Federal Court  Cour fédérale

Date: 20140310

Docket: T-17-13

Citation: 2014 FC 218

Ottawa, Ontario, March 10, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ROBERT BRAUNSCHWEIG

Applicant

and

MINISTER OF PUBLIC SAFETY

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review brought by Robert Braunschweig [the "Applicant"] under section 41 of the *Privacy Act*, RSC, 1985, c P-21 [the "Act"] in respect of a May 11, 2012 decision by the Canadian Security Intelligence Service [the "CSIS"], which was followed by a November 16, 2012 decision of the Office of the Privacy Commissioner of Canada [the "OPC"] which confirmed the conclusions of the CSIS to the effect that the complaints filed by the Applicant were not well-founded. The CSIS letter denied access to information held by the Canadian Security

Intelligence Service [the "CSIS"] in personal information banks ["PIB"] SIS PPU 005, SIS PPU 015 and not to confirm or deny if any information existed or not in SIS PPU 045 [respectively, PIB 005, PIB 015 and PIB 045]. At the hearing, counsel for the Respondents requested that the style of cause be amended to exclude the Minister of National Defence as no evidence in the Applicant's Record relates to him. Counsel for the Applicant agreed. Therefore, an Order to that effect will be rendered.

II. Facts and decision under review

[2] On April 16, 2012, the Applicant requested under the Act that the CSIS disclose any personal information concerning him that was held and controlled by the CSIS in PIBs 005, 015 and 045. In a brief letter dated May 11, 2012, Thérèse L. LeBlanc, CSIS Head of Access to Information and Privacy, responded to the Applicant's request. The letters' conclusions were as follows. First, no personal information relating to the Applicant had been found in PIB 005. Second, personal information concerning the Applicant was found in PIB 015, but this information was exempt from disclosure under the Act. Third, PIB 045 is an "exempt bank" and, accordingly, the CSIS declined to confirm or deny the existence of personal information concerning the Applicant. In addition, should this PIB contain such information, it would be exempt from disclosure.

[3] On July 12, 2012, the Applicant filed complaints before the OPC with respect to the response the CSIS had provided to his request. The OPC found the complaints not to be well-founded.

[4] The present application was filed on December 28, 2012 for the judicial review of the CSIS's decision to deny the disclosure of the personal information requested by the Applicant.

[5] By Order dated May 29, 2013 [the "Confidentiality Order"], Prothonotary Roger Lafrenière, case management judge, authorized the Respondent to file in addition to their public affidavit and public memorandum of fact and law, a supplementary affidavit as well as a supplementary memorandum of fact and law which were to be treated as secret documents not to be disclosed to the Applicant.

[6] An *ex parte in camera* hearing was held on February 12, 2014 in order for this Court to be presented with and appreciate the personal information withheld by the CSIS concerning the Applicant, to determine whether or not the exemptions being claimed were applicable and, if necessary, to review the exercise of the discretion applicable or the assessment of the injury. No submissions were made during this hearing but public submissions were made by both parties at the hearing of February 19, 2014.

III. The OPC's investigation and decision

[7] On November 16, 2012, Sue Lajoie, OPC's Director General of Investigations, *Privacy Act*, responded by letter to the Applicant's July 12, 2012 complaints with respect to the CSIS's response to his request. A Report of findings was attached to this letter detailing the concerns and conclusions regarding each PIB. The Report of findings examined every exemption applicable to the three PIBs, which the OPC reviewed before finding that the complaints were not well-founded.

[8] As for the first PIB, PIB 005, OPC confirmed that the CSIS appropriately conducted its search and that this PIB indeed contained no personal information related to the Applicant. As for the second PIB, PIB 015, OPC confirmed that it did contain personal information concerning the Applicant but added that the CSIS had met the requirements for the exemption from disclosure of this information by virtue of one or various provisions of the Act (subsection 19(1), section 21 and/or paragraph 22(1)(*a*) of the Act). Lastly, regarding the third PIB, PIB 045, OPC confirmed that the CSIS had acted in accordance with the provisions of the Act, given that this PIB was previously designated as an exempt bank by Governor in Council pursuant to section 18 of the Act and that, in any event, should it contain such personal documents, said documents could reasonably be expected to be exempt from disclosure under section 21 or paragraphs 22(1)(*a*) and/or 22(1)(*b*) of the Act.

[9] As noted earlier for the purposes of this judicial review and pursuant to section 41 of the Act, it will be the decision of the CSIS as contained in a letter dated May 11, 2012 that will be reviewed.

IV. Applicant's submissions

[10] At the outset of his submissions, the Applicant distinguishes the two types of exemptions that are found under the Act and the *Access to Information Act*, RSC, 1985, c A-1 [the "ATIA"]: class-based exemptions and injury-based exemptions.

[11] The only class-based exemption relied upon by the CSIS is subsection 19(1) of the Act concerning personal information obtained in confidence from government bodies. However, pursuant to subsection 19(2) of the Act, it is possible to overturn this exemption if the third-party

government body in question consents to the release of the information. According to case law from this Court, subsection 19(2) of the Act imposes an obligation on the Respondent to seek a waiver of confidence to make sure that the body from which the information is obtained is not consenting to disclosure of this information. Nothing in the present case indicates that the CSIS has tried to obtain such a waiver. Moreover, even where there is a *prima facie* case for the non-disclosure, a "balancing of competing interests" must be done to establish whether the third party's interest in the non-disclosure of the documents outweighs the Applicant's reasonable interest in disclosure.

[12] By way of consequence, if only one exemption is class-based, all the other exemptions are injury-based. The exemptions relied upon under section 21 and subsection 22(1) relate to information that could reasonably be expected to be injurious with respect to international affairs and defence as well as law enforcement and investigation. In this regard, according to case law there must be a "clear and direct connection between the disclosure of specific information and the injury that is alleged." There must be a reasonable expectation of probable harm, and mere speculation of harm is not sufficient. The CSIS bore the onus of providing a sufficient justification for relying on exemptions under section 21 and subsection 22(1) of the Act but failed to do so. The CSIS also failed to balance the interest of non-disclosure against the Applicant's interest in the disclosure of documents concerning him.

[13] In addition, the refusal to confirm or deny the existence of personal information concerning the Applicant in PIB 045 after confirming the existence of information in PIB 015 is both inconsistent and unreasonable. Considering that the CSIS, through the affidavit of its employee Nicole Jalbert, clearly considers the Applicant to be a person "whose activities are suspected of

constituting threats to the security of Canada," it can reasonably be assumed that PIB 045 indeed contains information related to the Applicant.

[14] The Applicant ends by stating that should this Court find some legitimate concern with respect to certain information, exemptions from divulgation should be granted by way of specific severing of records so that as much information as possible can be communicated to the Applicant. Here, the CSIS did not make a reasonable effort to disclose at least portions of the information to the Applicant.

V. Respondent's submissions

[15] The Respondent claims that the CSIS's actions were reasonable with respect to all three PIBs. The Applicant has submitted no arguments regarding PIB 005 and the fact that the CSIS found no personal information relating to him in that bank. In any event, nothing in the file indicates that such information exists in this PIB or that the CSIS did not conduct its search appropriately.

[16] It was also reasonable for the CSIS to decline to confirm or to deny the existence of any personal information concerning the Applicant in PIB 045. This issue of whether a government institution can adopt a policy in view of neither confirming nor denying the existence of information in a PIB has been settled by case law, and this Court has already concluded that it was reasonable for the CSIS to adopt this kind of policy as it applies to PIB 045. Also, the CSIS has adopted this policy of regardless of any inferences that a person may claim can be drawn. As such, the decision is reasonable even if the Applicant submits that it was unreasonable because it could be inferred from the existence of personal information was found in PIB 015 that such information was also found in PIB 045. These two PIBs do not contain the same kind of information.

[17] In addition, the CSIS's reliance of sections 19, 21 and 22 of the Act to justify the non-disclosure of information was reasonable. Contrary to the Applicant's submissions, the discretionary exemption under paragraph 22(1)(*a*), as opposed to that of paragraph 22(1)(*b*) of the Act, is class-based and not injury-based. As such, the CSIS does not have to prove that the disclosure of the personal information requested could reasonably be expected to be injurious to law enforcement or lawful investigations. Rather, the CSIS must satisfy this Court that the information sought falls within the description of the exempt information under subparagraph 22(1)(*a*)(iii), and such is the case in the present matter. Once the CSIS determined that this information fell within subparagraph 22(1)(*a*)(iii), it considered its discretion but ultimately decided to withhold the information to protect investigations pertaining to activities suspected of constituting threats to the security of Canada. This decision was reasonable as it met the criteria established by case law (meaning that the information came from a specified investigative body, that it fell within the description of paragraph 22(1)(*a*) and that it was less than 20 years old). As for the balancing of public and private interests, this exercise is required under sections 8 and 26 of the Act, two provisions which are not relevant in the case at bar as they are not relied upon by the CSIS.

[18] The CSIS also relied on section 21, which creates a discretionary exemption preventing the disclosure of personal information that could reasonably be expected to be injurious with respect to international affairs and defence. In this regard, this Court has previously stated that while the release of some pieces of information in a particular case might seem trivial, the release of all the pieces of information on a regular basis could pose a threat to the CSIS's operations.

[19] As for the section 19 exemption relied upon by the CSIS, this exemption is a mandatory class-based exemption. As the information sought fell within the description found at paragraph 19(1) of the Act, the CSIS had the obligation of withholding the information absent consent from the third party. The CSIS is under no obligation to seek consent on a case-by-case basis if the government body acts within the limits of established protocols that respect the spirit of the Act.

VI. Applicant's reply

[20] In his reply, the Applicant submits that the Respondent misinterpreted the Confidentiality Order as it states that the Applicant should receive a version of the document from which the confidential information is redacted or removed. The Respondent was not entitled to file two separate memoranda.

[21] With respect to PIB 005, the Respondent bears the onus of demonstrating a proper search regardless of whether or not the Applicant submitted arguments.

[22] As for the inference that personal information related to the Applicant exists in PIB 045 as a result of information existing in PIB 015, it should be specified that the Respondent specifically denied the communication of information in PIB 015 because it was obtained or prepared in the course of investigating "activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act." PIB 045 contains "personal information on identifiable individuals whose activities are suspected of constituting threats to the

security of Canada." Thus, in this case, the Respondent has already confirmed the existence of personal information in PIB 045.

[23] Further, the Applicant reminds this Court that the exemption under paragraph 22(1)(*a*) of the Act is subject to the same standard of reasonableness as the exemption under paragraph 22(1)(*b*) of the Act. Both these exemptions are discretionary in nature and while the exemption under paragraph 22(1)(*a*) of the Act is indeed narrower, it does not call for a greater degree of deference with respect to unreasonable non-disclosure.

[24] The Applicant also argues that the CSIS must reconsider the Applicant's request if the records in question are more than 20 years old at the time of the hearing. If records in the present matter are more than 20 years old, the CSIS would need to conduct a second review without relying on paragraph 22(1)(*a*).

[25] As for the Respondent's argument that the balancing of competing interest is not applicable in the present matter, the Applicant adds that this balancing is not limited to sections 8 and 26 of the Act.

[26] With respect to the exercise of discretion under section 21 of the Act, the Respondent did not explain how the disclosure of seemingly insignificant information in the present case could threaten the integrity of the CSIS's operations.

[27] The Applicant further submits that the Respondent failed to demonstrate having sought a waiver of consent as contemplated in subsection 19(2) of the Act. If the Respondent did not have the obligation to seek such a waiver, subsection 19(2) would be rendered totally irrelevant.

VII. Issue

[28] This Court must determine whether the CSIS erred in refusing the Applicant access to personal information concerning him. More particularly:

1. Did the CSIS err by informing the Applicant that there was no personal information relating to him in PIB 005?

2. Did the CSIS err by declining to confirm or deny the existence of personal information relating to the Applicant in PIB 045?

3. Did the CSIS err by refusing to disclose the personal information relating to the Applicant in PIB 015?

VIII. Standard of review and burden of proof

[29] When a Court is called upon to review a government institution's decision not to disclose personal information, it must undertake a two-step process. It must first determine if the information sought falls within the description of the exempt information under the applicable provision of the Act, and this first portion is reviewable under the standard of correctness. If found to be correct then the Court must determine whether the government institution has appropriately exercised its discretion not to disclose the information in question. This second portion of the process must be

reviewed following the standard of reasonableness (*Barta v Canada (Attorney General)*, 2006 FC 1152 at paras 14-15, [2006] FCJ No 1450; see also *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at paras 96-100, [2012] FCJ No 1158). If an injury assessment is required as it is for section 21 of the Act, the reasonableness standard shall apply.

[30] Both parties agree that section 47 of the Act clearly places the burden of proof on the government institution. Therefore, the institution, in this case the CSIS, must prove the legality of its decision not to disclose the requested documents.

IX. Analysis

[31] Before undertaking the analysis of the three issues in the present matter, it would be best to provide the legal and factual background of this case. As such, the following paragraphs will explain the nature of the various exemptions under the Act as well as the nature of the information contained in the three PIBs at issue.

Personal Information Banks

[32] The present case also refers to three different PIBs established under section 10 of the Act and that contain different types of personal information to which the Applicant seeks access. The following is a brief description, as can be found on the CSIS's website, of the nature of the information likely to be found in these PIBs:

> **SIS PPU 005 – Security Assessments/Advice**
> The records described in this bank include personal information on individuals who are or have been the subject of a request for a security assessment for pre-employment / employment with federal or provincial government departments and agencies and the private

> sector working under federal government contracts, when a security clearance is a required condition of employment. […]
>
> **SIS PPU 015 – Canadian Service Intelligence Records**
> This bank consists of information on individuals who came to the attention of the former RCMP Security Service while carrying out its responsibilities pertaining to informing the government of national security concerns. This bank may also contain information on individuals who incidentally came to the attention of CSIS as a result of carrying out its mandate under section 12 and/or section 16 of the CSIS Act. […]
>
> **SIS PPU 045 – Canadian Security Intelligence Service Investigational Records**
> The records described in this bank include personal information on identifiable individuals whose activities are suspected of constituting threats to the security of Canada; on identifiable individuals who are or were being managed as confidential sources of information; on identifiable individuals no longer investigated by CSIS but whose activities did constitute threats to the security of Canada and which still meet the collection criteria stipulated in section 12 of the CSIS Act, and on identifiable individuals the investigation of whom relate to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities. (https://www.csis-scrs.gc.ca/tp/nfsrc-2012-eng.asp)

Exemptions under the Act

[33] Both the Act and the ATIA provide two types of exemptions from disclosure: class-based exemptions and injury-based exemptions. This Court has summarized the distinction between the two classes in *Bronskill v Canada (Minister of Canadian Heritage)*, 2011 FC 983 at para 13, [2011] FCJ No 1199:

> **[13]** The exemptions laid out in the Act are to be considered in two aspects by the reviewing Court. Firstly, exemptions in the Act are either class-based or injury-based. Class-based exemptions are typically involved when the nature of the documentation sought is sensitive in and of itself. For example, the section 13 exemption is related to information obtained from foreign governments, which, by its nature, is a class-based exemption. Injury-based exemptions

> require that the decision-maker analyze whether the release of information could be prejudicial to the interests articulated in the exemption. Section 15 is an injury-based exemption: the head of the government institution must assess whether the disclosure of information could "be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities". [Emphasis added.]

[34] In addition, the exemptions under the Act and the ATIA can be categorized as either mandatory or discretionary, depending on the wording of the provision creating the exemption – whether the government "shall refuse to disclose" or "may refuse to disclose". This means that depending on the provision relied upon, the government can be obligated to enforce the exemption or it can have the discretion to decide whether or not to enforce it.

[35] In the present case, the CSIS relies on a variety of exemptions found at sections 19, 21 and 22 of the Act, all of which will be addressed individually during the analysis of the specific issue to which they relate. This Court has had the full access to the withheld information during the *ex parte in camera* hearing held on February 12, 2014. It had the benefit of questions and answers between the affiant and counsel for the Respondent but also the Court had specific questions that were dealt with by the witness.

Preliminary matters

[36] In his reply, the Applicant argues the Respondent has not followed Prothonotary Lafrenière's Confidentiality Order dated May 29, 2013. It is the opinion of the Applicant that the Confidentiality Order provides for the disclosure of the confidential memorandum of fact and law with redactions if so required.

[37] The Confidentiality Order provides for the filing of two sets of documents: a) a public affidavit of the CSIS affiant and a public memorandum of fact and law; b) a confidential affidavit to be filed in a sealed envelope marked confidential with a confidential memorandum of fact and law.

[38] The Respondent has complied with the Confidentiality Order by filing the confidential documents as required and by also filing the public affidavit and the public memorandum of fact and law. These last documents are the redacted product of the confidential documents filed.

[39] On another subject matter addressed at the hearing, counsel for the Applicant did not pursue strongly the argument concerning PIB 005 to the effect that the search was not done in a complete way. Without dealing at length with this argument, it is important that those matters be clarified in the interest of the Applicant and I will therefore deal summarily with it.

[40] As mentioned above, this Court has reviewed all the information at play and has had the benefit of written and oral submissions arising from the legal issues. It is my conclusion, as it will be seen, that the exemptions being claimed by the Respondent are correctly being relied upon. When required, I have also reviewed the discretion to be exercised or the injury assessment to be made and have come to the conclusion that it was reasonably exercised or that there was a reasonable assessment of the injury. To come to this two-part conclusion, I have relied on the evidence presented *ex parte in camera*, but also the public evidence as presented by both parties and on the submissions made. I will now proceed with the analysis of the issues.

A. *Did the CSIS err by informing the Applicant that there was no personal information relating to him in PIB 005?*

[41] In her sworn affidavit, Nicole Jalbert explains that a thorough search has been undertaken in this PIB with respect to the Applicant. Nicole Jalbert also testified to that effect before the court during the *ex parte in camera* hearing on February 12, 2014. No exemptions were invoked for this PIB as none was necessary. Moreover, as rightly submitted by the Respondent, the OPC also undertook an investigation in this regard and ultimately confirmed that the CSIS's search in PIB 005 was appropriate.

[42] As such, this Court is satisfied that the institution's actions leading to the finding that there was no personal information relating to the Applicant in the above-mentioned PIB are factually based by the evidence submitted.

B. *Did the CSIS err by declining to confirm or deny the existence of personal information relating to the Applicant in PIB 045?*

[43] Section 18 of the Act allows the Governor in Council to designate certain PIBs as exempt banks with respect to files that contain mostly personal information described in section 21 or 22 of the Act.

Privacy Act, RSC, 1985, c P-21	*Loi sur la protection des renseignements personnels*, LRC (1985), ch P-21
EXEMPTIONS	**EXCEPTIONS**
Exempt Banks	**Fichiers inconsultables**
Governor in Council may designate exempt banks	Fichiers inconsultables

18. (1) The Governor in Council may, by order, designate as exempt banks certain personal information banks that contain files all of which consist predominantly of personal information described in section 21 or 22.	**18.** (1) Le gouverneur en conseil peut, par décret, classer parmi les fichiers de renseignements personnels inconsultables, dénommés fichiers inconsultables dans la présente loi, ceux qui sont formés de dossiers dans chacun desquels dominent les renseignements visés aux articles 21 ou 22.
Disclosure may be refused	Autorisation de refuser
(2) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is contained in a personal information bank designated as an exempt bank under subsection (1).	(2) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui sont versés dans des fichiers inconsultables.
[…]	[…]

[44] This is the case in the present matter. The Governor in Council designated by order PIB 045 as an exempt bank because it contains files "all of which consist predominantly of personal information described in section 21 or 22" of the Act (see Exempt Personal Information Bank Order, No. 14 (CSIS), SOR/92-688). Given that this PIB is made mostly of sensitive national security information, the CSIS has adopted the policy of refusing to confirm or to deny the existence of any information in this PIB because under certain circumstances – those circumstances related to PIB 045 – the mere acknowledgement that the CSIS does in fact detain or, to the opposite, does not detain information about a particular individual could jeopardize the CSIS's operations and investigations.

[45] This kind of policy pursuant to which the CSIS declines to confirm or deny the existence of information in these exempt banks has already been addressed by the Federal Court of Appeal in *Ruby v Canada (Solicitor General)*, [2000] 3 FC 589 at paras 45-73, [2000] FCJ No 779 (FCA), reversed on other grounds in 2002 SCC 75, [2002] SCJ No 73 [Ruby], and it has been found to be reasonable. Building on the findings in *Ruby*, above, this Court has further stated, in *Cemerlic v Canada (Solicitor General)*, 2003 FCT 133 at paras 44 and 45, [2003] FCJ No 191 [*Cemerlic*], that this policy as it applies specifically to PIB 045 is reasonable under subsection 16(2) of the Act:

> **[44]** The Federal Court of Appeal held in Ruby (F.C.A.) that subsection 16(2) permits a government institution to adopt a policy of neither confirming nor denying the existence of information in a personal information bank. The implementation of a policy of this nature under subsection 16(2) involves an exercise of discretion by the government institution. That discretion must be exercised reasonably in the context of the factual circumstances involved, see Ruby (F.C.A.) at paras. 65-66. In Ruby (F.C.A.) at para. 65, the Court found that the Department of External Affairs had acted reasonably in adopting a policy of this nature because "[g]iven the nature of the bank in question, the mere revealing of the existence or non-existence of information is in itself an act of disclosure; a disclosure that the requesting party is or is not the subject of an investigation."
>
> **[45]** Bank 045 contains information on individuals who are or were under investigation by CSIS on the suspicion that they have been involved in activities that constitute a threat to the security of Canada. Like the situation in Ruby (F.C.A.), if CSIS revealed the existence or non-existence of information in bank 045 to a requesting party, it would in effect be disclosing to that individual whether they were a target of a CSIS investigation. In the context of these factual circumstances, the Court finds CSIS acted reasonably in adopting a uniform policy of neither confirming nor denying the existence of information in bank 045. Even a judge of this Court could not obtain confirmation from CSIS that he or she is or is not under investigation with respect to these matters.

[46] This conclusion was followed by this Court (see for example *Westerhaug v Canada (Canadian Security Intelligence Service)*, 2009 FC 321 at paras 16-21, [2009] FCJ No 414).

[47] The Applicant further argues that PIB 045 surely contains personal information relating to him because the institution has already confirmed the existence of such documents in PIB 015. Therefore, given that there was some information in the latter, it was unreasonable for the institution to decline to deny or confirm the existence of information in the former. This argument is devoid of any logic as these two PIBs do not contain the same kind of information. PIB 045 contains information related to individuals who are under investigation by the CSIS, whereas PIB 015 is made of information related to people who "came to the attention of the former RCMP Security Service." Those people found in PIB 015 are not necessarily the subject of investigations by the CSIS. The Applicant's inference is wrong and without merit in the present matter.

[48] Consequently, this Court finds that it was reasonable for the institution to refuse to either confirm or deny the existence of personal information related to the Applicant in PIB 045.

[49] A last word on this issue. Without confirming or denying anything in relation to this PIB but just on a hypothetical basis, let's assume that there would be information concerning the Applicant in PIB 045. Then, this Court would undertake the same type of review of the information that is required and would look for the correctness of the exemptions being claimed and the reasonableness of the exercise of discretion or the assessment of the injury if required.

C. *Did the CSIS err by refusing to disclose the personal information relating to the Applicant in PIB 015?*

[50] The institution confirmed that certain personal information related to the Applicant was indeed found in PIB 015 but refused to disclose it, relying on exemptions under sections 19, 21 and 22 of the Act.

[51] In fact this Court finds that a single one of these exemptions is sufficient to justify the non-disclosure of personal information detained by the CSIS relating to the Applicant, namely subparagraph 22(1)(*a*)(iii) of the Act, which reads as follows:

Privacy Act, RSC, 1985, c P-21	*Loi sur la protection des renseignements personnels*, LRC (1985), ch P-21
EXEMPTIONS	**EXCEPTIONS**
[…]	[…]
Responsibilities of Government	**Responsabilités de l'État**
[…]	[…]
Law enforcement and investigation	*Enquêtes*
22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)	**22.** (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :
(a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified	a) soit qui remontent à moins de vingt ans lors de la demande et qui ont été obtenus ou préparés par une institution fédérale, ou par une subdivision d'une

in the regulations in the course of lawful investigations pertaining to	institution, qui constitue un organisme d'enquête déterminé par règlement, au cours d'enquêtes licites ayant trait :
(i) the detection, prevention or suppression of crime,	(i) à la détection, la prévention et la répression du crime,
(ii) the enforcement of any law of Canada or a province, or	(ii) aux activités destinées à faire respecter les lois fédérales ou provinciales,
(iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act,	(iii) aux activités soupçonnées de constituer des menaces envers la sécurité du Canada au sens de la Loi sur le Service canadien du renseignement de sécurité;
if the information came into existence less than twenty years prior to the request;	
[…]	[…]

[52] This provision sets out a discretionary class-based exemption which allows a government institution to refuse disclosure of personal information obtained by an investigative body during the course of an investigation if the information in question came into existence less than 20 years prior to an applicant's request for information. Given that this exemption is class-based, the Respondent did not have to show that the disclosure of the requested information could reasonably be expected to be injurious to law enforcement or to lawful investigations. Rather, it had to show that said information falls within the description of the exemption under subparagraph 22(1)(*a*)(iii) and that the discretion was properly exercised.

[53] In this regard, as stated above, this Court held an *ex parte in camera* hearing on February 12, 2014, and it was then able to appreciate the nature and the content of the personal information the disclosure of which was requested by the Applicant and subsequently denied by the CSIS. Following this hearing, there is no doubt for this Court that this information is less than 20 years old and falls squarely within the ambit of subparagraph 22(1)(*a*)(iii) of the Act. Indeed, the CSIS is an "investigative body" for the purposes of subparagraph 22(1)(*a*)(iii) as it is listed, pursuant to paragraph 5(*b*) of the *Privacy Regulations*, SOR/83-508 [the "*Privacy Regulations*"], in Schedule III to these *Privacy Regulations*. In addition, this Court was satisfied that the information was obtained in the course of a lawful investigation and suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*, RSC, 1985, c C-23. Furthermore, through her confidential and public affidavits and her testimony, Nicole Jalbert, affiant for the Respondent satisfied the Court that she had exercised her discretion reasonably as contemplated by case law (see for example *Ruby v Canada (Royal Canadian Mounted Police)*, 2004 FC 594 at paras 21-25, [2004] FCJ No 783; *Fuda v Canada (Royal Canadian Mounted Police)*, 2003 FCT 234 at para 26, [2003] FCJ No 314). It is the finding of this Court that the exercise of the discretion shows that it was concretely connected to the purpose for which it was planned, and there is not one iota of evidence which may indicate any bad faith on the part of the decision maker.

[54] This exemption is in itself entirely sufficient to justify the non-disclosure of the personal information related to the Applicant found in PIB 015 as the full content of personal information detained by the CSIS falls within the description of subparagraph 22(1)(*a*)(iii) of the Act.

[55] The Respondent nonetheless relies on other exemptions all of which, however unnecessary, add to the reasonableness of the CSIS's actions, namely sections 19 and 21 of the Act. There is no need for this Court to examine these exemptions in greater detail. However, I will add the following on this issue. With respect to the exemption under subsection 19(1) of the Act, the Applicant claims that the CSIS had the obligation of seeking a waiver of confidence on the part of the third party from which the information was obtained to make sure that it did not consent to the disclosure of the information. The Court heard evidence on this during the *ex parte in camera* hearing. It was satisfied with the explanation given. In order to facilitate the judiciary making process in the future, the CSIS would help its statutory duties when dealing with such third-party information if it could develop a protocol which would clearly describe the approach to be followed, the caveats if any at play and the steps to be followed. This protocol could then be made available when having to be called to explain the duties as they are required in such case.

[56] A brief note on the claimed section 21 international affairs and defence exemption. This is a discretionary exemption that calls for an injury assessment to be conducted. It addresses concerns related to the conduct of international affairs, the defence of the country or any state allied or associated with Canada or the efforts that Canada undertakes to detect, prevent or suppress subversive or hostile activities. This policy exemption relates in part to Canada's relationship with friendly or associated countries and the impact on this relationship if the information is disclosed. The other component relates to the CSIS operational role it activates in order to protect Canadians and friendly or associated countries from subversive or hostile activities. Without wanting to limit the role of the judiciary when assessing the injury made by the CSIS in such cases, this Court must show some deference when deciding the reasonableness of the injury assessment made. Having said

that, this Court must make sure that the explanation given to show the evaluation of the injury, if disclosure occurs, is serious, in depth, professional and factually based.

[57] Lastly, the Applicant puts forward the argument that the CSIS should have undertaken a balancing of competing interests to determine whether the third party's interest in the non-disclosure of the documents outweighs the Applicant's reasonable interest in disclosure. However, as rightly stated by the Respondent, this balancing exercise is only required when sections 8 and 26 of the Act come into play, as paragraph 8(1)(*m*) of the Act enacts the following:

Privacy Act, RSC, 1985, c P-21	*Loi sur la protection des renseignements personnels*, LRC (1985), ch P-21
PROTECTION OF PERSONAL INFORMATION	**PROTECTION DES RENSEIGNEMENTS PERSONNELS**
8. […]	8. […]
Where personal information may be disclosed	Communication des renseignements personnels
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(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	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie

could result from the disclosure, or	privée,
(ii) disclosure would clearly benefit the individual to whom the information relates.	(ii) l'individu concerné en tirerait un avantage certain.
[…]	[…]
[Emphasis added.]	[Non souligné dans l'original.]

And such is the interpretation that has been followed by the Federal Courts (see for example *Cemerlic*, above, at para 30; *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at para 78, [2012] FCJ No 1158; *Del Zotto v Canada (Minister of National Revenue)*, 2005 FC 653 at paras 34-40, [2005] FCJ No 808). Thus, contrary to the Applicant's submissions, no balancing of interests was required in the present matter because the CSIS did not rely on sections 8 and 26 of the Act.

[58] Therefore, this Court finds that it was reasonable for the CSIS to refuse to communicate to the Applicant the personal information concerning him found in PIB 015, and considering that the answers to the first two issues of the present case also uphold the reasonableness of the CSIS's actions, this Court has no other choice but to dismiss the present application for judicial review.

[59] As for costs, the Respondent has informed that it is not seeking costs. Therefore, none will be granted.

ORDER

THIS COURT ORDERS that:

1. The style of cause be amended to exclude the Minister of National Defence as a Respondent;

2. The application for judicial review is dismissed; and

3. Without costs.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-17-13
STYLE OF CAUSE:	ROBERT BRAUNSCHWEIG v MINISTER OF PUBLIC SAFETY
PLACES OF HEARINGS:	Ottawa, Ontario and Vancouver, British Columbia
DATE OF *EX PARTE IN CAMERA* HEARING:	February 12, 2014
DATE OF HEARING:	February 19, 2014
REASONS FOR ORDER AND ORDER:	Noel, S. J.
DATED:	March 10, 2014

APPEARANCES:

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