

ACCESS TO INFORMATION

Related subject: Privacy

Appeal, cross-appeal from decision of Federal Court (2021 FC 164) allowing appellant/cross-respondent's (appellant) application for review under *Access to Information Act*, R.S.C., 1985, c. A-1 (Act), s. 41(1) of Canada Border Services Agency's (Agency) refusal to disclose to appellant all information subject of appellant's access to information request — In 2017, appellant involved in incident with one of his superiors at end of shift — Appellant was working at border crossing in southern Ontario — Agency launched internal investigation; appellant filed grievance — Appellant filed access to information request with Agency for, among other things, reports written by employees, managers, true copies of surveillance video recordings — Appellant complained to Information Commissioner of Canada (Commissioner) of fact he was not provided with all requested videotapes, those provided deliberately altered in editing process, almost impossible to view because in accelerated mode — Commissioner rejected complaint, but indicated he had already asked Agency to redo videotapes — Commissioner also noted samples taken by Agency from some videotapes complied with "clear framework" governing privacy rights in context of use of surveillance cameras in workplace — Following receipt of Commissioner's report, appellant applied for review under Act, s. 41(1) — In allowing appellant's application, Federal Court found requested videotapes outside scope of Act, s. 19(1), should have been disclosed to appellant — Federal Court ruled images taken in this case under Act, s. 19(1) fell within exception to definition of "personal information" set out in *Privacy Act*, R.S.C., 1985, c. P-21, s. 3(j) as being information relating to position, duties of officers concerned — Having concluded images taken in this case should have been disclosed to appellant, Federal Court found settling of debate on Agency's application of Act, s. 25 unnecessary in this context — In this case, appellant argued Federal Court failed to address all issues raised in action it brought before Federal Court — Main issue whether Federal Court failed to rule on all issues raised in action appellant brought before it, and therefore failed to grant appellant relief sought, namely order requiring Agency disclose to him all information covered by his access to information request — Reading of notice of application, memorandum of fact and law filed by appellant before Federal Court clearly showed appellant ultimately focused action on use made of Act, s. 19 in connection with four of seven videotapes sent to him in response to his access to information request — As appellant framed, circumscribed action in this manner before Federal Court, Federal Court could not be faulted for any omission in relation to its decision — Appellant emphasized conclusion of notice of application, whereby requesting respondent be ordered to respond "in full" to appellant's request for access to information — However, this generic conclusion could not be regarded as catch-all authorizing consideration before Federal Court of Appeal of arguments not raised before Federal Court — Appellant made several attempts to broaden debate by requesting permission to present new evidence on appeal — Those requests unsuccessful — Present appeal required decision in light of record as presented to Court — Main appeal therefore unfounded — Cross-appeal involved question of whether Federal Court erred in concluding information Agency refused to disclose did not fall within exemption in Act, s. 19(1) on grounds information would itself fall within one of exceptions to concept of "personal information" as defined by *Privacy Act* — Although complementary and requiring to be "interpreted together", clear that Act and *Privacy Act*, read together, "afford greater protection to personal information" — Hence, care required to avoid "giving 'narrow interpretation' to personal information exception by giving access to information primacy over protection of personal information" — Rights set out in these two statutes not always equal in value when individual's personal information concerned, right to privacy taking precedence over right of access to information, except to extent provided by law — Such nuance apparently not part of milestones in development of Federal Court's reasoning — Insufficient

to point out fact that definition of “personal information” undeniably very broad; analysis also required on basis of primacy of protection over right of access to information — While true that federal public servants, because of exception to definition of “personal information” set out in *Privacy Act*, s. 3(j), enjoy lower level of privacy protection in relation to information about their position and duties, public servants not completely deprived of protection — Exception in s. 3(j) remains circumscribed by relatively precise guidelines — Images captured in workplace reveal, in principle, much more about employee, employee’s specific “characteristics”, even if employee wears uniform — Federal employees continue to enjoy protection of *Privacy Act*, requirement to wear uniform changes nothing — If characteristic of wearing uniform were pushed to its limit, two categories of public servants would be created within regime established by Act and *Privacy Act*: those wearing uniform being deprived of protection of Act, s. 19(1), those not wearing uniform continuing to benefit from such protection — This cannot have been Parliament’s intention — In short, Federal Court, in name of transparency in government activities, gave precedence to right to information over right to privacy — In so doing, Federal Court gave overly broad scope to exception in *Privacy Act*, s. 3(j), thereby reducing scope of Act, s. 19(1) — All agents appearing on videotapes were entitled to same protection under Act, s. 19(1) — Accordingly, exception in s. 3(j) had to be applied to agents in same way, regardless of purpose or nature of appellant’s request for access to information — Agency could properly invoke Act, s. 19(1) to refuse disclosure of images of officers appearing on videotapes provided to appellant — Act, s. 25 requires head of government institution to disclose any part of record subject to access to information request not containing information head of institution entitled to refuse to disclose, provided severance of those parts does not raise serious problems — Issue whether Agency fulfilled its duty under s. 25 — S. 25 correctly applied to appellant’s request for access to information, in accordance with its purpose — Appeal dismissed; cross-appeal allowed.

BENIEY V. CANADA (PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) (A-74-21, 2024 FCA 11, LeBlanc J.A., reasons for judgment dated January 15, 2024, 30 pp. + 5 pp.)