeking access to public documents for a public purpose ought to be shielded from a substantial award of costs. That idea has added validity where the proponent does not have access to the records to allow for a considered assessment of the merits of the impugned withholding decision.

[50] In the circumstances of this case, I am satisfied that Professor Attaran's application was made in good faith and that he was at a substantial disadvantage by not knowing the substance of what had been withheld by the Respondent. He was also advancing a cause that carried a significant public interest dimension. At the same time, there were aspects to Professor Attaran's initial judicial claim that were clearly unmeritorious and which were only abandoned very late in the process.

[51] This is a situation where it is appropriate that each party bear its own costs.

Addendum

[52] Part of the hearing of this application took place *in camera* and involved *ex parte* affidavit evidence bearing on security matters arising under s 15 of the ATIA. Having regard to Professor Attaran's withdrawal of those parts of the application which arose under s 15 and the

limited scope of these reasons, it was unnecessary for me to consider the Respondent's *ex parte* submissions beyond the exercise of examining the disputed photographs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with each party to bear its own costs.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ATTARAN v MINISTER OF NATIONAL DEFENCE v INFORMATION COMMISSIONER
PLACE OF HEARING:	OTTAWA, ON
DATE OF HEARING:	February 21, 2011 and March 10, 2011
REASONS FOR JUDGMENT:	BARNES J.
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Information Commissioner Ottawa, ON	FOR THE INTERVENER