

Court File No.

~~2024-1234~~
T-381-24

FEDERAL COURT

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

-and-

OSAMA EL-BAHNASAWY

Respondent

NOTICE OF APPLICATION
(Section 18.1 of the *Federal Courts Act*)

FILED	FEDERAL COURT COUR FÉDÉRALE		DEPOSE
	FEB 23 2024		
	Victoria Bell		
OTTAWA, ON		- 1 -	

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**ORIGINAL SIGNED BY
VICTORIA BELL
A SIGNÉ L'ORIGINAL**

DATE:

23-Feb-2024

Issued by:

Address of local office:
Federal Court
Thomas D'Arcy McGee Building
90 Sparks Street, Main Floor
Ottawa, Ontario
K1A 0H9

APPLICATION

THIS IS AN APPLICATION pursuant to s. 18.1 of the *Federal Courts Act* RSC 1985, c. F-7, where the Attorney General of Canada (“AGC”) seeks, amongst other things, a declaration: (a) that the National Security and Intelligence Review Agency (“Review Agency”) is without jurisdiction under section 10 and section 27 of the *National Security and Intelligence Review Agency Act* S.C. 2019, c. 13, (“*NSIRA Act*”) to issue a summons compelling the Royal Canadian Mounted Police (“RCMP”) to produce documents subject to solicitor-client privilege to the Review Agency; and (b) that the Review Agency has expended all powers to investigate after the issuance of a report under section 29 of the *NSIRA Act* (“Final Report”). More specifically, on or about February 14, 2024, the Review Agency issued a Procedural Ruling where it held that it had the legal authority to issue a summons to compel the RCMP to produce solicitor-client privileged documents in respect of a complaint investigation for which it had issued a Final Report. This is an improper exercise of authority in that the Review Agency is without the requisite legal authority to demand the production of these privileged documents and, in any event, without the requisite legal authority to continue an investigation after the issuance of a Final Report.

THE APPLICANT MAKES APPLICATION FOR:

- (a) A declaration that with the issuance of a Final Report, the Review Agency has exhausted all investigatory powers under the *NSIRA Act* and that it ceases to have the requisite legal authority to issue a summons;
- (b) A declaration that the Review Agency is not entitled to reserve jurisdiction for itself for the sole purpose of making a demand for production of documents in a context where it has issued a Final Report;
- (c) A declaration that the Review Agency is not legally entitled to access solicitor-client privilege information, including but not limited to under section 10 of the *NSIRA Act*;

- (d) An order setting aside the Review Agency's Procedural Ruling issued on or about February 14, 2024, where it concludes that it has the requisite jurisdiction to compel the production of documents which are subject to solicitor-client privilege from the RCMP, after it has issued a Final Report;
- (e) A stay of the execution of the summons, if any, issued by the Review Agency, until such time as the matters raised in this Application can be fully adjudicated by this Court; and
- (f) such further and other relief as the AGC may request and the Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

- (g) Mr. Osama El-Bahnasawy ("Complainant"), father of Mr. Abdulrahman El-Bahnasawy ("Mr. El-Bahnasawy") filed a complaint with the Review Agency requesting an investigation of certain actions of the RCMP. Mr. El-Bahnasawy was the subject of an RCMP investigation and was later arrested by the Federal Bureau of Investigation (FBI) in the United States of America on terrorism charges;
- (h) Mr. El-Bahnasawy was convicted in a U.S. Federal Court and sentenced to a decades-long prison sentence in a high security U.S. prison. The Complainant alleges that RCMP was involved in events leading to the U.S. arrest of Mr El-Bahnasawy and demanded an investigation by the Review Agency;

- (i) On or about January 10, 2022, the Review Agency requested that the RCMP provide all documents relating to legal advice sought or obtained in relation to Mr. El-Bahnasawy, excluding any legal advice specific to the NSIRA Complaint investigation. The request for solicitor-client privileged documents was refused by the AGC, in part, on the grounds that section 10 of the *NSIRA Act* does not authorize the Review Agency to make demand for the production of such privileged documents;
- (j) The AGC advised the Review Agency that while section 9 of the *NSIRA Act* expressly allows the Review Agency to call for solicitor-client privileged documents within the context of a review, section 10 of the *NSIRA Act* (which deals with an investigation of a complaint) does not provide for it;
- (k) On October 12, 2023, the Review Agency issued a Final Report to the Complainant where it reported on findings it made in respect of the Complaint, but reserved for itself the authority “to conduct an ongoing investigation” in respect of the solicitor-client privileged documents that were not produced, and which could require further consideration;
- (l) The reserve of jurisdiction by the Review Agency is without legal foundation. First, the solicitor-client privileged documents may not be compelled under section 10 of the *NSIRA Act*; and second, the Review Agency expended its authority to investigate when it issued its Final Report pursuant to s. 29 of the *NSIRA Act*;
- (m) On November 23, 2023, the Complainant and other members of his family filed an application for judicial review in the Federal Court seeking an order that would require the Review Agency to exercise its power to compel the RCMP to produce the solicitor-client privileged documents. That matter is currently before the Federal Court and has yet to be adjudicated. The application will decide the issue of whether the Review Agency has the requisite legal authority to compel production of solicitor-client privileged documents after it has issued a Final Report;

- (n) The *NSIRA Act* requires that the Review Agency issue a Final Report upon “completion of an investigation”. The Review Agency completed the investigation and issued a Final Report;
- (o) The *NSIRA Act* does not provide the Review Agency with the authority to reserve jurisdiction on an investigation that it has completed. The power to issue a summons under the *NSIRA Act* is only in respect of an ongoing investigation. The Review Agency’s investigation was completed upon the issuance of a Final Report;
- (p) On December 22, 2023, the Review Agency advised the AGC that even though it had issued a Final Report, it would consider issuing a summons requiring the RCMP to attend before it and produce the solicitor-client privileged documents that it had previously requested, and which had been refused;
- (q) On January 4, 2024, in response to questions from the Complainant’s counsel as to the finality of the October 12, 2023, Final Report, the Review Agency confirmed that it was final because it determined substantive issues from the complaint;
- (r) By letter dated January 19, 2024, the AGC again reiterated the RCMP’s legal position to the Review Agency. The AGC noted that there was already an application before the Federal Court where the legal issues would be resolved and that it would not be an efficient use of judicial resources to issue a summons;
- (s) On February 14, 2024, the Review Agency issued a Procedural Ruling where it again stated that it had the jurisdiction to issue a summons requiring the RCMP to attend before it and produce solicitor-client privileged documents, even after the issuance of a Final Report;

- (t) On February 19, 2024, the AGC advised the Review Agency that it intended to file a judicial review in respect of the Procedural Ruling and requested that it refrain from issuing a summons pending the outcome of the judicial review;
- (u) The Review Agency does not have the jurisdiction at any stage of a complaint investigation to issue a summons compelling production of solicitor-client documents, and certainly cannot do so after it has expended all powers of investigation under the Act;
- (v) Sections 18.1, 18.2 and 50 of the *Federal Courts Act* RSC 1985 c. F-7, as amended ;
- (w) Sections 9, 10, 27 and 29 of the *NSIRA Act*; and
- (x) Such further and other grounds as the applicant may advise and this Honourable Court may permit.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (y) Affidavit of Cheryl Giles, affirmed February 26, 2024;
- (z) Such further material as counsel may advise and this Honourable Court may permit.



Date: February 23, 2024

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Rule 317 Request: The Applicant requests that the Review Agency produce any and all unclassified documents, not above Protected B, that were before the Review Agency when it issued the Procedural Ruling of February 14, 2024.

TO: The Judicial Administrator
Federal Court
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