

Re: Our file: 5820-02183 / Institution's file: A-2018-01188

From: FRANCOIS LAREAU (flareau@rogers.com)

To: brittany.ricl@oic-ci.gc.ca

Cc: genevieve.bernatchez@forces.gc.ca; michel.saindon@forces.gc.ca; caroline.maynard@oic-ci.gc.ca; deirdra.finn@forces.gc.ca

Date: Friday, December 4, 2020, 2:12 p.m. EST

Ms. Brittany,

Thank you for your email.

In regard to my part "Complaint -- par. 5 -- any other matter", I do not mention s. 58, but s. 68 of the *ATI Act*. However, I can understand the difficulty in understanding this part of my complaint. For ease of reference to all parties, I attach hereunder a copy of my complaint:

To solve the problem, I would simply rephrase my "complaint--par. 5 --any other matter" to: "Complaint --par 5--any other matter: Is the complete Marsaw transcript exempted under s. 68 of the *ATI Act* as being published material so that pages 1-1 to 1-12 should not have been exempted under s. 19 of the *ATI Act*? Or, is the Marsaw transcript only partially exempted under s. 68 so that only the Social Insurance Numbers (SIN) should be deleted from pages 1-1 to 1-12 under s. 19? Or, if the complete Marsaw transcript is exempted under s. 68 of the *ATI Act*, should only the SIN be exempted not because of an *ATI Act exemption*, but because of another legal position taken and to be explained by the DND/CF authorities?"

A bit more background. It is important to understand that at one time, in the Canadian Forces, members were identified by their SIN. This was the case when the Marsaw court martial occurred in 1994-1995. Military witnesses and military court members (judge, defence, prosecution and panel members in General courts martial) were identified publicly with their SIN. When a military witness testified, the witness had to identify himself with his SIN or agree to a question that his SIN was so and so. This is why at one time, you find SIN numbers in all published transcripts.

Later on in the nineties, I do not really know the exact date, the Canadian Forces and the Department of National Defence realized that using SIN publicly in transcript and elsewhere was in breach of privacy laws. Accordingly, the SIN were eliminated as a means to identify service members and replaced by another service number system. So the problem of SIN was eliminated from court martial transcripts.

Let me explain more in details my reformulated "complaint --par.5--any other matter" above

a) If the complete court martial transcript of Lieutenant-Commander Marsaw is "published material" under s. 68 of the *ATI Act*, then no exemption exists for pp. 1-1 to 1-12 and the *ATI Act* does not apply. Part of my blog of 21 October 2020 "Major Legal Problem with the transcript I received" which is part of my complaint reads in part as follows:

"on two previous *Access to Information Act (ATIA)* requests for transcripts made by me, the DND Director Access to Information and Privacy replied, in November 2015 and January 2016, that the *ATIA* did not apply to my requests for transcripts because these transcripts were excluded by s. 68 of the *ATIA* (being published material) and that future requests for court martial transcripts should be addressed directly to the Office of the Judge Advocate General. However, I did receive the transcripts with the replies, my requests having been treated as informal requests."

The two transcripts I received from the DND Director Access to Information and Privacy as informal requests

contained SIN. I must admit that I would have preferred to receive the two transcripts without SIN because it stops me from publishing them on my web site.

b) If the court martial transcript is "published material" under s. 68 except for the social insurance numbers which are not "published material" but "personal information", under s. 19, then only the social insurance numbers can be exempted. You may be familiar with the recent issue regarding the public release of the transcript of Captain McRae, Angus, General Court Martial, CFB Edmonton, 15-18 July 1980, available at https://cfbnamao.files.wordpress.com/2020/11/a-2019-00017_transcript.pdf, with the background newspaper article at theguardian.pe.ca/news/canada/defence-minister-has-the-power-to-release-info-about-dead-child-molester-legal-experts-say-491878/. The transcript was obtained by an AT/ Act request, DND, number A0610347_265-A-2019-00017-00265; this is the number that appears at the bottom of each page; all the SIN were exempted and deleted from the transcript.

c) If the complete court martial transcript is "published material" under s. 68 AT/ Act, the SIN issue presents a difficult legal problem for DND/JAG/CF/Court Martial Administrator (CMA), they could take the position that the complete transcript like in the Marsaw case should be exempted from the AT/ Act but that the SIN are exempted not under s. 19 but by a legal position that they will have to explain and divulge after my complaint. The legal reason would probably be found in the documentation that brought the change to end the use of SIN to service numbers in the CF. I don't have that documentation.

In addition to par a) to c) above, one can also distinguish the period of transcripts where SIN are used from the period where they are not. Of course, for the period starting with the end of SIN in transcripts, the problem about SIN is eliminated.

Mr. Saindon, from the CMA office, as you know, has informed me of the following:

"Afin qu'il n'y ait pas de mésentente, il m'apparait important de mentionner que l'administratrice des cours martiales n'est pas l'autorité concernant les procès-verbaux des cours martiales précédent le 27 septembre 1997, date de l'arrêté ministériel d'organisation qui autorisait la constitution du Cabinet du juge militaire en chef. Tous les procès-verbaux des cours martiales datant d'avant le 27 septembre 1997 sont maintenus à la librairie du JAG."

Following Mr. Saindon's statement, I commented upon it as follows:

"Lorsque j'ai fait la demande pour le procès-verbal de monsieur Marsaw, je me suis fondé sur le par. 10b) de la "Policy on Access to Documents and Information - Courts Martial and other Judicial Hearings", memorandum 5203-3 (CMA), first published 14 December 2016". La demande du procès-verbal pour Marsaw n'est pas fondée sur le par. 10a). Cependant cette politique n'explique pas la situation pour les procès-verbaux des cours martiales avant le 27 septembre 1997 que vous soulevé dans votre courriel. Si vous avez pris la peine de m'écrire, je dois conclure qu'il y a confusion pour moi et le public. À tout le moins, si on restreint le débat au par 10a), celui-ci et la politique devraient explicitement distinguer entre les procès-verbaux d'avant et après le 27 septembre 1997."

Je crois également que la contre-amiral Bernatchez en tant que "supervisor" de la justice militaire devrait également clarifier ce point."

It is my understanding that at one time complete transcripts were prepared for all courts martial but since a date that I would have to determine after research (probably the coming into force of relevant legislation amending the *NDA*) not all courts martial are now transcribed. My understanding is that since that certain date, a complete transcript is only prepared if there is an appeal or partially prepared if there a need to have that part in another court case.

As explained in my complaint, s. 180(1) of the *NDA* dictates that courts martial shall be public. Finally, s 165.3, enacts the possibility of the Chief Military Judge making rules about public access to minutes of proceedings:

"**165.3** The Chief Military Judge may, with the Governor in Council's approval and after consulting with a rules committee established under regulations made by the Governor in Council, make rules governing the following:

...

(e) the minutes of proceedings of courts martial and other proceedings"

These rules have not been made.

I consent that my complaint be made public.

I also think that the Commissioner should initiate a personal and special report on this matter.

Thank you and do not hesitate to come back to me if necessary

François Lareau
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On Thursday, December 3, 2020, 1:26:35 p.m. EST, Brittany Ricl <brittany.ricl@oic-ci.gc.ca> wrote:

Dear Mr. Lareau:

This is to acknowledge receipt of your complaint dated November 23, 2020, against National Defence (DND).

We have determined that you have not provided sufficient information to allow us to register your complaint. As a result, in accordance with the Act, please submit the following:

- The first part of your complaint regarding exemptions is valid. However, the second part of your complaint regarding the Sec. 58 exclusion requires clarification. I note from the final response from DND that only Sec. 19 was applied to the records. Confirm the nature of your complaint, i.e. exemptions, missing records or any other matter related to requesting records under the Act.

If you are still interested in pursuing your complaint, please submit the above-noted information to our office by **December 15, 2020**, quoting our file number. If we do not receive the requested information by that date, we will consider your complaint as abandoned.

Upon receipt of the required information, we will proceed with the registration of your complaint.

Yours sincerely,

Brittany Rici

Enquêtrice, Greffe

Commissariat à l'information du Canada

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Investigator, Registry

Office of the Information Commissioner of Canada

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