Federal Court of Appeal | Cour d'appel fédérale

Date: 20190424

Dockets: A-311-17
A-313-17

Citation: 2019 FCA 95

CORAM: **NEAR J.A.**
DE MONTIGNY J.A.
WOODS J.A.

Docket: A-311-17

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

THE PRIME MINISTER OF CANADA

Respondent

Docket: A-313-17

BETWEEN:

THE PRIME MINISTER OF CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 17, 2018.

Judgment delivered at Ottawa, Ontario, on April 24, 2019.

PUBLIC REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190424

Dockets: A-311-17
A-313-17

Citation: 2019 FCA 95

CORAM: **NEAR J.A.**
DE MONTIGNY J.A.
WOODS J.A.

Docket: A-311-17

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Appellant

and

THE PRIME MINISTER OF CANADA

Respondent

Docket: A-313-17

BETWEEN:

THE PRIME MINISTER OF CANADA

Appellant

and

THE INFORMATION COMMISSIONER OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Before this Court are two appeals from a decision of the Federal Court (per Justice O'Reilly), dated September 13, 2017, by which the Court allowed, in part, the application for judicial review brought by the Information Commissioner of Canada (the Commissioner) against the Prime Minister of Canada (the Prime Minister) (2017 FC 827). At issue was the denial of a reporter's 2013 request for copies of certain records held by the Privy Council Office (PCO) related to four senators. The Federal Court ultimately directed the PCO to disclose a portion of the records in question.

[2] For the reasons that follow, I am of the view that both appeals should be allowed in part.

I. Facts

[3] On August 22, 2013, a reporter made a request under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act), for the disclosure of "[a]ny records created between March 26, 2013 to present [August 22, 2013] related to Senators Mike Duffy, Mac Harb, Patrick Brazeau and/or Pamela Wallin".

[4] On September 20, 2013, the PCO responded to the access request. It identified 28 pages of records as responsive to the request, but withheld 27 of them. The refusal to disclose the records was justified by PCO on the basis that it contained information of a personal nature (subsection 19(1) of the Act), information covered by solicitor-client privilege (section 23 of the

Act), as well as recommendations and advice to the Prime Minister (paragraph 21(1)(a) of the Act).

[5] The records pertain to [redacted]

[6] [redacted]

[7] On October 10, 2013, the reporter sent a complaint to the Commissioner regarding PCO's refusal to disclose the requested documents and receipt of that complaint was confirmed on October 23, 2013. On November 13, 2013, the Commissioner notified the PCO that this complaint would be investigated.

[8] On February 21, 2014, PCO provided the Commissioner with written representations relating to its refusal of access. It expressed its continued reliance on the exemptions cited above, and slightly modified its position as to which provision was relied upon for each portion of the record.

[9] On May 23, 2014, in the course of its investigation, the Commissioner wrote to PCO, pursuant to paragraph 35(2)(b) of the Act, to ask for further representations in support of its refusal of access, and regarding how it exercised its discretion. The letter emphasized that the burden fell on PCO to demonstrate that the information at issue was covered by the exemptions relied upon and that, where necessary, it exercised its discretion in a reasonable manner.

[10] On June 13, 2014, PCO responded to the Commissioner's letter, confirming its reliance on the exemptions cited, and explaining how it had weighed factors for and against disclosure when exercising its discretion.

[11] On March 23, 2015, the Commissioner informed Prime Minister Harper, under subsection 37(1) of the Act, of the results of her investigation. In this letter, she explained why

she felt that the complaint at issue was well-founded, and recommended that PCO facilitate partial release of the responsive records.

[12] On May 8, 2015, PCO responded that, having looked at the report, it remained convinced that the exemptions of sections 19, 21(1)(a) and 23 of the Act applied, and that it had reasonably exercised its discretion to refuse disclosure. The letter also mentioned that, following a reassessment of the application of section 25 of the Act, it was concluded that further information, such as signatures, dates, and names, could be released.

[13] On July 24, 2015, a record of decision for the final disclosure package was signed on behalf of PCO, approving mandatory exemptions under subsection 19(1) and discretionary exemptions under sections 21(1)(a) and 23 of the Act.

[14] On September 11, 2015, the Commissioner filed with the Federal Court an application for judicial review of PCO's decision. This application was made against the Prime Minister of Canada.

II. The Federal Court decision

[15] The application Judge determined that the standard of review was correctness for reviewing the exemptions applied by PCO, and reasonableness for the exercise of any residual discretion by PCO (Reasons at para. 3).

[16] With respect to section 19 of the Act, the Judge concluded that, insofar as the information at issue - that is information regarding [redacted] - related to "discretionary financial benefits", it fell within one of the exceptions to the exemption for "personal information" as defined in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 [*Privacy Act*] (at para. 9). The Judge thus rejected the Prime Minister's arguments that [redacted] was not a benefit (at paras. 10-16), that it was not discretionary (at paras. 17-22), and that for these reasons the information pertaining to the alleged benefits should not be released.

[17] Concerning paragraph 21(1)(a) of the Act, the Judge concluded that while documents containing advice and recommendations to a government institution are exempt from disclosure, their factual basis is not (at para. 26). The "factual portions" of the records thus can, according to the Judge, be severed from the rest and disclosed (at para. 27). These include the following information:

- Description of [redacted];
- Decisions taken [redacted].

[18] As for the Prime Minister's decisions, the Judge held that they do not constitute advice or recommendations and that they can therefore be disclosed (at para. 27).

[19] The Judge also found that PCO had reasonably exercised its discretion not to disclose the information covered by the exemption under paragraph 21(1)(a) of the Act (at para. 30). While the factors favouring disclosure were not explicitly identified in its analysis, whereas the factors against disclosure were, the Judge was confident that they were implicitly considered (at para. 30). It would be a "somewhat artificial exercise", the Judge wrote, "for those senior officials to set out explicitly the factors favouring public disclosure" (at para. 31).

[20] As for section 23 of the Act, the Judge agreed with the Commissioner that some of the information withheld by the PCO "does not fall within the scope of solicitor-client privilege" (at para. 34). This conclusion was based on the observation that some portions of this information, which includes [redacted], "did not involve communications … relating to the provision of legal advice that was intended to be confidential" (*Ibid*). Relying on the decision of the Supreme Court in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 [*Solosky*], the Judge concluded that these portions of the record were thus not privileged. Regarding the documents which, according to the Judge, clearly fell within the privilege, he was "satisfied that PCO reasonably exercised its proper discretion not to disclose them" (at para. 35). Here again, the factors favouring disclosure were said to have been implicitly considered.

[21] On October 13, 2017, both the Prime Minister and the Commissioner appealed from this judgment.

III. Issues

[22] The six main questions raised by the two appeals can be summarized as follows:

A. What is the applicable standard of appellate review?

B. Was PCO authorized to refuse the disclosure of the records based on paragraph 21(1)(a) of the Act?

C. Was PCO authorized to refuse the disclosure of the records based on section 23 of the Act?

D. To the extent that PCO was authorized to refuse the disclosure of the records based on either sections 21(1)(a) or 23 of the Act, did it reasonably exercise its discretion not to disclose these records?

E. Was PCO authorized to refuse the disclosure of the records based on subsection 19(1) of the Act?

F. Did PCO reasonably exercise its discretion not to disclose the information at issue under subsection 19(2) of the Act?

[23] These questions will be considered in turn.

IV. Analysis

A. *What is the applicable standard of appellate review?*

[24] There has been some uncertainty in this Court as to the applicable standard of appellate review to be applied to a reviewing court's findings on the applicability of an exemption to the right of access under the Act. This confusion stems from the apparent inconsistency resulting from the decisions of the Supreme Court in *Merck Frosst Canada Ltd. v. Canada*, 2012 SCC 3,

[2012] 1 S.C.R. 23 [*Merck Frosst*], and in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*].

[25] In *Merck Frosst*, the Supreme Court unanimously held that a Federal Court decision pertaining to the application of an exemption under the Act ought to be reviewed pursuant to the framework set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Justice Deschamps (concurring with the majority on this issue) explained that this exception to the "classic process" of judicial review stems from the peculiarities of the review process provided for in section 44 of the Act. She mentioned, notably, Parliament's intent "to set up an independent review process", the lack of "adjudicatory powers" afforded to the federal Commissioner, the fact that the government's opinion was not authoritative, as well as the Federal Court's role as "first impartial gatekeeper" (at paras. 249-250).

[26] Slightly more than a year after *Merck Frosst*, the Supreme Court rendered its decision in *Agraira*. Writing for a unanimous Court, Justice LeBel adopted the reasoning of this Court in *Telfer v. Canada Revenue Agency*, 2009 FCA 23 [*Telfer*], and found that the proper approach on an appeal from a judgment of a reviewing court deciding an application for judicial review of an administrative decision "is simply [to ask] whether the court below identified the appropriate standard of review and applied it correctly" (*Telfer* at para. 18, quoted with approval by Justice LeBel at para. 45 of his reasons in *Agraira*). While *Agraira* was admittedly decided in the context of immigration law, there is nothing in Justice LeBel's reasons suggesting, either explicitly or by implication, that his approach is to be confined to the facts of that case and should not find application more broadly whenever an appeal court deals with the decision of a

reviewing court sitting on judicial review (indeed, *Telfer* was an appeal from a decision of the Federal Court sitting on judicial review of a ministerial decision made pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*Income Tax Act*]).

[27] As pointed out by the parties, these two decisions have given rise to seemingly conflicting decisions of this Court as to the appropriate standard of appellate review concerning the applicability of an exemption provision under the Act (see *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 at para. 18 [*Canada (Information Commissioner*)]; *Blank v. Canada (Justice)*, 2016 FCA 189 at paras. 22-24 [*Blank 2016*]; *Canada (Office of the Information Commissioner) v. Calian Ltd*., 2017 FCA 135 at paras. 26-27; *Husky Oil Operations Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al.*, 2018 FCA 10 at paras. 9-17, 59 and 61 [*Husky Oil*]; *Suncor Energy Inc. v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al.*, 2018 FCA 11 at paras. 14 and 26).

[28] There is no need to rehash the diverging views on the matter nor to restate the position that I have already expressed in earlier decisions. I remain of the view that on appeal from a decision of the Federal Court disposing of an application for judicial review, the proper role of this Court is to focus on the administrative decision, or, to use the colloquial expression of Justice Deschamps in *Merck Frosst*, to "[step] into the shoes" of the lower court (at para. 247; *Husky Oil* at paras. 9-17). In the administrative law context, it is only in situations where the issues raised in appeal relate to decisions made by a judge of the Federal Court (such as decisions pertaining to mootness or prematurity, admissibility of evidence and remedy), as

opposed to a judge's review of a decision made by an administrative decision-maker, that the applicable standard of appellate review will be the one set out in *Housen*.

[29] I readily acknowledge that the debate is far from over, and could eventually become academic if Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2017, s. 21 (as passed by the House of Commons on December 6, 2017) comes to be adopted (since a new section 44.1 would provide, "for greater certainty", that an application under sections 41 or 44 will be the subject of a *de novo* review).

[30] There is no dispute here that, assuming the *Agraira* framework applies, the Judge appropriately identified the correctness standard in deciding whether the exemptions claimed by the Prime Minister applied (*Blank 2016* at para. 24; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paras. 21-22 [*PM Agendas*]: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 at paras. 28-42 [*Telezone*]; *Blank v. Canada (Justice)*, 2010 FCA 183 at paras. 16-17 [*Blank 2010*]). I am comforted in that view by the fact that one of the main contextual factors favouring a more deferential approach - the expertise of the decision-maker - is lacking here. As previously noted by this Court, it is not at all clear that the Prime Minister and the Ministers, even with the assistance of the specialized units tasked with the processing of access to information requests, have greater expertise than the Court in dealing with statutory exemptions. I believe that the importance of an independent scrutiny of access refusals militates strongly in favour of an exacting standard of review. While decided prior to *Dunsmuir*, I can only reiterate the views of

then Chief Justice Richard in *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, 2003 FCA 257 at paragraph 13:

> Since the Minister has no greater expertise than the Court, a less deferential standard of review is warranted. The Minister, through the specialized departmental unit referred to as the Access Office, does have expertise in responding to access to information requests. However, the Access Office has no more expertise than the Court which often interprets and applies statutory exemptions. The Court is better skilled in balancing the public's right to disclosure against the individual's right to confidentiality. Further, as Evans J. aptly explained in [*Telezone*] at para. 36: "...if the Court were to confine its duty...to review ministerial refusals to access requests by deferring to ministerial interpretations and applications of the *Act*, it would, in effect, be putting the fox in charge of guarding the henhouse." The greater expertise of the Court supports less deference.
>
> (See also *PM Agendas* at paras. 21-22; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paras. 14-19; *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (C.A.) at para. 13.)

[31] I hasten to add that there is no debate between the parties with respect to the applicable standard of review to the Judge's findings on the exercise of discretion by the Prime Minister to either disclose or refuse to disclose exempted information. Discretionary decisions of administrative decision-makers are to be reviewed on a standard of reasonableness, and this is the standard that the Judge applied (see *Blank 2016* at para. 24; *Husky* at paras. 17 and 62).

[32] In the analysis below, the *Agraira* framework will be applied in the manner described above. The role of this Court, therefore, is to determine whether the Judge properly applied these standards.

B. *Was PCO authorized to refuse the disclosure of the records based on paragraph 21(1)(a) of the Act ?*

[33] The Prime Minister argues that some of the information severed by the Judge as being purely factual either contains normative elements of advice that should remain exempt from disclosure, is intertwined in the analysis for consideration [redacted], or cannot reasonably be severed without directly or indirectly revealing exempt information. The Prime Minister also claims that the reasons of the Judge do not spell out clearly why certain pieces of information were severed, and that they are inconsistent with respect to what information is considered purely factual.

[34] It has been repeated more than once that the purpose of the Act is to strike a balance between democracy and effective governance. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (at para. 61), Justice La Forest (dissenting but not on this point) emphatically stressed that the overarching purpose of access to information legislation is to facilitate democracy, first by ensuring that citizens have the necessary information to participate meaningfully in the democratic process, and secondly by making sure that politicians and bureaucrats are accountable. More recently, the Supreme Court unanimously reaffirmed that rationale, stating in its opening paragraph of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 [*Criminal Lawyers' Association*]:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.
>
> (See also *PM Agendas* at paras. 15 and 78-83.)

[35] This balancing act finds expression in subsection 2(1) of the Act, which sets out the purpose of Parliament in the following terms:

2 (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	2 (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[36] The right to access created to achieve this purpose is contained in subsection 4(1) of the Act:

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	a) les citoyens canadiens;
…	…
has a right to and shall, on request, be given access to any record under the control of a government institution.	

[37] Though not absolute (see *Criminal Lawyers' Association* at para. 35; *Rubin v. Canada (Clerk of the Privy Council),* [1994] 2 F.C. 707 at p. 712 (C.A.), affirmed [1996] 1 S.C.R. 6), the right of access is generally interpreted liberally in accordance with a purposive interpretation and

the specific exceptions provided for in sections 13 to 26 of the Act receive a narrow construction (*Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71, [2002] 3 S.C.R. 661 at para. 18). There is a presumption of a right of access, and the government institution opposing disclosure bears the burden of establishing that the records at issue fall within one of the exemptions under the Act (see section 48 of the Act; *PM Agendas* at para. 22). Moreover, section 25 of the Act specifies that, where a request is made for access to a record that the institution is authorized to refuse to disclose because of the information or material it contains, there is a duty on the institution to disclose "any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information".

[38] It is with these principles in mind that I will now turn to the various exemptions claimed by the Prime Minister, the first of which being the exemption for "advice or recommendations developed by or for a government institution or a minister of the Crown" (paragraph 21(1)(a) of the Act). The rationale behind that exemption has been aptly described by Justice Evans (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (C.A.):

> [30] … To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> [31] It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.

[39] This reasoning was explicitly endorsed by the Supreme Court in *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3 at para. 44 [*John Doe*], albeit in the context of the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Writing for the Court, Justice Rothstein added that requiring the disclosure of such advice or recommendations would be antithetical to the political neutrality of the civil service in Canada and could lead to self-censorship (at para. 45).

[40] The words "advice" and "recommendation" are not defined in the Act. The distinction between the two concepts is not readily apparent, although the former must have a distinct meaning and would appear to be broader than the latter. Justice Evans found as much in *Telezone* (at para. 50), and the Supreme Court endorsed that approach in *John Doe* (at para. 24). It would appear that a "recommendation" points to a suggested course of action that may or may not be accepted by the person being advised, whereas "advice" will not necessarily urge a specific course of action but could encompass a range of options with pros and cons for each of them without expressly advocating for one or the other (*Telezone* at paras. 61-64; *John Doe* at paras. 25-28). As broad as the term "advice" may be, however, it clearly does not encompass information of a largely factual and objective nature (*John Doe* at para. 26). Information of that nature must be severed and disclosed whenever reasonably practicable in accordance with section 25 of the Act.

[41] The Prime Minister agrees that paragraph 21(1)(a) of the Act only exempts opinion, policy or normative elements of advice and does not extend to the facts on which it is based, but goes on to claim that "[m]ost internal documents that analyze a problem, starting with an initial

identification of a problem, then canvassing a range of solutions, and ending with a specific recommendation are still likely to be caught within [subsection] 21(1), notwithstanding their factual components" (Prime Minister's Appellant Memorandum of Fact and Law at para. 66). The Judge rejected that argument, and properly so, as it goes much too far and is not in keeping with the rationale underlying that provision of the Act. The categories of information found to be severable by the Judge (information such as a description of [redacted], the fact that [redacted], the identity of [redacted], and the decisions taken [redacted]) are clearly of a factual nature and would not directly or indirectly reveal exempted information.

[42] For example, the information in the Memorandum to the Prime Minister dated July 10, 2013, [redacted]. While the Clerk slightly reformulated [redacted] in his Memorandum, he clearly conveys the same objective information and is not offering advice or recommendation; moreover, it is not intertwined in the analysis for consideration by the Prime Minister, and as such it can reasonably be severed from the record.

[43] The same is true of the information found in the second and third bullets in the Memorandum to the Clerk, dated August 6, 2013, pertaining to the fate of [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 208). This is clearly factual and objective information that is devoid of any normative element.

[44] I am of the same view with respect to the information contained in the second bullet of the Memorandum to the Clerk dated July 2, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 222). Here, the information at issue is an enumeration, in the Clerk's own words, of [redacted] considered at the time of the making of the Memorandum. Once again, no recommendation or advice is offered here; it is merely a summary of the arguments made by [redacted], without any gloss. This is to be contrasted with the third bullet in the same Memorandum, where the author expressed the views of the Deputy Secretary to the Cabinet and Counsel to the Clerk with respect to [redacted]. The information in the second bullet of the July 2 Memorandum is quite different from that information, and from the one considered by the Court in the following excerpt of *Telezone*:

> [63] … a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They cannot be characterized as merely informing the Minister of matters that are largely factual in nature. Nor do I think that the use in the French text of paragraph 21(1)(a) of the word "*avis*", which is generally translated into English as "opinion", conveys a narrower meaning in this context than the word "advice" in the English version.

[45] When reading the second bullet of the above-mentioned Memorandum, there is not the slightest hint as to the writer's opinion regarding what the Clerk should do or how [redacted] should be treated. The advice or recommendation is fully set out in the third bullet, where the writer addresses in turn each of [redacted]. The second bullet is completely neutral and reads as a faithful and objective description of [redacted] submissions, without even drawing attention to what could be considered the most salient or persuasive of his arguments.

[46] The only information that cannot be considered purely factual and that should have been exempted by the Judge is that found in the third bullet of the summary that is part of the Memorandum to the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 212). That piece of information clearly "relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised" (*John Doe* at para. 23). Indeed, almost identical wording found in the body of the Memorandum has been redacted by the Judge (see Appeal Book, vol. 2, tab 6(11), p. 214, second to last bullet). I note as well that the Commissioner agrees with the Prime Minister that this information constitutes a recommendation under paragraph 21(1)(a) of the Act; although not binding on this Court, this agreement is further support for the view that it ought to have been redacted by the Judge.

C. *Was PCO authorized to refuse the disclosure of the records based on section 23 of the Act?*

(1) General Principles

[47] Section 23 of the Act recognizes another discretionary exemption to the broad section 4 right to access, stating that a government institution "may refuse" the disclosure of any record containing "information that is subject to solicitor-client privilege".

[48] The common law recognizes two types of solicitor-client privilege: legal advice privilege and litigation privilege. In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, the Supreme Court confirmed that the phrase "solicitor-client privilege" in section 23 of the Act refers to both legs of the privilege (at para. 4). In the case at bar, the Prime Minister relied only upon the legal advice privilege to exempt some of the information in the 27 pages of records at issue. The Judge accepted that some of the information that the Prime Minister sought to shield from disclosure was privileged, but for the most part found that the documents did not involve solicitor-client communications (Reasons at para. 34).

[49] The legal advice privilege attaches to all communications between a solicitor and his or her client for the purpose of obtaining or giving legal advice. The test for determining whether a document or communication is subject to that privilege was enunciated by the Supreme Court in *Solosky*. Three conditions must be met for a document to be considered as legal advice giving rise to the privilege: 1) there must be a communication made in confidence between a lawyer and his or her client; 2) that communication must be for the purpose of seeking or giving legal advice; and 3) the parties must have intended the communication to be confidential (*Solosky* at p. 837; *Blank 2016* at para. 44).

[50] The Supreme Court has often reiterated the critical importance of the solicitor-client privilege to the proper functioning of our legal system, and has gone as far as stating that it should only be set aside in the "most unusual circumstances" (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at para. 17; see also *Alberta (Information and Privacy Commissioner) v. University of Calgary)*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 34). That being said, a party asserting that a document is privileged bears the onus of establishing the privilege; this onus requires more than a bald assertion of privilege and will only be met if there is sufficient evidence to show that each of the three criteria of the *Solosky* test are met (see *Canada (Attorney General) v. Williamson*, 2003 FCA 361 at paras. 11-13).

[51] Solicitor-client privilege applies to communications that take place within what the case law refers to as a "continuum of communication". This notion was considered as follows by this Court in *Canada (Information Commissioner)*:

> [27] Part of the continuum protected by privilege includes "matters great and small at various stages … includ[ing] advice as to what should prudently and sensibly be done in the relevant legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client"…
>
> [28] In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice" … If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege - namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

[52] The Prime Minister argues that the Judge was right to conclude that a letter dated July 31, 2013 [redacted] in various

documents, were exempt from disclosure under section 23 of the Act. However, the Prime Minister is of the view that the Judge failed to apply the legal test to determine if a continuum of communications existed to protect other parts of the record; had he done so, it is submitted, he would have found the Clerk's Memorandum to the Prime Minister (Appeal Book, vol. 2, tab 6(11), at pp. 212-215), the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), the two draft letters attached to the Memorandum (Appeal Book, vol. 2, tab 6(11), at pp. 217, 219) and a four-page letter dated June 18, 2013 from [redacted] to the Clerk [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 225-228), to be covered by the privilege. Needless to say, the Commissioner takes the opposite view on all of these documents.

(2) The [redacted] Letter

[53] I shall now turn to each of these documents, starting with the letter sent to the Clerk by [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 210-211). The Judge exempted that letter, without giving much explanation as to why he came to that determination. Counsel for the Commissioner argues that the Judge erred in doing so, since the letter does not meet the *Solosky* test and cannot be considered as having been routed to PCO's legal counsel for the purpose of providing the Clerk with legal advice.

[54] The second prong of this argument can be quickly disposed of. Had the letter [redacted] been sent directly to Simon Fothergill, in his capacity as counsel for the Clerk, or forwarded by the Clerk to PCO Legal Operations, that letter could plausibly have been considered as part of the legal advice ultimately given with respect to [redacted]

[redacted]. Since legal advice must include ascertaining or investigating the facts upon which the advice will be rendered, that letter could be considered as underlying the legal advice given to the Clerk and therefore as a communication that occurred within the framework of the solicitor-client relationship between the Clerk, [redacted], and his legal advisors within PCO. [redacted]

[55] The problem with this line of argument is that PCO officials acknowledged that [redacted] letter to the Clerk existed not only as an attachment to confidential communications between PCO's legal counsel and the Clerk, but also in the form of a stand-alone record under the control of the PCO. As such, [redacted] letter must be examined as an independent record, outside of the continuum of confidential communications between the Clerk and PCO's legal counsel. From that perspective, the mere fact that the letter was subsequently conveyed to PCO's Legal Operations for the purpose of obtaining legal advice regarding [redacted] does not retroactively make it privileged. A document that is not clothed with privilege does not become privileged simply because it goes into the hands of a lawyer (*Redhead Equipment v. Canada (Attorney General)* 2016 SKCA 115 at para. 33 (*Redhead*); also see Adam Dodek, *Solicitor-Client Privilege* (Markham, Ont.: Lexis Nexis Canada) 2014 at p. 53).

[56] What, then, of the argument that the letter from [redacted] does not meet the *Solosky* test because it was not a communication between [redacted] and his client, it was neither seeking nor providing legal advice, and it was not a confidential communication between

a lawyer and his client? Relying on *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590 [*Descôteaux*], the Prime Minister responded that the letter from [redacted] to Mr. Fothergill (directly and through the Clerk) was a communication that occurred within the framework of the solicitor-client relationship between [redacted].

[57] I agree with the Commissioner that the facts in this appeal are somewhat different from those before the Supreme Court in *Descôteaux*, where [redacted]

[58] In the case at bar, there is no doubt that [redacted] when the latter wrote to the Clerk and Mr. Fothergill. However, I do not think that this is fatal to the Prime Minister's claim that the letter from [redacted] occurred within the framework of the latter's solicitor-client relationship with [redacted].

[59] In my view, the information communicated [redacted] in support of [redacted] is as much confidential as information disclosed

[redacted], and should therefore be privileged. I appreciate, as pointed out by the Commissioner, that [redacted]. However, I would note that [redacted] because of the urgency of the matter, and has asked that [redacted]

> [redacted]
>
> (Appeal Book, vol. 4, tab 7(E) at p. 530)

[60] More importantly, the communication from [redacted] was clearly related to obtaining legal advice. I agree with the Prime Minister [redacted]. As such, the Clerk's role [redacted] was central to the solicitor-client relationship [redacted] and must for that reason fall within the framework of a solicitor-client relationship. It does not matter that the information was provided to the Clerk [redacted].

[61] Moreover, the rationale behind the solicitor-client privilege is the necessity to ensure the confidentiality of the communications between a person and his or her lawyer and, thereby, the promotion of the interests of justice (*Descôteaux* at pp. 883, 893). [redacted] In both cases, the disclosure of the information would reveal privileged information about the solicitor-client relationship, and could lead directly or indirectly to the revelation of confidential solicitor-client communications [redacted]. It would permit inferences to be drawn about the instructions given, and reveal or permit accurate inferences to be drawn about the precise legal services provided.

[62] For all of the above reasons, I am of the view that the [redacted] letter ought to fall within the ambit of solicitor-client privilege; such a finding is only a logical (and incremental) extension of the [redacted] line of cases, pursuant to which all communications made within the framework of the solicitor-client relationship must be kept confidential. [redacted]

[redacted] The Judge therefore correctly redacted the entirety of that letter. Not recognizing the application of the solicitor-client privilege in the case at bar likely would have a chilling effect on [redacted], and would run contrary to the rationale underlying this privilege.

(3) [redacted]

[63] The second set of documents to be examined comprises those wherein the [redacted] have been ordered redacted by the Judge. This information is found in the letter from [redacted] to the Clerk (Appeal Book, vol. 2, tab 6(11), at pp. 225 and 227), in the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), in the email exchanges between [redacted] and Mr. Fothergill (Appeal Book, vol. 2, tab 6(11), at pp. 229-234), and in the letter from the Clerk to [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 209).

[64] I agree with the Commissioner that [redacted], which were in part publicly known, were not confidential information made for the purposes of receiving legal advice and should therefore not be exempt under section 23 of the Act. Contrary to the accounting records of notaries and lawyers at issue in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 at para. 74, or the billing records of the Legal Services Society in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, the portions of the documents at issue containing the [redacted] in the present case are not communications within the framework of the solicitor-client relationship. In addition, [redacted] in the case at bar do not reveal

confidential information about the nature of the legal advice because this information was publicly known. Nor do they include information provided for the purpose of obtaining legal advice. Indeed, a communication revealing [redacted], and nothing else, will rarely be considered legal advice exempted under section 23 of the Act (see *Canada (Minister of National Revenue) v. Revcon Oilfield Construction Inc.*, 2015 FC 524 at para. 25, affirmed 2017 FCA 22 at para. 3). As a result, the Judge erred in finding that [redacted] were covered by the section 23 exemption.

(4) Memorandum from the Clerk to the Prime Minister

[65] Turning now to the Memorandum from the Clerk to the Prime Minister regarding the [redacted] (Appeal Book, vol. 2, tab 6(11), at pp. 212-215), it is not clear from the Judge's terse reasons in relation to that matter whether he rejected the notion that the Clerk is part of the solicitor-client chain of communication or whether he did not accept the Memorandum as containing legal advice. Be that as it may, I believe the Judge erred in that respect.

[66] The evidence establishes that the Clerk was acting as an "agent" of the client, the Prime Minister, when he sent the Memorandum providing legal advice on the [redacted]. The Prime Minister, [redacted], was entitled to seek advice from officials, including legal advice, before making a decision ([redacted]). According to the uncontradicted affidavit of Monique Oliveira, a senior paralegal in the Legal Operations unit at PCO, an assigned counsel ([redacted]) prepared his legal advice and

marked it as solicitor-client privileged. That advice was then reviewed by the Director of Legal Operations and the Assistant Secretary to the Cabinet, in conformity with standard practice at PCO and with departmental reporting lines. The legal advice was then signed off by the Clerk and communicated to the [redacted] Prime Minister Harper (see Oliveira affidavit, Appeal Book, vol. 5, tab 8, pp. 652-654, at paras. 15, 19-20).

[67] There is no doubt that the Clerk was acting, to quote from the Court of Appeal for Saskatchewan in *Redhead*, as a "channel of communication between solicitor and client" (at para. 45). In this respect, the Memorandum constitutes a communication made "in furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor" (*Ibid*).

(5) Decision Annex

[68] As for the Decision Annex, which is a brief statement signed by Prime Minister Harper [redacted], the Prime Minister relies on the decision of this Court in *Canada (Information Commissioner)* for the proposition that instructions from a client on how to proceed based on the legal advice received by counsel shall be considered to form part of the protected continuum of legal advice. In my opinion, this principle finds no application in the case at bar.

[69] The Prime Minister's decision does not fall within the continuum of communications between solicitor and client for the simple reason that we are past the stage of seeking and obtaining legal advice. In my view, the Decision Annex is not the kind of document this Court

had in mind when speaking of instructions on "how certain proceedings should be conducted" (*Canada (Information Commissioner)* at para. 29). Rather, we are now at the stage where the client has "start[ed] to act on the advice for the purposes of conducting [his] regular business" and the information no longer constitutes legal advice (at para. 33). The communication of that information would clearly not, to borrow the words of Justice Stratas in the above-mentioned case, "undercut the purposes" behind the privilege (at para. 28).

[70] Moreover, I agree with the Commissioner that even if the Decision Annex was covered by the legal advice privilege, it could be said to have been waived by the Prime Minister. When he communicated his decision [redacted], who are third parties in regard to the solicitor-client relation here, he clearly renounced any possibility to claim solicitor-client privilege over that communication.

(6) Draft [redacted] Letters

[71] Also attached to the Memorandum to the Prime Minister were two draft letters prepared by counsel, which reflected the legal advice [redacted]. Neither the Judge's reasons nor his Appendix refer to these two draft letters. In my view, these two letters (which were not ultimately sent by the Prime Minister) are clearly communications made between solicitor and client; when sharing those draft letters prepared by counsel, the Clerk was clearly acting as an agent of the client, the Prime Minister. We are therefore dealing, as was the case with the Clerk's Memorandum, with a communication made "between solicitor and client" (*Solosky* at p. 837).

[72] These two draft [redacted] letters also meet the second requirement of the *Solosky* test insofar as they are within the continuum of communications which entail the seeking or giving of legal advice. In *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.), this Court has defined as follows the scope of the "legal advice" notion:

> [8] … The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context. (Emphasis added.)
>
> (See also *Sheldon Blank & Gateway Industries Ltd. v. Canada (Minister of the Environment)*, 2001 FCA 374 at para. 19.)

[73] In the present case, the draft response letters reflect the legal advice [redacted]. Disclosing them could therefore have the effect of revealing the nature of the legal advice that was given by counsel. As a result, they ought to be protected by solicitor-client privilege.

(7) The [redacted] Letter

[74] The last document to be examined is the four-page letter dated June 18, 2013 sent from [redacted] to the Clerk [redacted]. The Judge did not explicitly deal with that letter, but obliquely referred to it when determining that [redacted] did not fall within the scope of solicitor-client privilege (Reasons at para. 34). The Judge gave no explanation as to why this letter should receive a different treatment than the letter containing similar information sent [redacted], to Mr. Fothergill, counsel to the Clerk.

[75] In my opinion, the two letters should be treated similarly with respect to the solicitor-client privilege. The information disclosed by [redacted] to the Clerk is [redacted] [redacted]. There is no principled difference between these two communications, and the rationale set out above in paragraphs 59 to 62 of these reasons as to why the latter is privileged, applies with equal force to the former. In both cases, the information communicated is of the same nature as that found to be protected in *Descôteaux*, and its disclosure could lead to inferences being drawn about the legal opinions sought and received. Accordingly, the [redacted] letter should have been exempted from disclosure under section 23 of the Act.

(8) Severance

[76] Before turning to the reasonableness of PCO's exercise of its discretion not to disclose certain records falling under paragraph 21(1)(a) or section 23 of the Act, I shall briefly address the Prime Minister's argument that the Judge improperly severed solicitor-client privileged records. Counsel argues that the Judge erred in severing large portions of the two Memoranda to the Clerk (dated July 2, 2013 and August 6, 2013 and found respectively at pp. 222 and 208 of the Appeal Book, vol. 2, tab 6(11)), despite having seemingly proceeded on the basis that they were exempt from disclosure under section 23 of the *Act*.

[77] Where a request is made to a government institution for access to a record that it is authorized to refuse to disclose, section 25 of the Act requires the head of the institution to disclose "any part of the record that does not contain, and can reasonably be severed from any

part that contains, any … information or material" covered by an exemption. In other words, this provision "imposes a duty to sever portions of documents which do not contain the information for which an exemption is claimed and which can reasonably be severed without disclosing the exempt information" (*Canada v. Blank*, 2007 FCA 87 at para. 2 [*Blank 2007*]).

[78] While section 25 seemingly applies to every provision of the Act, it must nevertheless be modulated to take into account the full extent of the solicitor-client privilege. In *Blank 2007*, this Court considered the interplay between sections 23 and 25 of the Act in the following terms:

> [7] Section 25…does not require the severance from a record of material which forms part of a privileged solicitor-client communication. When considering whether disclosure has been wrongly refused, a Judge should not approach a record containing a privileged solicitor-client communication by asking whether disclosure of parts of the communication would cause harm. Such an approach would undermine a client's confidence that communications made for the purpose of requesting or giving legal advice are not subject to disclosure without the client's consent, and would deter the frankness required in this context.
>
> …
>
> [13] …[S]ection 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.
>
> (See also *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 268 at pp. 296-298 (T.D.).)

[79] On that basis, I agree with the Prime Minister that the first two bullets and first sentence of the third bullet of the July 2, 2013 Memorandum (Appeal Book, vol. 2, tab 6(11), at p. 222) and the first four bullets of the August 6, 2013 Memorandum (Appeal Book, vol. 2, tab 6(11), at p. 208), should have been redacted like the rest of these documents. The portions of the record in

question "do not contain extraneous matter, such as policy advice or personal topics" (*Blank 2007* at para. 12). Rather, they are information that, if disclosed, "would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought" (*Blank 2007* at para. 13). They are, to quote this Court in *Sheldon Blank & Gateway Industries Ltd. v. Canada*, 2001 FCA 374, "factual statements" that are "inextricably linked to the legal issue under discussion" and should thus be treated as part of the privileged communication (at para. 22).

D. *To the extent that PCO was authorized to refuse the disclosure of the records based on either sections 21(1)(a) or 23 of the Act, did it reasonably exercise its discretion not to disclose these records?*

[80] The Commissioner argues that the discretion accorded by paragraph 21(1)(a) and section 23 of the Act was not reasonably exercised by PCO officials, since the factors favouring disclosure were not explicitly identified when the decision to refuse disclosure was made. In that context, it is contended, the Judge similarly could not come to the conclusion that the discretion was reasonably exercised since he could not determine how the factors for and against disclosure were balanced.

[81] Before addressing that submission, it is worth reproducing what the Judge wrote in this respect:

> [30] The Commissioner has not persuaded me that the Prime Minister's discretion was improperly exercised. I find that a variety of factors were taken into account, including the harm that would result from disclosure, the sensitive and personal nature of the information, and the importance of the information to the Crown. While factors favouring disclosure were not explicitly set out, they were implicit in PCO's analysis. I am satisfied, in these circumstances, that the senior officials charged with balancing the factors for and against disclosure would be fully aware

> of the significant public interest in the release of information about a matter of intense public discourse.
>
> [31] In my view, it would be a somewhat artificial exercise for those senior officials to set out explicitly the factors favouring public disclosure. I am confident that they would be fully aware of the overarching public interest that would generally support release of information in government hands, especially in respect of a matter of considerable public debate, and that they would premise their analysis on the assumption that important factors tending toward public disclosure were clearly present. Where, as here, the analysis focuses mainly on the factors that militate against disclosure, one should not conclude that the factors favouring disclosure were not weighed in the balance.

[82] Having carefully considered the record that was before the Judge, I am of the view that he could reasonably infer that all the factors were duly considered and that it would be inappropriate to second-guess the PCO's discretionary decision. I wholeheartedly agree with the Commissioner that a discretion conferred by statute is never absolute, and must always be exercised consistently with the purposes underlying the grant of that discretion. It is also true, however, that courts will not lightly interfere with discretionary decisions such as the ones at issue herein (see *Blank 2016* at para. 24; *Husky* at paras. 17 and 62).

[83] In the context of the Act, the discretion that is conferred on the head of a government institution to disclose information otherwise exempted under subsection 21(1) or section 23 must obviously be exercised bearing in mind not only the factors favouring non-disclosure, but also those factors furthering the Act's underlying purpose of facilitating democracy and its operative principle of maximized public access to information. For such a decision to pass muster on judicial review, a boiler-plate declaration that the discretion was exercised and that all relevant factors have been considered will obviously not be sufficient; on the other hand, it is not necessary to provide a detailed analysis of each and every factor that has an impact on the

decision and how they were weighed against each other (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16).

[84] As this Court stated in *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 (*Leahy*), the requirement that administrative decisions be transparent and intelligible can only be met if the reasons provide basic information, and if the record before the administrative decision-maker sheds light on the reasons why the decision was made (at para. 121). At paragraph 141 of that decision, the Court elaborated on the type of information that may be required for a decision to be intelligible and transparent:

> …all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

[85] In the case at bar, the Commissioner claims that not a single factor favouring disclosure was explicitly set out in the decision refusing to disclose the requested information, and that the Judge could not properly assume that important factors tending toward public disclosure were in fact properly considered by PCO officials in the exercise of their discretion. At paragraph 69 of her Memorandum of Fact and Law as Appellant, the Commissioner gives examples of factors that favoured disclosure and that were not mentioned in the decision of PCO. These include the extent to which information was in the public domain, Canadians' significant and justified interest in [redacted]

[redacted], the high public interest in the disclosure of information pertaining to the Senate expense scandal, and the fact that the information at issue would shed additional light on speculation in the media [redacted].

[86] It is true that neither the Clerk's letter to the Commissioner dated May 8, 2015, nor the letters sent by Mr. Fothergill (who had full delegation with respect to the exercise of discretion) in February and June of 2014, went into that level of detail. They do provide, however, a lot more information than what was before the reviewing court in *Leahy*. In that case, the decision letter merely asserted the exemptions that applied without giving any further reasons, and the material in the record did not provide even the basic information outlined in the above-noted excerpt.

[87] This is to be contrasted with the situation in the case at bar. First, the May 8, 2015 letter from the Clerk to the Commissioner makes it clear that the discretion to authorize disclosure of exempted material pursuant to sections 19(2), 21(1)(a) and 23 of the Act was duly considered (Appeal Book, vol. 3, tab 6(14)). More importantly, the justification for the decision was spelled out by Mr. Fothergill in his June 13, 2014 letter to the Assistant Commissioner (Appeal Book, vol. 2, tab 6(11)). In that letter, he did not only refer to factors supporting non-disclosure, such as the expectations of individuals involved, the sensitivity of the information, the probability of injury and the limited extent to which information was already publicly available. It is clear that public interest in access to information and the principle of government transparency were also

on his mind (Appeal Book, vol. 2, tab 6(11), at pp. 204-205). He also devoted a full page of his letter to these factors (under the heading of "Public Interest") in his discussion of subsection 19(2) of the Act (at pp. 200-202). The fact that he did not repeat the same discussion in the context of paragraph 21(1)(a) and section 23 of the Act cannot be taken as an indication that he was unaware or oblivious to those considerations in the exercise of his discretion pursuant to these two provisions.

[88] Finally, an internal Memorandum by PCO officials in the Access to Information and Privacy Unit dated December 10, 2013 (Appeal Book, vol. 6, tab 9(5) at p. 1041), also reveals that public interest considerations were front and centre in the exercise of the discretion conferred by the Act. Under the heading "Factors…and probable injuries…considered in the exercise of discretion", we find the following paragraph:

> The decision-making process involves two steps. First, PCO considered whether or not [an] exemption applied to the information and concluded that it does. Secondly, PCO considered all relevant interests (including the public interest in disclosure); and considered whether all or individual parts of the record could be disclosed. With the intention of releasing as much information as possible, PCO carefully assessed the risk that disclosure of this information would incur against the public's right to disclosure. These were confidential documents that were not written with the intention of publication.
>
> (Appeal Book, vol. 6, tab 9(5) at p. 1043.)

[89] Of course, these officials did not have delegated authority to make decisions regarding disclosure under either paragraph 21(1)(a) or section 23 of the Act. The Memorandum was nevertheless transferred to PCO officials working under Mr. Fothergill's watch, and his letters to the Assistant Commissioner must be read in the context of this information.

[90] In short, there is sufficient evidence that PCO considered all the relevant factors in exercising its discretion to withhold information, including the public interest in access to information and the principle of government transparency, and there was a sufficient basis for the Judge to carry out his role and determine that the discretion was exercised in a reasonable manner. The decision of PCO to refuse disclosure was both transparent and intelligible.

E. *Was PCO authorized to refuse the disclosure of the records based on subsection 19(1) of the Act?*

[91] Section 19 of the Act holds that, as a general rule, the disclosure of "any record … that contains personal information" as defined in section 3 of the *Privacy Act* shall be refused by the government institution. The latter provision broadly defines this notion as "information about an identifiable individual that is recorded in any form". These opening words are followed by a list of examples of what constitutes personal information, as well as a list of exceptions. Among these exceptions is the information described in paragraph (l) of the definition of "personal information" in section 3 of the *Privacy Act*:

> (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…
>
> l) des [renseignements concernant 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…

[92] The only issue in this appeal is whether that paragraph applies. The Judge came to the conclusion that the information in issue relates to a financial benefit, since [redacted] has a substantial monetary value (Reasons at paras. 10-15). [redacted]

[redacted]; in the Judge's view, this amounts to a benefit of a financial nature.

[93] He also held that granting such benefit is discretionary, [redacted]

[94] The Judge also made the following critical finding:

> [15] In addition, to my mind, [redacted] is a financial benefit. The rationale behind the benefit here is fairness - ensuring that public servants [redacted]. However, the fact that fairness animates [redacted] does not mean that [redacted] does not provide public servants with a financial benefit. In the absence of [redacted], public servants could potentially [redacted]. Instead, [redacted]. In my view, that is a financial benefit.

[95] The phrase "discretionary benefit of a financial nature" is not defined in the *Privacy Act*, and has not received much judicial attention. In one of the very few cases discussing that exception, *Sutherland v. Canada (Minister of Indian and Northern Affairs)*, [1994] 3 F.C. 527, Justice Rothstein (then at the Federal Court) adopted a dictionary definition of "benefit",

referring to *The Shorter Oxford English Dictionary* (3rd ed.) and its description of that word as a "favour", "gift", "advantage" or "profit".

[96] I agree with the Commissioner that there is no need to resort to the case law interpreting the term "benefit" in the *Income Tax Act.* As the Commissioner rightly points out, the Act and the *Privacy Act* are far from pertaining to the same subject, or sharing the same purpose, as the *Income Tax Act*. What constitutes a "benefit" for the purpose of calculating taxable income has no bearing on what constitutes a "benefit of a financial nature" in the context of the *Privacy Act*. One should therefore be wary of transposing the meaning of words from one act to the other.

[97] I also accept the Commissioner's argument that a "benefit" is not limited to a positive benefit, such as the payment of money, and that it can also be a negative benefit. In her Memorandum of Fact and Law as Respondent, the Commissioner, relying on two decisions about unjust enrichment, *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at p. 790 (*Peel*) and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 31 (*Garland*), writes that "[a] 'benefit' can also be a negative benefit, such as the avoidance of the payment of an expense" (at para. 26). Yet, this is an incomplete statement of what the Supreme Court wrote in each of these cases. What is missing is the notion that the negative benefit relates to the avoidance of the payment of an expense "which [the beneficiary] would otherwise have incurred" (*Garland* at para. 31) or "would have been required to undertake" (*Peel* at p. 790). In my view, this is a critical feature of the "benefit" to which paragraph (l) of the definition of "personal information" in section 3 of the *Privacy Act* refers.

[98] As broad as the term “benefit” may be, it cannot be interpreted in such an all-encompassing manner as to overshoot its ordinary meaning, or as bearing no relationship with the underlying purpose of the Act. A “benefit” must be something that gives an advantage to or profits the person upon whom it is conferred. To receive a benefit, a recipient must be put in a better position than he or she would otherwise have been without the benefit.

[99] The Commissioner argues that [redacted] placed them in a better financial position than they otherwise would have been placed, since ordinary citizens do not have the benefit of [redacted]. In my view, this is an erroneous analogy. [redacted] In such a case, they would clearly receive a negative benefit, [redacted]. Such a benefit would compare to other medical and dental insurance plans offered by various employers to their employees: these benefits would clearly add to the salary to which they are entitled as a compensation for the work performed.

[100] This is to be contrasted with the reimbursement of expenses that they would not incur were they not employed in a particular position, and that result directly from the performance of their duties. Relocation costs, travel expenses, and costs associated with the purchase of apparel and work uniforms, for example, could conceivably fall under that category. It would be a stretch to assimilate the payment of these items by an employer to a financial benefit for the employee. Far from being a salary increase or bonus, such payments are only meant to ensure that

employees are not negatively impacted as a result of being made liable for costs they would not otherwise incur.

[101] This approach is consistent with the specific inclusion of the granting of a licence or permit as a discretionary benefit of a financial nature under paragraph (l) of the definition of "personal information" in section 3 of the *Privacy Act*. A permit or a licence has a monetary value and provides an advantage for which an interested ordinary citizen would have to pay. The same is true of so-called "fringe benefits" often associated with employment, such as dental coverage and life insurance. On the contrary, [redacted].

[102] For the above reasons, I am of the view that the Judge erred in determining that the information in the above documents is not exempted from disclosure under subsection 19(1) of the Act. When properly construed, [redacted] does not give rise to a "benefit" of a financial nature, and the exception to the exemption for "personal information" found in paragraph (l) of the definition of "personal information" in section 3 of the *Privacy Act* therefore does not apply.

F. *Did PCO reasonably exercise its discretion not to disclose the information at issue under subsection 19(2) of the Act?*

[103] Subsection 19(2) of the Act allows for the disclosure of personal information if: "(a) the individual to whom it relates consents to the disclosure"; "(b) the information is publicly available"; or "(c) the disclosure is in accordance with section 8 of the *Privacy Act*". Having

found that the Prime Minister had not established that he was authorized to refuse disclosure based on subsection 19(1) of the Act, the Judge determined that it was not necessary to consider the applicability of subsection 19(2). Since I came to the opposite conclusion, I now have to address that issue.

[104] The Commissioner does not argue the applicability of either paragraphs (a) or (b) of that provision. [redacted] declined to consent to the release of their personal information, and the Prime Minister had directed departmental officials to protect his instructions under section 21 of the Act. As well, PCO could reasonably conclude, as it did during the Commissioner's investigation, that the limited information that was publicly available could not be released without inadvertently disclosing other non-publicly available information about the individuals.

[105] Subparagraph 8(2)(m)(i) of the *Privacy Act* provides that personal information may be disclosed "for any purpose where, in the opinion of the head of the institution, … the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". The Commissioner argues, much as she did in the context of paragraph 21(1)(a) and section 23 of the Act, that the Prime Minister's delegate did not consider one single factor favouring disclosure in exercising his discretion. For the reasons set out earlier in section D) of these reasons, I am of the view that this argument must fail. If anything, it is even more obvious, in light of the record (Appeal Book, vol. 2, tab 6(11), at pp. 200-202), that PCO took into consideration all relevant factors in exercising the discretion conferred by subsection 19(2) than it did when exercising its discretion under paragraph 21(1)(a) and section 23 of the Act.

V. Conclusion

[106] For these reasons, I would allow both the Prime Minister's appeal and the Information Commissioner's appeal in part, without costs as neither party sought them. I would therefore amend the Appendix attached to the Order of the application Judge to reflect the following conclusions:

- The information found in the third bullet of the summary that is part of the Memorandum for the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at p. 212) is covered by the exemption in paragraph 21(1)(a) of the Act;
- The information relating to [redacted] to the Clerk (Appeal Book, vol. 2, tab 6(11), at pp. 225 and 227), in the Decision Annex (Appeal Book, vol. 2, tab 6(11), at p. 220), in the email exchanges between [redacted] and Mr. Fothergill (Appeal Book, vol. 2, tab 6(11), at pp. 229-234), and in the letter from the Clerk to [redacted] (Appeal Book, vol. 2, tab 6(11), at p. 209), are not covered by the exemption in section 23 of the Act;
- The Memorandum from the Clerk to the Prime Minister dated July 10, 2013 (Appeal Book, vol. 2, tab 6(11), at pp. 212-215) is covered by the exemption in section 23 of the Act;
- The two draft [redacted] letters attached to the above-mentioned Memorandum from the Clerk to the Prime Minister (Appeal Book, vol. 2, tab 6(11), at pp. 217, 219) are covered by the exemption in section 23 of the Act;

- The letter from [redacted] to the Clerk dated June 18, 2013 (Appeal Book, vol. 2, tab 6(11), at pp. 225-227) is covered by the exemption in section 23 of the Act; and
- The information for which an exemption was claimed pursuant to section 19 of the Act should be redacted.

"Yves de Montigny"
J.A.

"I agree
D. G. Near J.A."

"I agree
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-311-17
STYLE OF CAUSE:	THE INFORMATION COMMISSIONER OF CANADA v. THE PRIME MINISTER OF CANADA
AND DOCKET:	A-313-17
STYLE OF CAUSE:	THE PRIME MINISTER OF CANADA v. THE INFORMATION COMMISSIONER OF CANADA
DATE OF HEARING:	SEPTEMBER 17, 2018
PUBLIC REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
DATED:	APRIL 24, 2019

APPEARANCES:

Patricia Boyd Richard G. Dearden	FOR THE INFORMATION COMMISSIONER OF CANADA
Catherine A. Lawrence Sharon Johnston Adrian Johnston	FOR THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Office of the Information Commissioner of Canada Gatineau, Quebec	FOR THE INFORMATION COMMISSIONER OF CANADA
Gowling WLG (Canada) LLP Ottawa, Ontario	
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE ATTORNEY GENERAL OF CANADA