

CANADA / JUDGMENT

Maydak v. Canada (Solicitor General)

2004 FC 1171

COURT

Federal Court

DECIDED

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Decision Content

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Docket: T-73-04

Citation: 2004 FC 1171

BETWEEN:

KEITH MAYDAK

Applicant

- and -

SOLICITOR GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

ROULEAU, J.

- [1] This is an application pursuant to section 41 of the Privacy Act, R.S.C. 1985, c. P-21 ("Privacy Act"), wherein the Applicant seeks access to information held in the records of the Royal Canadian Mounted Police (the "RCMP") as well as by Interpol Ottawa.

- [2] The United States of America sought the extradition of the Applicant to prosecute a violation of supervised release stemming from a 1994 fraud conviction. Ms. Chalifour, counsel for the Minister of Justice, issued an Authority to Proceed against the Applicant purportedly pursuant to s.15(1) of the Extradition Act, S.C. 1999, c. 18 ("Extradition Act"), with respect to the extradition request by the United States.
- [3] On September 19, 2003, the Applicant filed a request pursuant to the Privacy Act in which he sought access to all personal information held in the records of the RCMP or by RCMP member Daniel Bérubé, Criminal Ops, Interpol Ottawa.
- [4] On October 24, 2003, the RCMP responded to the request by providing some of the information while withholding other information under section 22(1)(a) of the Privacy Act. The Applicant was also advised that sections 19(1)(a), 19(1)(b), 19(1)(c), 22(1)(b) and 26 of the Privacy Act could also apply. As a result, on November 26, 2003, the Applicant lodged a complaint to the Office of the Privacy Commissioner for Canada.
- [5] On December 19, 2003, the Office of the Privacy Commissioner found that the complaint was not well-founded. More specifically, the Assistant Privacy Commissioner (the "Commissioner") found that s.22(1)(a) exempted the requested documents from disclosure since:

The RCMP need only demonstrate that the information at issue is less than 20 years old and that it was prepared or obtained in the course of a lawful investigation by an investigative body.... The RCMP is indeed an investigative body for the purposes of the Act and, in my view, all of the other requirements of this provision have been met as well. Therefore, I am satisfied that the RCMP had the legal authority to invoke this exemption at the time it was claimed.

- [6] The Commissioner did not comment on the validity of sections 19(1)(a), 19(1)(b), 19(1)(c), 22(1)(b) and 26 of the Privacy Act as he was of the view that section 22(1)(a) of the Privacy Act by itself justified the decision to withhold the requested information. This is the decision being challenged.
- [7] On May 7, 2004, pursuant to a motion under Rule 369 of the Federal Court Rules, 1998, brought by the Respondent, Prothonotary Hargrave issued an order that the undisclosed documents be treated as confidential and allowing them to be filed under seal for the purpose of the present judicial review.
- [8] The Applicant argues that the Commissioner by concluding that s. 22(1)(a) of the Privacy Act was applicable at the case at hand, committed a reviewable error which warrants this Court's intervention.
- [9] Indeed, the Applicant points out that, contrary to the requirements contained in s. 22(1)(a) of the Privacy Act, it does not appear that the RCMP conducted an "investigation", but merely monitored the progress and status of the extradition proceedings.

- [10] The Applicant argues that, even if the RCMP conducted an "investigation", the basis of the action neither involved the "detection, prevention, or suppression of crime", nor the "enforcement of any law of Canada or a province", such as the wording of that section requires. The Applicant underlines that the United States sought him for non-criminal supervised release violations. Since he was in custody in Vancouver during all material times, no enforcement of an arrest warrant or investigation by the RCMP as to his location occurred.
- [11] With respect to the entries made on the CPIC, the Applicant asserts that the actions taken were not investigatory in nature since the RCMP knew of the Applicant's location; that is, he was detained at the time of each entry.
- [12] Regarding the exception contained in s. 19 of the Privacy Act, the Applicant argues that it does not apply since the RCMP could not possibly demonstrate that the United States provided the information "in confidence". The Applicant asserts that the extradition matters and the facts relating thereto are public records, and the FBI's NCIC identification records and database reports are made available on payment of a fee.
- [13] Similarly, as to s. 22(1)(b), the Applicant states that the RCMP must demonstrate that disclosure would be "injurious to the enforcement of any law", and argues that the RCMP has failed to do so. Indeed, the Applicant states that since the RCMP disclosed that they placed him on the CPIC to alert police, and because the extradition proceedings were known to the Applicant at the time he made the request for information, no reasonable claim of injury to the enforcement of any law could exist.
- [14] Finally, regarding s. 26 of the Privacy Act, the Applicant notes that the RCMP may easily redact the names of any third parties.
- [15] The Respondent, on the other hand, argues that the exempted material in this matter pertains to the lawful investigation of the Applicant relating to the enforcement of the Extradition Act and thus the Commissioner correctly applied s. 22(1)(a) of the Privacy Act.
- [16] Furthermore, the Respondent argues that the institutional head of the RCMP in this case reviewed the information subject to the request and properly determined that certain portions of that material could be disclosed to the Applicant.
- [17] The Respondent notes that in the event that this Court determines that s. 22(1)(a) was not properly invoked or that the discretion available thereunder was improperly exercised, the Court should consider the affidavit material filed herein supporting the refusal to disclose the material sought on the basis of the other sections of the Privacy Act, namely sections 19(1)(a), 19(1)(b), 19(1)(c) and 26.
- [18] The Respondent notes that although the Commissioner, in light of his decision respecting s. 22(1)(a), did not rule on the applicability of these sections the Applicant's complaint to the Privacy Commissioner and the Applicant's affidavit material addresses these sections.

[19] The purpose of the Privacy Act was considered by the Supreme Court of Canada in *Dagg v. Canada*, [1997] 2 S.C.R. 403. At page 434, the Supreme Court, per Cory J. stated:

¶ 64 The purpose of the Privacy Act, as set out in s. 2 of the Act, is twofold. First, it is to "protect the privacy of individuals with respect to personal information about themselves held by a government institution"; and second, to "provide individuals with a right of access to that information".

[20] An individual's rights of access to personal information are prescribed by section 12(1) of the Act, which states:

12. (1) Subject to this Act, every individual who is a Canadian citizen or 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
- (a) any personal information about the individual contained in a personal information bank; and
 - (b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

[21] Parliament has, however, provided exemptions to the disclosure of personal information otherwise accessible under section 12(1). There exists abundant case law to the effect that the question of whether the requested record falls within an exemption contained in the Privacy Act must be reviewed on a standard of correctness. In *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, the Federal Court of Appeal stated:

¶ 47 In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption.

[22] In the case at bar, the exemption set forth in section 22(1)(a) of the Privacy Act was used by the Commissioner as the basis for the withholding of the information. This section reads:

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
- (a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to
 - (i) the detection, prevention or suppression of crime,
 - (ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act

if the information came into existence less than twenty years prior to the request;

[23] Having reviewed the file, it is clear to me that the RCMP simply received information from the Department of Justice of Canada that the United States sought the Applicant for a supervised release violation having submitted an extradition request.

[24] A review of the documents clearly indicates that the only actions taken involved placing, and subsequently removing, the Applicant's name from the CPIC, a Canadian police database, and communicating by email with the Department of Justice relating to the status of the extradition proceedings.

[25] Certainly, this type of activity does not constitute an investigation within the meaning of the statute exempting the information from disclosure.

[26] While there may be cases where the RCMP did conduct an investigation to assist an extradition proceeding, it appears clear that the RCMP Interpol did not do so in this case. In fact, it appears to have taken no investigatory actions.

[27] The Commissioner, by concluding that the information requested by the Applicant falls within the exemption contained in section 22(1)(a) of the Privacy Act made an error which warrants this Court's intervention.

[28] Since the decision under review was solely based on the s. 22(1)(a) exemption, it is not for this Court to consider the applicability of the other exemptions contained in the Privacy Act to the case at bar. Nonetheless, having reviewed the confidential documents, I am of the view that none of the other exemptions alleged by the Respondent seem applicable.

[29] Indeed, among the withheld documents, the only one that seems remotely relevant to the possible application of an exemption is a letter from the FBI to the RCMP (Exhibit D) which contains the name of a third party. Since the Privacy Act deals with "information," not "documents," an agency may not withhold the entire page simply because a portion may be exempt. Thus, this document shall be communicated to the Applicant once the opening paragraph of the letter has been redacted.

[30] For all the reasons above, the judicial review should be allowed. Costs to the Applicant will be fixed at \$200.00 inclusive of disbursements.

(Sgd.) "Paul Rouleau" Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED: August 24, 2004

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on own behalf

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Deputy Attorney General of Canada

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