Date: 20060501

Dockets: A-165-05
A-304-05

Citation: 2006 FCA 157

CORAM: **RICHARD C.J**
DESJARDINS J.A.
EVANS J.A.

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

THE EXECUTIVE DIRECTOR OF THE CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD

Respondent

and

NAV CANADA

Respondent

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Heard at Ottawa, Ontario, on February 28 and March 1, 2006.

Judgment delivered at Ottawa, Ontario, on May 1, 2006.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: RICHARD C.J.
EVANS J.A.

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REASONS FOR ORDER

DESJARDINS J.A.

[1] This is an appeal of a decision of a application judge of the Federal Court dismissing four applications for judicial review brought by the Information Commissioner of Canada (the

Commissioner) pursuant to paragraph 42(1)(*a*) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the *Access Act*). The applications for judicial review relate to four refusals by the Canadian Transportation Accident Investigation and Safety Board (the Safety Board) to disclose records requested under this Act, in their entirety, based on the purported application of section 19 of the *Access Act*, namely the "personal information" exemption.

[2] The records at issue contain communications relating to four air occurrences which were subject to distinct investigations and public reports by the Safety Board. In each case, the requesters (three journalists and a legal representative of the estate of the deceased involved in one of the air accidents) seek access to recordings and/or transcripts of air traffic control communications (ATC communications) recorded by NAV CANADA and now under the control of the Safety Board.

[3] A description of the occurrences, the requests for information and the relevant decisions of the Safety Board can be found in the reported decision of the application judge (*Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, [2006] 1 F.C.R. 605, 2005 FC 384, Snider J.).

THE DECISION BELOW

[4] The application judge concluded that the requested information was "personal information" within the meaning of section 19 of the Act and section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.

[5] Firstly, it was her view that the ATC communications were “about” an individual. She found that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contained information about the status of the aircraft, weather conditions, matters associated with air traffic control and utterances of the pilots and controllers, except for a few lines in one of the communications which contained direct reference to names and other information which the Commissioner acknowledged was personal. She agreed with the Commissioner that the recordings were largely technical (para. 20). Viewed in context, however, she said they were much more.

[6] Two different types of individuals were involved: the ground crew of air traffic controllers and flight specialists, and the air crew. To establish the nature of the communications, she looked at the purpose for which the ATC communications were made and used. She noted that a provision in Annex 10, volume II of the *Convention on International Civil Aviation* signed at Chicago, Illinois, on December 7, 1944, 15 U.N.T.S. 295 (the ICAO Convention), mandated the logging of ATC communications. These standards were incorporated into Part VIII, subpart 2 of the *Canadian Aviation Regulations*, S.O.R./1996-433. However, when an occurrence happened (a defined term to be examined later), NAV CANADA was under a duty to notify the Safety Board. The Safety Board could then carry on an investigation as it is empowered to do under section 7 of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the *Safety Board Act*). The tapes were then handed to the investigators. The Safety Board, in her view, had the responsibility of examining how those individuals involved in the occurrence chose to perform the task assigned to them (para. 25 of her reasons).

[7] The application judge quoted, at para. 14 of her reasons, the following sentence from para. 94 of La Forest J.'s reasons in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 [*Dagg*]:

> [I]nformation relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information".
>
> [Emphasis added by application judge.]

[8] She wrote at para. 25 and 26 of her reasons:

> 25 In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.
>
> 26 For these reasons, I conclude that the ATC communications are "about" the individuals involved.
>
> [My emphasis.]

[9] She further held that the information was about an "identifiable" individual (para. 31 of her reasons) since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of the specific controller. Moreover, the voices of the individuals involved could be heard and identified. She found that those individuals had a reasonable expectation of privacy considering that the consistent policy of NAV CANADA had been to keep ATC communications confidential, that the collective agreements governing the relationship between the unions and NAV

CANADA contained a clause prohibiting use of the tapes beyond what is required by law, and that both the ICAO Convention and international practices favoured the non-disclosure of information of this nature.

[10] She then proceeded, as she was required, to an analysis under subsection 19(2) of the *Access Act*. She determined that the information should not be disclosed because it was not "publicly available", except for the occurrences at Clarenville where the communications had already been made publicly available. She considered paragraphs 8(2)(*a*) and (*b*) of the *Privacy Act* and found that those provisions were not applicable to the cases before her. She concluded that the Board had properly exercised its discretion under subparagraph 8(2)(*m*)(i) of the *Privacy Act*. As a result, she was satisfied that she did not need to address subsection 20(1), nor section 25 of the *Access Act*, nor whether subsection 9(2) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2, infringed subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter).

[11] It is my view that the application judge erred in coming to the conclusion that the information requested was "personal information" under the *Access Act* and the *Privacy Act*. I consequently do not need to determine the other issues raised in this appeal, except for subsection 20(1) of the *Access Act*.

DEFINING ATC COMMUNICATIONS – THE OBJECT OF THE SAFETY BOARD

[12] Prior to November 1, 1996, civil air navigation services were delivered by Transport Canada. On that date, pursuant to section 9 of the *Civil Air Navigation Services Commercialization*

Act, S.C. 1996, c. 20, and to an earlier transfer agreement signed between the Government of Canada and NAV CANADA, NAV CANADA was given exclusive responsibility over the delivery of those services within Canadian airspace and within other airspace in respect of which Canada has responsibility for the provision of such services. NAV CANADA, a private corporation incorporated on May 26, 1995 under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, was given the right to charge for those services.

[13] The responding parties emphasized the important role of Canada's international obligations in structuring the policies concerning disclosure of ATC communications. The Court's attention was drawn in particular to Annex 13, article 5.12 of the ICAO Convention, which provides that, in conducting an accident investigation, a state shall protect from disclosure "all communications between persons having been involved in the operation of the aircraft" and shall not make such records available for purposes other than accident investigation "unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation". Contrary to the suggestion of the responding parties, however, I am not persuaded that the disclosure of ATC communications, in appropriate circumstances following a request under the *Access Act*, is necessarily inconsistent with Canada's international obligations. A request under the *Access Act* is overseen by "the appropriate authority for the administration of justice", and the considerations mandated by article 5.12 can be accommodated within the process created by this domestic statutory regime.

[14] ATC communications are regulated by section 2 of the *Civil Air Navigation Services Commercialization Act* and section 6 of the *Radiocommunication Regulations* S.O.R.//1996-484. Their content is limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. The messages are transmitted over frequencies reserved specifically for aeronautical services. Users of these frequencies are statutorily required not to identify themselves using their names (para. 18 of the application judge's reasons).

[15] ATC communications may be air-to-ground, ground-to-air and ground-to-ground communications, that is, from the air control tower to the air crew in flight or on the ground, or to vehicles on the ground. Controllers also communicate by means of interphone communication with other control towers and vehicles on the runway (*Sabourin Estate v. Watterrodt Estate* (2005), 213 B.C.A.C. 301, 44 B.C.L.R. (4th) 244, 2005 BCCA 348). The purpose of communications between air traffic controllers or flight specialists and the crew of any aircraft is to ensure the safe and efficient departure, flight and landing of those aircraft and surrounding aircraft (affidavit of Kathleen Fox, A.B. vol. 4, p. 834, para. 28).

[16] As stated earlier, all incoming and outgoing ATC communications are required to be recorded by NAV CANADA. They are retained for a period of 30 days. Where there is an "aviation occurrence", the relevant tape is set aside to preserve its integrity. The tape is taken out of service, placed in a container and stored in a secure location where it cannot be tampered with.

[17] The term "aviation occurrence" is defined thus in section 2 of the *Safety Board Act*:

2. In this Act,	**2.** Les définitions qui suivent s'appliquent à la présente loi.
…	…
aviation occurrence" means	« accident aéronautique » Tout accident ou incident lié à l'utilisation d'un aéronef. Y est assimilée toute situation dont le Bureau a des motifs raisonnables de croire qu'elle pourrait, à défaut de mesure corrective, provoquer un tel accident ou incident.
(*a*) any accident or incident associated with the operation of an aircraft, and	
(*b*) any situation or condition that the Board has reasonable grounds to believe could, if left unattended, induce an accident or incident described in paragraph (*a*);	

[18] The object of the Safety Board is described in subsection 7(1) of the *Safety Board Act*. An important restriction is contained in subsection 7(2). Both provisions read:

7. (1) The object of the Board is to advance transportation safety by	7. (1) Le Bureau a pour mission de promouvoir la sécurité des transports :
(a) conducting independent investigations, including, when necessary, public inquiries, into selected transportation occurrences in order to make findings as to their causes and contributing factors;	a) en procédant à des enquêtes indépendantes, y compris des enquêtes publiques au besoin, sur les accidents de transport choisis, afin d'en dégager les causes et les facteurs;
(b) identifying safety deficiencies as evidenced by transportation occurrences;	b) en constatant les manquements à la sécurité mis en évidence par de tels accidents;
(c) making recommendations designed to eliminate or reduce any such safety deficiencies;	c) en faisant des recommandations sur les moyens d'éliminer ou de

and	réduire ces manquements;
(d) reporting publicly on its investigations and on the findings in relation thereto.	d) en publiant des rapports rendant compte de ses enquêtes et présentant les conclusions qu'il en tire.
(2) In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board's findings.	(2) Dans ses conclusions, le Bureau n'est pas habilité à attribuer ni à déterminer les responsabilités civiles ou pénales; ses conclusions doivent toutefois être complètes, quelles que soient les inférences qu'on puisse en tirer à cet égard.
…	…

[19] The Safety Board explains (para. 25 of its memorandum of fact and law) that the purpose of the investigation of civil aviation occurrences is to understand what caused the occurrence and to identify factors which can be mitigated in order to avoid further occurrences. The purpose is not to assign blame or further criminal, civil or disciplinary proceedings.

[20] Communication records, including ATC communications, enjoy a degree of privilege under the *Safety Board Act*. Paragraph 29(1)(*a*) of the *Safety Board Act* defines a communication record to include:

29. (1) In this section, "communication record" means the whole or any part of any record, recording, copy, transcript or substantial summary of	29. (1) Au présent article, « enregistrement contrôle » s'entend de tout ou partie de l'enregistrement, de la transcription ou d'un résumé appréciable de toute communication :
(a) any type of communications respecting air traffic control or related matters that take place between any of the following persons, namely, air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air traffic control or related matters, …	a) relative au contrôle de la circulation aérienne ou aux questions connexes, entre les contrôleurs de la circulation aérienne, les équipages d'aéronefs, les conducteurs de véhicules d'aéroport, les spécialistes de l'information de vol ou les personnes qui relaient les renseignements relatifs au contrôle de la circulation aérienne ou aux questions connexes; …

[21] Subsection 29(6) of the *Safety Board Act* specifically provides that a communication record which has been obtained by the Board pursuant to its legislative mandate is not to be used against any person referred to in subsection (1) (i.e. air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air

traffic control or related matters) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings. Subsection 29(6) reads:

…	...
29(6) A communication record obtained under this Act shall not be used against any person referred to in subsection (1) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings.	29(6) Dans les procédures judiciaires ou, sous réserve de la convention collective applicable, dans le cadre de procédures disciplinaires, il ne peut être fait usage contre les personnes mentionnées au paragraphe (1) des enregistrements contrôle obtenus en application de la présente loi.

[22] A much stricter provision protects the "on-board recordings" from the flight deck of an aircraft, a term defined in subsection 28(1) of the *Safety Board Act*. Subsection 28(1) of the *Safety Board Act* and section 24 of the *Access Act* specifically provide for mandatory exemption with respect to such recordings and transcripts.

[23] Section 28 of the *Safety Board Act* reads in full:

PRIVILEGE Definition of "on-board recording"	RENSEIGNEMENTS PROTÉGÉS Définition de « enregistrement de bord »
28. (1) In this section, "on-board recording" means the whole or any part of (a) a recording of voice communications originating from, or received on or in, (i) the flight deck of an aircraft,	28. (1) Au présent article, « enregistrement de bord » s'entend de tout ou partie soit des enregistrements des communications orales reçues par le poste de pilotage d'un aéronef, par la passerelle ou

(ii) the bridge or a control room of a ship,
(iii) the cab of a locomotive, or
(iv) the control room or pumping station of a pipeline, or
(b) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline
that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

toute salle de contrôle d'un navire, par la cabine d'une locomotive ou par la salle de contrôle ou de pompage d'un pipeline, ou en provenant, soit des enregistrements vidéo des activités du personnel assurant le fonctionnement des aéronefs, navire, locomotive ou pipeline, qui sont effectués à ces endroits à l'aide du matériel d'enregistrement auquel le personnel n'a pas accès. Y sont assimilés la transcription ou le résumé substantiel de ces enregistrements.

Privilege for on-board recordings

(2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall

(a) knowingly communicate an on-board recording or permit it to be communicated to any person; or

(b) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other

Protection des enregistrements de bord

(2) Les enregistrements de bord sont protégés. Sauf disposition contraire du présent article, nul ne peut, notamment s'il s'agit de personnes qui y ont accès au titre de cet article:

a) sciemment, les communiquer ou les laisser communiquer;

b) être contraint de les produire ou de témoigner à leur sujet lors d'une procédure judiciaire, disciplinaire ou autre.

proceedings.

Access by Board

(3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.

Mise à la disposition du Bureau

(3) Les enregistrements de bord relatifs à un accident de transport faisant l'objet d'une enquête prévue par la présente loi sont mis à la disposition de l'enquêteur qui en fait la demande dans le cadre de sa mission.

Use by Board

(4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

Utilisation par le Bureau

(4) Le Bureau peut utiliser les enregistrements de bord obtenus en application de la présente loi comme il l'estime nécessaire dans l'intérêt de la sécurité des transports, mais, sous réserve du paragraphe (5), il ne peut sciemment communiquer ou laisser communiquer les parties de ces enregistrements qui n'ont aucun rapport avec les causes et facteurs de l'accident de transport faisant l'objet de l'enquête ou avec les manquements à la sécurité.

Access by peace officers, coroners and other investigators

(5) The Board shall make available any on-board recording obtained under this Act to

(a) [Repealed, 1998, c. 20, s. 17]

(b) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

Mise à la disposition des agents de la paix, coroners et autres enquêteurs

(5) Le Bureau est tenu de mettre les enregistrements de bord obtenus en application de la présente loi à la disposition :

a) [Abrogé, 1998, ch. 20, art. 17]

b) des coroners qui en font la demande pour leurs enquêtes;

(c) any person carrying out a coordinated investigation under section 18.

c) des personnes qui participent aux enquêtes coordonnées visées à l'article 18.

Power of court or coroner

(6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall
(a) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;
(b) in camera, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and
(c) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

Pouvoir du tribunal ou du coroner

(6) Par dérogation aux autres dispositions du présent article, le tribunal ou le coroner qui, dans le cours de procédures devant lui, est saisi d'une demande de production et d'examen d'un enregistrement de bord examine celui-ci à huis clos et donne au Bureau la possibilité de présenter des observations à ce sujet après lui avoir transmis un avis de la demande, dans le cas où celui-ci n'est pas partie aux procédures. S'il conclut, dans les circonstances de l'espèce, que l'intérêt public d'une bonne administration de la justice a prépondérance sur la protection conférée à l'enregistrement par le présent article, le tribunal ou le coroner en ordonne la production et l'examen, sous réserve des restrictions ou conditions qu'il juge indiquées; il peut en outre enjoindre à toute personne de témoigner au sujet de cet enregistrement.

Use prohibited

(7) An on-board recording may not be used against any of the

Interdiction

(7) Il ne peut être fait usage des enregistrements de bord dans le

following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely, air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, persons who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.	cadre de procédures disciplinaires ou concernant la capacité ou la compétence d'un agent ou employé relativement à l'exercice de ses fonctions, ni dans une procédure judiciaire ou autre contre les contrôleurs de la circulation aérienne, les régulateurs de trafic maritime, les aiguilleurs, le personnel de bord des aéronefs, navires — y compris, dans ce dernier cas, les capitaines, officiers, pilotes et conseillers glaciologues — ou trains, les conducteurs de véhicules d'aéroport, les spécialistes de l'information de vol, les personnes qui relaient les renseignements relatifs au contrôle de la circulation aérienne ou ferroviaire ou du trafic maritime ou aux questions connexes et les personnes qui assurent le fonctionnement des pipelines.
<u>Definition of "court"</u> 8) For the purposes of subsection (6), "court" includes a person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this Act or the Inquiries Act.	<u>Qualité de tribunal</u> (8) Pour l'application du paragraphe (6), ont pouvoirs et qualité de tribunal les personnes nommées ou désignées pour mener une enquête publique sur un accident de transport conformément à la présente loi ou à la Loi sur les enquêtes.

[24] Section 24 of the *Access Act* reads:

STATUTORY PROHIBITIONS	INTERDICTIONS FONDÉES SUR D'AUTRES LOIS
Statutory prohibitions against disclosure	Interdictions fondées sur d'autres lois
24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	**24.** (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.
…	…
SCHEDULE II	*ANNEXE II*
Canadian Transportation Accident Investigation and Safety Board Act	*Loi sur le Bureau canadien d'enquête sur les accidents de transport et de la sécurité des transports*
subsections 28 (2) and 31 (4)	paragraphes 28 (2) et 31 (4)

[25] It was initially the position of the Safety Board that the information contained in ATC communications was personal information, but was publicly available because some of the information, being the conversations carried over open radio frequencies, could be intercepted by a member of the public with the appropriate technology. Accordingly, if an access request for ATC communications was made after an investigation had been completed, the Safety Board was of the view that there was no basis to refuse disclosure.

[26] Subsequently, questions were raised as to whether the information in question should be exempted under section 19 of the *Access Act*. The Board came to the conclusion that the ATC communications contained personal information. Thereafter, the Safety Board had to determine whether the ATC communications should, in any event, be released because the information was publicly available or because the public interest in disclosure clearly outweighed any invasion of privacy. The Safety Board determined that the information could not be said to be publicly available within the meaning of subsection 19(2) of the *Access Act* and that the public interest in disclosure did not clearly outweigh any invasion of privacy.

[27] Initially, the appellant agreed with this assessment. He, in particular, did so in the case of Swiss Air Flight 111 in 1998, but has since changed his mind.

THE STANDARD OF REVIEW

[28] The parties do not dispute the application judge's finding that the standard of review is correctness.

[29] The decision of the Safety Board relates to a mandatory refusal under subsection 19(1) of the *Access* Act and it has to be correct. Moreover, the application judge is sitting as a reviewing judge in a section 41 application. She is invested with a *de novo* review power (*Dagg*, *supra*, at para. 107) and her decision also has to be correct.

THE KEY ISSUE IN THIS APPEAL

[30] The key issue in this appeal is whether ATC communications are “personal information” under the *Access Act*.

STRUCTURE OF THE RELEVANT LEGISLATION

[31] Subsection 19(1) of the *Access Act* exempts from disclosure “personal information” as defined in section 3 of the *Privacy Act*. Subsection 19 of the *Access Act* reads:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.	19. (1) Sous réserve du paragraphe (2), le responsable d’une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l’article 3 de la Loi sur la protection des renseignements personnels.

[32] Section 3 of the *Privacy Act* reads:

3. In this Act, “personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	3. Les définitions qui suivent s’appliquent à la présente loi. « renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
	b) les renseignements relatifs à

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of

son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui

another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la Loi sur l'accès à l'information, les renseignements personnels ne comprennent pas les renseignements concernant :

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) the fact that the individual is or was an officer or employee of the government institution,

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) the title, business address and telephone number of the individual,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci

(iv) the name of the individual on a document prepared by the individual in the course of employment, and	figure sur un document qu'il a établi au cours de son emploi,
(v) the personal opinions or views of the individual given in the course of employment,	(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;
(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,	k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;
(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and	l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;
(m) information about an individual who has been dead for more than twenty years;	m) un individu décédé depuis plus de vingt ans.

[33] Section 4 of the *Access Act,* which gives the right of access, reads in part:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is	4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :
(a) a Canadian citizen, or (b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.	a) les citoyens canadiens; b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés

[34] The words "including, without restricting the generality of the foregoing", which are found in the definition of "personal information" in section 3 of the *Privacy Act*, convey the proposition that the opening words ("'personal information' means information about an identifiable individual that is recorded in any form") must be given a generous interpretation and that the enumeration which follows is not limitative but illustrative only. Further down, section 3 contains a list of exceptions to the concept of "personal information". They apply only "for the purposes of sections 7, 8 and 26, and section 19 of the *Access to Information Act* …". One of these exceptions is subsection 3(*j*), which includes 3(*j*)(iii).

"PERSONAL INFORMATION": THE KEY PRINCIPLES OF INTERPRETATION

[35] The Supreme Court of Canada has stated on numerous occasions that the *Privacy Act* and the *Access Act* must be read together as a "seamless code", following a "'parallel' interpretive model" that balances the competing values of access and privacy: see *Dagg*, *supra* at paras. 45 and 55-57; *RCMP*, *supra* at paras. 21-22; *H. J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 at paras. 2, 22, 25 [*Heinz*]. However, within this balanced legislative scheme, the right to privacy is made paramount in certain contexts, as the Supreme Court recently affirmed in *Heinz, supra* at para. 26:

> 26 The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right to access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*. (my emphasis)

[36] In *Dagg*, *supra*, La Forest J., dissenting but confirmed by the majority on this point (see para. 1), described as follows the wide reach of the "personal information" definition (paras. 68-69):

> 68 With these broad principles in mind, I will now consider whether the information requested by the appellant constitutes personal information under s. 3 of the Privacy Act. In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent

> enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.
>
> 69 As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, supra, at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, "How Much Privacy for Public Officials?", speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture.
>
> [My emphasis.]

[37] La Forest J.'s views were cited with approval by the unanimous Court in *Canada (Information Commissioner v. Canada (RCMP))* 2003 SCC 8, [2003] 1 S.C.R. 66 at para. 23 [*RCMP*].

[38] The words upon which I need to focus in the present analysis are the following: "'personal information' means information about an identifiable individual that is recorded in any form including" (« renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment »).

[39] The word "about" (« concernant ») should be considered first.

[40] The *Concise Oxford Dictionary of Current English* tells us that the word encompasses the following definitions:

> **about: 1 a** on the subject of, in connection with (*a book about birds; what are you talking about? Argued about money*). **b.** relating to (something funny about this).

[41] The *Petit Larousse illustré* says the following:

> **concernant :** À propos de, au sujet de.

[42] The French *Petit Robert* states the following:

> **concernant :** À propos de, au sujet de – relative. 1. touchant .. en ce qui concerne.

[43] These two words, "about" and "concernant", shed little light on the precise nature of the information which relates to the individual, except to say that information recorded in any form is relevant if it is "about" an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an "identifiable" individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available (Colin H. H. McNairn and Christopher D. Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell, 1992) at p. 7-5; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), 154 O.A.C. 97 (Ont. Div. Ct.), aff'd (2002), 166 O.A.C. 88 (Ont. C.A.)).

[44] "Personal information" must however be understood as equivalent to information falling within the individual's right of privacy. Section 2 of the *Privacy Act* sets the tone by providing that:

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.	2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

[45] The *Privacy Act*, adopted in 1982, was one of the legislative responses to the development of the right to privacy. In their seminal work on "The Right to Privacy", [1890-91] 4 *Harv. L. Rev.* 193, Samuel D. Warren and Louis D. Brandeis wrote (at page 193):

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.

[46] The concept of privacy has proven sufficiently robust to live up to its description by Justice Brandeis (*Olmstead v. United States*, 277 U.S. 438 at 478 (1928)), as the "right most valued by civilized men", and has shouldered its way into U.S. and Canadian constitutional doctrines (see Stanley A. Cohen, *Privacy, Crime and Terror*, (Markham: LexisNexis Butterworths, 2005) at page 9).

[47] In *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427 per La Forest J. [*Dyment*], the Supreme Court of Canada spoke about privacy in the following terms:

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[48] A privacy-based interpretation of the "personal information" definition does not provide a definite resolution to questions concerning the precise scope of "personal information". However, as I explain further below, this interpretation, as wide as it may be, captures the essence of the definition and is, in my view, sufficient to dispose of the appeal at bar.

THE CONCEPT OF PRIVACY

[49] In *Dagg*, *supra* La Forest J., at para. 67, noted that privacy is a broad and somewhat evanescent concept and that it was necessary to describe with greater precision the particular privacy interests protected. He mentioned his earlier writing in *Dyment*, *supra*, at 429-430, in which he referred to the Report of the Task Force established jointly by the Department of Communications and the Department of Justice (1972), entitled *Privacy and Computers*, in these terms:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal

> such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act. . .
>
> [My emphasis.]

[50] La Forest then added (*Dagg* at para. 67 *in fine*):

> See also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46 ("privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself"); *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 613-15 (per L'Heureux-Dubé J., dissenting); Westin, supra, at p. 7 ("[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, "Privacy" (1968), 77 Yale L.J. 475, at p. 483 ("[p]rivacy . . . is control over knowledge about oneself").
>
> [My emphasis.]

[51] The Task Force cited in *Dyment*, *supra* refers to "information about a person … in a fundamental way his own for him to communicate or retain for himself as he sees fit". The same concepts of intimacy and identity are found in the passage from *Duarte*, quoted in *Dagg*, *supra*: "… the right of the individual to determine for himself when, how and to what extent he will release personal information about himself". Alan F. Westin refers to "the claim … of individuals … to determine for themselves when, how and to what extent information about them is communicated to

others" (my emphasis). Charles Fried says "[p]rivacy … is control over knowledge <u>about oneself</u>" (my emphasis).

[52] Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.

[53] The information at issue is not "about" an individual. As found by the application judge (at para. 18 of her reasons) the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals.

[54] The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not <u>about</u> an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is <u>non</u>-personal information transmitted <u>by</u> an individual in job-related circumstances.

[55] The application judge misapprehended the function of the ATC communications and the object of the Safety Board when she said that "the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those

communications in the event that something goes wrong" (para. 25). This interpretation is not in the spirit of subsections 7(1) and (2) and subsection 29(6) of the *Safety Board Act*, nor is it to be found in the submissions made by the Safety Board before this Court (para. 25 of its memorandum of fact and law, referred to at para. 19 of my reasons for judgment). The ATC communications, *when combined with other information*, may well in certain circumstances be *used* as a basis for an evaluation of their authors' performances. However, the possibility of such eventual use cannot transform the communications themselves into personal information, when the information contained therein has no personal content.

[56] The application judge also erred by misapplying *Dagg* when she referred, in the present context, to the evaluation of the performance of the parties to the ATC communications. An analysis of the *Dagg* case is necessary to further my thought on the matter.

THE *DAGG* CASE

[57] As mentioned earlier, the application judge quoted (at para. 14 of her reasons) the following sentence from para. 94 of La Forest J.'s reasons in *Dagg*, *supra*:

> [I]nformation relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information".
>
> [Emphasis added by application judge.]

[58] She later wrote at para. 25 and 26 of her reasons:

> 25 In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the

> accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.
>
> 26 For these reasons, I conclude that the ATC communications are "about" the individuals involved.

[59] In *Dagg*, *supra*, the Court was called upon to determine whether copies of logs with the names, identification numbers and signatures of Department of Finance employees entering and leaving the workplace on weekends was information that "relates to the position or functions of the individual", as provided in the exception set out in s. 3(*j*) of the *Privacy Act* (per Gonthier J. in *RCMP*, *supra* at para. 20; my emphasis).

[60] Speaking for the *Dagg* majority comprised of Lamer C.J., Sopinka, McLachlin and Iacobbucci JJ., Cory J. agreed with La Forest J., dissenting, with whom L'Heureux-Dubé, Gonthier and Major JJ. concurred, that the names on the sign-in logs were "personal information" for the purpose of section 3 of the *Privacy Act*. However, he said that he arrived "at a different conclusion with respect to the application of s. 3 'personal information' (*j*)" (para. 1).

[61] Cory J. stated the following (at paras. 5 and 6 of *Dagg*, *supra*):

> 5 La Forest J. holds, at para. 94, that the purpose of s. 3(j) and s. 3(j)(iii) of the Privacy Act is:

> . . . to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information".
>
> [Emphasis in original.]
>
> 6 I agree. Moreover, I agree with La Forest J. that "[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description", such as "the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range" (para. 95).

[62] Cory J. said that he agreed in principle with that part of para. 94 of La Forest J.'s decision which contains the words also quoted by the application judge in the case at bar. He further agreed with La Forest J. (at his para. 95) that "[g]enerally speaking, information relating to the position … will consist of the kind of information disclosed in a job description" such as "the terms and conditions associated with a particular position, including … qualifications, duties, responsibilities, hours of work and salary range". However, Cory J. applied these conditions differently (para. 8 and 9 of *Dagg*). He disagreed with La Forest J.'s conclusion that since the requested information was not about the nature of a position, but about the individual, it should be kept confidential. Cory J. for the majority held that the requested information "related to the position or functions of the individual" and was excepted from "personal information". He ordered that the requested information be released.

[63] Read in context, La Forest J.'s comment at para. 94 of *Dagg* ("the manner in which they choose to perform the tasks assigned to them is personal information") properly relates only to officers and employees of government institutions, that is to the exception contained in subsection 3(*j*) of the *Privacy Act*. This distinction between information relating to the position versus that relating to the person is inapplicable and indeed irrelevant in respect of the general definition of "personal information" ("information about an identifiable individual") (see also *RCMP*, *supra* at paras. 37-38).

[64] NAV CANADA's employees are not officers or employees of a government institution. So La Forest J.'s comments, concerning the salience of the distinction between information attaching to the position and that relating to specific individuals, are not applicable to them. The application judge thus erred when she applied this distinction directly in the case at bar.

PARAGRAPH 20(1)(*b*) OF THE *ACCESS ACT*

[65] Having concluded that the ATC communications at issue are not personal information under section 3 of the *Privacy Act*, I must address the alternative issue raised by NAV CANADA (the only responding party pleading this point), namely, whether the disclosure of such information is prohibited under paragraph 20(1)(*b*) of the *Access Act*, which reads:

Third Party Information	Renseignements de tiers
20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
…	…
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;
…	…

[66] For this paragraph to apply, it must be shown that:

(i) the information is financial, commercial, scientific or technical information;

(ii) the information is confidential;

(iii) the information is supplied to a government institution by a third party; and

(iv) the information has been treated consistently in a confidential manner by a third party.

[67] NAV CANADA claims that as part of its business it is required by law to maintain records of all radio-communications between controllers and pilots. In the context of its unique business, NAV CANADA claims that ATC communications are "commercial" communications under paragraph 20(1)(*b*) of the *Access Act*. It also says that because the tapes and transcripts are complex and difficult to understand, they constitute "technical" information.

[68] I disagree.

[69] Common sense with the assistance of dictionaries (*Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 at 208) dictates that the word "commercial" connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as "commercial".

[70] It is also incorrect in my view to characterize the entire record collected during an air navigation flight as being "technical" information when only a specific part might be, for instance when precise flight instructions are given.

[71] The second requirement under the paragraph 20(1)(*b*) disclosure exemption is that the information in question must be confidential.

[72] The jurisprudence establishes that confidentiality must be judged according to an objective standard: the information itself must be "confidential by its intrinsic nature" (*Société Gamma Inc. v. Department of the Secretary of State of Canada* (1994), 79 F.T.R. 42 at para. 8 [*Société Gamma*]; *Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (T.D.) [*Air Atonabee*]; *Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare)* (1992), 52 F.T.R. 22, aff'd (1992), 148 N.R. 147 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2006]

1 F.C.R. 379 (F.C.A.)). In *Air Atonabee*, *supra*, Mackay J. suggested the following approach to determine whether a particular record contained "confidential information" (at page 210):

> . . . whether information is confidential will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely:
>
> (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

This Court recently endorsed this approach in *Canada (Minister of Public Works and Government Services v. Hi-Rise Group Inc*. (2004), 318 N.R. 242 (F.C.A.) [*Hi-Rise*].

[73] The burden of persuasion with respect to the confidential nature of the information clearly rests upon the responding parties (*Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency)* (1999), 250 N.R. 314 at para. 3 (F.C.A.) [*Atlantic Canada*]; *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General* (2003), 241 F.T.R. 160, at para. 19). To satisfy their burden in this regard, the responding parties must provide "actual direct evidence" of the confidential nature of the information at issue (*Atlantic Canada*, *supra* at para. 3), which must disclose "a reasonable explanation for exempting each record" (*Wyeth-Ayerst*, *supra* at para. 20);

"evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1)" (*Wyeth-Ayerst*, *supra* at para. 20).

[74] In my opinion, the evidence provided by NAV CANADA is plainly insufficient to discharge this burden on a balance of probabilities. NAV CANADA's submissions with respect to this issue can be divided into three categories, which I will analyze in turn: first, NAV CANADA has maintained a consistent policy and practice of confidentiality of ATC communications; second, the reasonable expectations of pilots and controllers supports such confidentiality; and third, disclosure for investigative purposes only is in the public interest.

[75] First, NAV CANADA relies upon its own policies and consistent past practice to establish the confidentiality of the records at issue. Such evidence – which essentially only substantiates a heretofore unchallenged subjective belief that the records are confidential – is insufficient to satisfy the objective test (*Wyeth-Ayerst*, *supra* at para. 21). The evidence does not elaborate, by reference to the information actually contained within the records at issue, as to how or why the information is *objectively* confidential. The fact that information has been kept confidential in the past – and NAV CANADA's assertion in this regard is disputed by the Commissioner – is at most only a factor to be considered in determining whether the information is confidential for the purposes of paragraph 20(1)(*b*) (*Hi-Rise*, *supra* at para. 38; *Atlantic Canada*, *supra* at para. 4; *Société Gamma*, *supra* at para. 8; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480 at para. 13 (T.D.) [*Ottawa Football*]).

[76] Second, NAV CANADA suggests that there is a reasonable expectation of privacy in the ATC communications on the part of the pilots and controllers whose voices and utterances are recorded. NAV CANADA points in this regard to the confidentiality provisions of the collective agreements with its unions. This consideration cannot, however, be determinative of the status of this information under the *Access Act*: private parties cannot through such agreements alone contract out of the express statutory provisions of the *Access Act* (*Hi-Rise*, *supra* at para. 38; *Ottawa Football*, *supra* at para. 13). At most, such agreements may be taken into account in the final analysis, to support other objective evidence of confidentiality.

[77] Third, NAV CANADA argues that the ATC communications are produced to the Board on demand as required by law, for investigative purposes only. The confidentiality of these records, NAV Canada asserts, reflects Canada's international obligations under Article 5.12, Annex 13 of the ICAO Convention (discussed above at paragraph 13 of these reasons), and is in the public interest.

[78] Considerations of the public interest are indeed relevant to the determination of whether the records at issue are confidential for the purposes of paragraph 20(1)(*b*): the jurisprudence recognizes that the maintenance of confidentiality is justified under the *Access Act* if it fosters a confidential relationship with public benefit (see *Hi-Rise*, *supra* at para. 38, *Air Atonabee*, *supra* at 210). In this regard, the considerations mandated by the *Access Act* appear consistent with Canada's international obligations under Article 5.12, which directs the maintenance of confidentiality unless "disclosure

outweighs the adverse domestic and international impact such action may have on that or any future investigations". However, in the case at bar, NAV CANADA has provided no supporting explanation as to how or why the maintenance of confidentiality serves the public interest, in the circumstances of the records at issue. A bald assertion in this regard is insufficient to overcome the general right of access established by the *Access Act*.

[79] In my view, therefore, NAV-CANADA has not satisfied its burden of showing that the ATC communications are confidential within the meaning of paragraph 20(1)(*b*). Since the first two requirements of paragraph 20(1)(*b*) are not met, I need not consider the other criteria of this provision. I conclude that the ATC communications at issue do not qualify for exemption from disclosure under paragraph 20(1)(*b*) of the *Access Act*.

CONCLUSION IN FILE A-165-05

[80] The appeal should be allowed with costs in this court and the decision of the application judge should be set aside. Rendering the decision she should have rendered, I would grant the four applications for judicial review and would order the Safety Board to disclose the requested records.

[81] The Commissioner is seeking costs throughout. Since the Commissioner, the Safety Board and the Attorney General had agreed not to seek costs against each other in the Federal Court, I find that I should not disrupt their agreement. No costs should therefore be awarded to the Commissioner against those parties in the Federal Court. Considering moreover that the

Commissioner indicated, in the Federal Court, that he was not seeking costs against NAV CANADA, no costs should be awarded to the Commissioner against NAV CANADA.

FILE A-304-05

[82] The appellant appeals an order for costs in favour of NAV CANADA pronounced by the application judge in an order dated June 8, 2005.

[83] Since I conclude, in file A-165-05, that the appeal should be allowed and the decision of the application judge should be set aside, her order of costs cannot stand. This appeal should be allowed and her order as to costs should be set aside.

"Alice Desjardins"
J.A.

"I agree.
J. Richard C.J."

"I agree.
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-165-05

APPEAL FROM A JUDGMENT OR AN ORDER OF THE FEDERAL COURT DATED MARCH 18, 2005, FEDERAL COURT FILE NOS. T-465-01, T-650-02, T-888-02 AND T-889-02

STYLE OF CAUSE:	THE INFORMATION COMMISSIONER OF CANADA v. THE EXECUTIVE DIRECTOR OF THE CANADIAN TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 28 and March 1, 2006
REASONS FOR JUDGMENT BY:	DESJARDINS J.A.
CONCURRED IN BY:	RICHARD C.J. EVANS J.A.
DATED:	May 1, 2006

APPEARANCES:

Mr. Daniel Brunet Raynold Langlois, Q.C. Ms. Marlys Edwardh Mr. François LeBel	for the Appellant
Barbara A. McIsaac, Q.C. Mr. Gregory S. Tzemenakis	for the Respondent, Executive Director, CTAISB
Brian A. Crane, Q.C. Mr. Graham S. Ragan	for the Respondent, NAV CANADA
Mr. Christopher Rupar	for the Intervener

SOLICITORS OF RECORD:

Office of the Information Commissioner of Canada Ottawa, Ontario	for the Appellant
McCarthy Tétrault LLP Ottawa, Ontario	for the Respondent, Executive Director, CTAISB
Gowling Lafleur Henderson LLP Ottawa, Ontario	for the Respondent, NAV Canada
John H. Simms, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	for the Intervener