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A–165–05

A–304–05

2006 FCA 157

The Information Commissioner of Canada (*Appellant*)

v.

The Executive Director of the Canadian Transportation Accident Investigation and Safety Board and **NAV CANADA** (*Respondents*)

and

The Attorney General of Canada (*Intervener*)

INDEXED AS: CANADA (INFORMATION COMMISSIONER) v. CANADA (TRANSPORTATION ACCIDENT INVESTIGATION AND SAFETY BOARD) (F.C.A.)

Federal Court of Appeal, Richard C.J., Desjardins and Evans JJ.A.—Ottawa, February 28; March 1; May 1, 2006.

Access to Information — Appeal from Federal Court decision dismissing applications for judicial review brought under Access to Information Act (Access Act), s. 42(1)(a) relating to refusals by Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on purported application of "personal information" exemption of Access Act, s. 19 — Content of records relating to status of aircraft, weather conditions, air traffic control (ATC) matters, utterances of pilots, controllers — Information requested not "personal information" under Access Act, Privacy Act, not exempted from disclosure under Access Act, s. 19(1) — Definition of "personal information" in Privacy Act, s. 3 interpreted — Words "about an individual" in definition meaning information leading to possible identification of individual — "Personal information" equivalent to information falling within individuals' privacy rights — Distinction made by Supreme Court of Canada in Dagg v. Canada (Minister of Finance) regarding information attaching to positions, information relating to specific individuals not applicable as relating only to officers, employees of government institutions as stated in Privacy Act, s. 3(j) — Moreover, information collected by NAV CANADA during air flight not "commercial", "technical" — Information not confidential — Therefore, air traffic control (ATC) communications not meeting requirements for exemption from disclosure under Access Act, s. 20(1)(b).

Privacy — Appeal from Federal Court decision dismissing applications for judicial review brought under Access to Information Act (Access Act), s. 42(1)(a) relating to refusals by Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on purported application of "personal information" exemption at Access Act, s. 19 — Concept of privacy examined — Privacy defined as individual's right to determine for self when, how, to what extent personal information about self released — Connoting intimacy, identity, dignity, integrity of individual — Information at issue not "about" individual since air traffic control (ATC) communications not involving subjects engaging individual's right to privacy — Information professional, could identify individual, assist in determination of person's work-related performance but not qualifying as personal — Fact ATC communications could be used as basis for evaluation of authors' performances not transforming communications themselves into personal information.

This was an appeal from a Federal Court decision dismissing applications for judicial review brought by the appellant under paragraph 42(1)(*a*) of the *Access to Information Act* (Access Act), relating to refusals by the Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on the purported application of the "personal information" exemption at section 19 of the Act. The records contain communications relating to four aviation occurrences, which were subject to distinct investigations and public reports by the Safety Board. In each case, the requesters sought access to recordings and/or transcripts of air traffic control (ATC) communications recorded by NAV CANADA and now under the control of the Safety Board.

The content of ATC communications is limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of pilots and controllers. All incoming and outgoing ATC communications are required to be recorded by NAV CANADA. Where there is an "aviation occurrence" (defined in part as any accident or incident associated with the operation of an aircraft) the relevant tape is set aside to preserve its integrity. The Safety Board concluded that the information in ATC communications was personal information but was publicly available within the meaning of subsection 19(2) of the Access Act and the public interest in disclosure did not clearly outweigh any invasion of privacy. The Federal Court concluded that the requested information was "personal information" within the meaning of section 19 of the Access Act and section 3 of the *Privacy Act*. It found that the ATC communications were "about" an individual and that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. Both the ground crew of air traffic controllers and flight specialists and the air crew were involved. The Federal Court also found that the information was about an "identifiable" individual since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of the specific controller and that the individual had a reasonable expectation of privacy. Furthermore, it held that, except for the communications regarding the occurrences at Clarenville, which were already publicly available, the information should not be disclosed since it was not "publicly available" under subsection 19(2) of the Access Act**.** The key issue was whether ATC communications are "personal information" under the Access Act.

Held, the appeal should be allowed.

The Federal Court erred in concluding that the information requested was "personal information" under the Access Act and the *Privacy Act*. Subsection 19(1) of the Access Act exempts from disclosure "personal information" as defined in section 3 of the *Privacy Act.* The term is defined as "information about an identifiable individual that is recorded in any form, including" the examples enumerated thereafter provided. The words "including, without restricting the generality of the foregoing" in the section 3 definition convey the proposition that the opening words must be given a generous interpretation and that the enumeration which follows is not limitative but illustrative only. The definition also provides exceptions to the concept of "personal information". The Supreme Court of Canada has often stated that the *Privacy Act* and the Access Act must be read together as a "seamless code" following a "'parallel' interpretative model" that balances the competing values of access and privacy. However, within this balanced legislative scheme, the right to privacy is made paramount in certain contexts. Case law has given the definition of "personal information" a wide reach. Focussing on the general opening words of the definition, in particular the word "about" ("*concernant*" in French) information recorded in any form is relevant if it is "about" an individual and if it permits or leads to the possible identification of the individual. An "identifiable" individual is someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available. "Personal information" must however be understood as equivalent to information falling within the individuals' right of privacy (*Privacy Act*, section 2). A privacy-based interpretation of the "personal information" definition does not definitively resolve the precise scope of "personal information" but captures the essence thereof and was sufficient to dispose of the appeal.

Privacy may be defined as an individual's right to determine for himself when, how and to what extent he will release personal information about himself. Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual. The information at issue was not "about" an individual since the content of the communications did not involve subjects that engaged an individual's right to privacy. The information at issue was of a professional and non-personal nature. It could lead to identifying an individual and assist in determining how an individual performed his or her task in a given situation but did not qualify as personal information. It was not about an individual, considering that it did not match the concept of "privacy" and the values that concept was meant to protect. The Federal Court misapprehended the function of the ATC communications and the Safety Board's object. The ATC communications, when combined with other information, may in certain circumstances be used as a basis for an evaluation of their authors' performances but that possibility could not transform the communications themselves into personal information, when the information contained therein had no personal content.

The Federal Court also erred by applying the Supreme Court of Canada case of *Dagg v. Canada (Minister of Finance)* when it referred to the evaluation of the performance of the parties to the ATC communications. In *Dagg*, the majority agreed with La Forest J.'s dissenting comment that the purpose of paragraph 3(*j*) and subparagraph 3(*j*)(iii) of the *Privacy Act* is to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is not "personal information" whereas information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information." The latter part of La Forest J.'s explanation related only to officers and employees of government institutions, in other words, the exception contained in paragraph 3(*j*) of the *Privacy Act*. The distinction between information relating to the position versus that relating to the person is inapplicable and irrelevant in respect of the

general definition of “personal information.” NAV CANADA’s employees are not officers or employees of a government institution.

NAV CANADA’s alternative submission that the ATC communications were exempted from disclosure under paragraph 20(1)(*b*) of the Access Act was not accepted. Paragraph 20(1)(*b*) of the Access Act provides that, if specific requirements are met, certain types of information (i.e. financial, commercial, scientific or technical) are exempted from disclosure by the head of a government institution. “Commercial” connotes information which in itself pertains to trade. Provision of air navigation services for a fee does not render the data or information collected during an air flight “commercial” or “technical”. It is also incorrect to characterize the entire record collected as technical when only a specific part might be. Moreover, the information in question was not confidential as required by paragraph 20(1)(*b*). Confidentiality must be judged according to the objective standard that the information itself must be “confidential by its intrinsic nature.” Whether information is confidential will depend upon its content, purpose and the circumstances in which it is compiled and communicated. The burden of persuasion with respect to the confidential nature of the information clearly rests on the responding party who must provide “actual direct evidence” of the confidential nature of the information at issue. The evidence provided by NAV CANADA that the ATC communications were confidential within the meaning of paragraph 20(1)(*b*) was plainly insufficient.

statutes and regulations judicially

considered

Access to Information Act, R.S.C., 1985, c. A−1, ss. 4 (as am. by S.C. 1992, c. 1, s. 144, Sch. VII, item 1(F); 2001, c. 27, s. 202), 19, 20(1), 24, 25, 41, 42(1)(*a*), Sch. II (as am. by S.C. 1989, c. 3, s. 38).

Canada Corporations Act, R.S.C. 1970, c. C−32, Part II.

Canadian Aviation Regulations, SOR/96−433, Part VIII, Subpart 2.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 2(*b*).

Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3, ss. 2 “aviation occurrence”, 7 (as am. by S.C. 1998, c. 20, s. 5), 28 (as am. *idem*, s. 17), 29(1)(*a*), (6) (as am. *idem*, s. 18).

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, ss. 2 (as am. *idem*, s. 108(*a*); 2003, c. 22, ss. 150(E), 225(*q*)(E)), 9.

Convention on International Civil Aviation, December 7, 1944, [1944] Can. T.S. No. 36.

Privacy Act, R.S.C., 1985, c. P−21, ss. 2, 3 “personal information” (as am. by S.C. 1992, c. 1, s. 144, Sch. VII, item 47(F)), 8(2)(*a*),(*b*),(*m*)(i).

Radiocommunication Act, R.S.C., 1985, c. R−2, ss. 1 (as am. by S.C. 1989, c. 17, s. 2), 9(2) (as am. *idem*, s. 6; 1993, c. 40, s. 24).

Radiocommunication Regulations, SOR/96-484, s. 6.

cases judicially considered

distinguished:

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403; (1997), 148 D.L.R. (4th) 385; 46 Admin. L.R. (2d) 155; 213 N.R. 161.

considered:

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 S.C.R. 441; (2006), 266 D.L.R. (4th) 675; 48 C.P.R. (4th) 161; 347 N.R. 1; 2006 SCC 13; *Olmstead v. United States*, 277 U.S. 438 (1928); *R. v. Dyment*, [1988] 2 S.C.R. 417; (1988), 73 Nfld.& P.E.I.R. 13; 55 D.L.R. (4th) 503; 229 A.P.R. 13; 45 C.C.C. (3d) 244; 66 C.R. (3d) 348; 38 C.R.R. 301; 10 M.V.R. (2d) 1; 89 N.R. 249; *R. v. Duarte*, [1990] 1 S.C.R. 30; (1990), 71 O.R. (2d) 575; 65 D.L.R. (4th) 240; 53 C.C.C. (3d) 1; 74 C.R. (3d) 281; 45 C.R.R. 278; 103 N.R. 86; 37 O.A.C. 322; *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.); *Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency* (1999), 250 N.R. 314 (F.C.A.); *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)* (2003), 6 Admin. L.R. (4th) 73; 305 N.R. 317; 2003 FCA 257.

referred to:

Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), [2006] 1 F.C.R. 605; (2005), 40 C.P.R. (4th) 158; 271 F.T.R. 7; 2005 FC 384; *Sabourin Estate v. Watterodt Estate* (2005), 213 B.C.A.C. 301; 44 B.C.L.R. (4th) 244; 34 C.C.L.T. (3d) 193; 2005 BCCA 348; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66; (2003), 224 D.L.R. (4th) 1; 47 Admin. L.R. (3d) 1; 24 C.P.R. (4th) 129; 301 N.R. 41; 2003 SCC 8; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), 39 Admin. L.R. (3d) 112; 16 C.P.R. (4th) 460; 154 O.A.C. 97 (Ont. Div. Ct.); affd *sub nom. Ontario (Attorney General) v. Pascoe* (2002), 22 C.P.R. (4th) 447; 166 O.A.C. 88 (Ont. C.A.); *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 27 Admin. L.R. (2d) 102; 17 B.L.R. (2d) 13; 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), 41 C.P.R. (3d) 512; 52 F.T.R. 22 (F.C.T.D.); affd (1992), 9 Admin. L.R. (2d) 161; 45 C.P.R. (3d) 390; 148 N.R. 147 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2006] 1 F.C.R. 379; (2005), 47 C.P.R. (4th) 401; 343 N.R. 221; 2005 FCA 215; *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.* (2004), 238 D.L.R. (4th) 44; 30 C.P.R. (4th) 417; 318 N.R. 242; 2004 FCA 99; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480; (1989), 23 C.P.R. (3d) 297; 24 F.T.R. 62 (T.D.).

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APPEAL from a Federal Court decision ([2006] 1 F.C.R. 605; (2005), 40 C.P.R. (4th) 158; 271 F.T.R. 7; 2005 FC 384) dismissing applications for judicial review brought under paragraph 42 (1)(*a*) of the *Access to Information Act* relating to refusals by the Canadian Transportation Accident Investigation and Safety Board to disclose records requested under the Act. Appeal allowed.

appearances:

Daniel Brunet, Raynold Langlois, Q.C., Marlys A. Edwardh and *François LeBel* for appellant.

Barbara A. McIsaac, Q.C. and *Gregorios S. Tzemenakis* for respondent Executive Director of the Canadian Transportation Accident Investigation and Safety Board.

Brian A. Crane, Q.C. and *Graham S. Ragan* for respondent NAV CANADA.

Christopher M. Rupar for intervener.

solicitors of record:

Office of the Information Commissioner of Canada for appellant.

McCarthy Tétrault LLP, Ottawa, for respondent Executive Director of the Canadian Transportation Accident Investigation and Safety Board.

Gowling Lafleur Henderson LLP, Ottawa, for respondent NAV CANADA.

Deputy Attorney General of Canada for intervener.

The following are the reasons for order rendered in English by

[1] DESJARDINS J.A.: This is an appeal of a decision of an application Judge of the Federal Court dismissing four applications for judicial review brought by the Information Commissioner of Canada (the Commissioner) pursuant to paragraph 42(1)(*a*) of the *Access to Information Act*, R.S.C., 1985, c. A−1 (the Access Act). The applications for judicial review relate to four refusals by the Canadian Transportation Accident Investigation and Safety Board (the Safety Board) to disclose records requested under this Act, in their entirety, based on the purported application of section 19 of the Access Act, namely the "personal information" exemption.

[2] The records at issue contain communications relating to four air occurrences which were subject to distinct investigations and public reports by the Safety Board. In each case, the requesters (three journalists and a legal representative of the estate of the deceased involved in one of the air accidents) seek access to recordings and/or transcripts of air traffic control communications (ATC communications) recorded by NAV CANADA and now under the control of the Safety Board.

[3] A description of the occurrences, the requests for information and the relevant decisions of the Safety Board can be found in the reported decision of the application Judge (*Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board*), [2006] 1 F.C.R. 605, Snider J.).

The decision below

[4] The application Judge concluded that the requested information was "personal information" within the meaning of section 19 of the Access Act and section 3 of the *Privacy Act*, R.S.C., 1985, c. P−21.

[5] Firstly, it was her view that the ATC communications were "about" an individual. She found that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contained information about the status of the aircraft, weather conditions, matters associated with air traffic control and utterances of the pilots and controllers, except for a few lines in one of the communications which contained direct reference to names and other information which the Commissioner acknowledged was personal. She agreed with the Commissioner that the recordings were largely technical (paragraph 20). Viewed in context, however, she said they were much more.

[6] Two different types of individuals were involved: the ground crew of air traffic controllers and flight specialists, and the air crew. To establish the nature of the communications, she looked at the purpose for which the ATC communications were made and used. She noted that a provision in Annex 10, Volume II of the *Convention on International Civil Aviation* signed at Chicago, Illinois, on December 7, 1944, [1944] Can. T.S. No. 36 (the ICAO Convention), mandated the logging of ATC communications. These standards were incorporated into Part VIII, Subpart 2 of the *Canadian Aviation Regulations*, SOR/1996−433. However, when an occurrence happened (a defined term to be examined later), NAV CANADA was under a duty to notify the Safety Board. The Safety Board could then carry on an investigation as it is empowered to do under section 7 [as am. by S.C. 1998, c. 20, s. 5] of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the Safety Board Act). The tapes were then handed to the investigators. The Safety Board, in her view, had the responsibility of examining how those individuals involved in the occurrence chose to perform the task assigned to them (paragraph 25 of her reasons).

[7] The application Judge quoted, at paragraph 14 of her reasons, the following sentence from paragraph 94 of La Forest J.'s reasons in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (*Dagg*):

. . . information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". [Emphasis added by application Judge.]

[8] She wrote at paragraphs 25 and 26 of her reasons:

In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.

For these reasons, I conclude that the ATC communications are "about" the individuals involved. [My emphasis.]

[9] She further held that the information was about an "identifiable" individual (paragraph 31 of her reasons) since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of the specific controller. Moreover, the voices of the individuals involved could be heard and identified. She found that those individuals had a reasonable expectation of privacy considering that the consistent policy of NAV CANADA had been to keep ATC communications confidential, that the collective agreements governing the relationship between the unions and NAV CANADA contained a clause prohibiting use of the tapes beyond what is required by law, and that both the ICAO Convention and international practices favoured the non-disclosure of information of this nature.

[10] She then proceeded, as she was required, to an analysis under subsection 19(2) of the Access Act. She determined that the information should not be disclosed because it was not "publicly available", except for the occurrences at Clarenville where the communications had already been made publicly available. She considered paragraphs 8(2)(*a*) and (*b*) of the *Privacy Act* and found that those provisions were not applicable to the cases before her. She concluded that the Safety Board had properly exercised its discretion under subparagraph 8(2)(*m*)(i) of the *Privacy Act*. As a result, she was satisfied that she did not need to address subsection 20(1), nor section 25 of the Access Act, nor whether subsection 9(2) [as am. by S.C. 1989, c. 17, s. 6; 1993, c. 40, s. 24] of the *Radiocommunication Act*, R.S.C., 1985, c. R-2 [s. 1 (as am. by S.C. 1989, c. 17, s. 2], infringed paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter).

[11] It is my view that the application Judge erred in coming to the conclusion that the information requested was "personal information" under the Access Act and the *Privacy Act*. I consequently do not need to determine the other issues raised in this appeal, except for subsection 20(1) of the Access Act.

Defining ATC communications—The object of the Safety Board

[12] Prior to November 1, 1996, civil air navigation services were delivered by Transport Canada. On that date, pursuant to section 9 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20, and to an earlier transfer agreement signed between the Government of Canada and NAV CANADA, NAV CANADA was given exclusive responsibility over the delivery of those services within Canadian airspace and within other airspace in respect of which Canada has responsibility for the provision of such services. NAV CANADA, a private corporation incorporated on May 26, 1995 under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32, was given the right to charge for those services.

[13] The responding parties emphasized the important role of Canada's international obligations in structuring the policies concerning disclosure of ATC communications. The Court's attention was drawn in particular to Annex 13 [*Aircraft Accident and Incident Investigation*], article 5.12 of the ICAO Convention, which provides that, in conducting an accident investigation, a state shall protect from disclosure "all communications between persons having been involved in the operation of the aircraft" and shall not make such records available for purposes other than accident investigation "unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation". Contrary to the suggestion of the responding parties, however, I am not persuaded that the disclosure of ATC communications, in appropriate circumstances following a request under the Access Act, is necessarily inconsistent with Canada's international obligations. A request under the Access Act is overseen by "the appropriate authority for the administration of justice", and the considerations mandated by article 5.12 can be accommodated within the process created by this domestic statutory regime.

[14] ATC communications are regulated by section 2 [as am. by S.C. 1996, c. 20, s. 108(*a*); 2003, c. 22, ss. 150(E), 225(*q*)(E)] of the *Civil Air Navigation Services Commercialization Act* and section 6 of the *Radiocommunication Regulations*, SOR//96-484. Their content is limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. The messages are transmitted over frequencies reserved specifically for aeronautical services. Users of these frequencies are statutorily required not to identify themselves using their names (paragraph 18 of the application Judge's reasons).

[15] ATC communications may be air-to-ground, ground-to-air and ground-to-ground communications, that is, from the air control tower to the air crew in flight or on the ground, or to vehicles on the ground. Controllers also communicate by means of interphone communication with other control towers and vehicles on the runway (*Sabourin Estate v. Watterodt Estate* (2005), 213 B.C.A.C. 301 (C.A.)). The purpose of communications between air traffic controllers or flight specialists and the crew of any aircraft is to ensure the safe and efficient departure, flight and landing of those aircraft and surrounding aircraft (affidavit of Kathleen Fox, A.B., Vol. 4, page 834, paragraph 28).

[16] As stated earlier, all incoming and outgoing ATC communications are required to be recorded by NAV CANADA. They are retained for a period of 30 days. Where there is an "aviation occurrence", the relevant tape is set aside to preserve its integrity. The tape is taken out of service, placed in a container and stored in a secure location where it cannot be tampered with.

[17] The term “aviation occurrence” is defined thus in section 2 of the Safety Board Act:

2. In this Act,

. . .

“aviation occurrence” means

(*a*) any accident or incident associated with the operation of an aircraft, and

(*b*) any situation or condition that the Board has reasonable grounds to believe could, if left unattended, induce an accident or incident described in paragraph (*a*);

[18] The object of the Safety Board is described in subsection 7(1) of the Safety Board Act. An important restriction is contained in subsection 7(2). Both provisions read:

7. (1) The object of the Board is to advance transportation safety by

(*a*) conducting independent investigations, including, when necessary, public inquiries, into selected transportation occurrences in order to make findings as to their causes and contributing factors;

(*b*) identifying safety deficiencies as evidenced by transportation occurrences;

(*c*) making recommendations designed to eliminate or reduce any such safety deficiencies; and

(*d*) reporting publicly on its investigations and on the findings in relation thereto.

(2) In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board’s findings.

[19] The Safety Board explains (paragraph 25 of its memorandum of fact and law) that the purpose of the investigation of civil aviation occurrences is to understand what caused the occurrence and to identify factors which can be mitigated in order to avoid further occurrences. The purpose is not to assign blame or further criminal, civil or disciplinary proceedings.

[20] Communication records, including ATC communications, enjoy a degree of privilege under the Safety Board Act. Paragraph 29(1)(*a*) of the Safety Board Act defines a communication record to include:

29. (1) In this section, “communication record” means the whole or any part of any record, recording, copy, transcript or substantial summary of

(*a*) any type of communications respecting air traffic control or related matters that take place between any of the following persons, namely, air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air traffic control or related matters,

[21] Subsection 29(6) [as am. by S.C. 1998, c. 20, s. 18] of the Safety Board Act specifically provides that a communication record which has been obtained by the Board pursuant to its legislative mandate is not to be used against any person referred to in subsection (1) (i.e. air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air traffic control or related matters) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings. Subsection 29(6) reads:

29. (1) . . .

(6) A communication record obtained under this Act shall not be used against any person referred to in subsection (1) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings.

[22] A much stricter provision protects the "on-board recordings" from the flight deck of an aircraft, a term defined in subsection 28(1) [as am. *idem*, s. 17] of the Safety Board Act. Subsection 28(1) of the Safety Board Act and section 24 of the Access Act specifically provide for mandatory exemption with respect to such recordings and transcripts.

[23] Section 28 of the Safety Board Act reads in full:

PRIVILEGE

28. (1) In this section, "on-board recording" means the whole or any part of

(*a*) a recording of voice communications originating from, or received on or in,

(i) the flight deck of an aircraft,

(ii) the bridge or a control room of a ship,

(iii) the cab of a locomotive, or

(iv) the control room or pumping station of a pipeline, or

(*b*) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline

that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

(2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall

(*a*) knowingly communicate an on-board recording or permit it to be communicated to any person; or

(*b*) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

(3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.

(4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

(5) The Board shall make available any on-board recording obtained under this Act to

(*a*) [Repealed, 1998, c. 20, s. 17]

(*b*) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

(*c*) any person carrying out a coordinated investigation under section 18.

(6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall

(a) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;

(b) in camera, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and

(c) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

(7) An on-board recording may not be used against any of the following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely, air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, persons who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.

(8) For the purposes of subsection (6), "court" includes a person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this Act or the *Inquiries Act*.

[24] Section 24 of the Access Act reads:

Statutory Prohibitions

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

. . .

SCHEDULE II [as am. by S.C. 1989, c. 3, s. 38]

Canadian Transportation Accident Investigation and Safety Board Act

subsections 28(2) and 31(4)

[25] It was initially the position of the Safety Board that the information contained in ATC communications was personal information, but was publicly available because some of the information, being the conversations carried over open radio frequencies, could be intercepted by a member of the public with the appropriate technology. Accordingly, if an access request for ATC communications was made after an investigation had been completed, the Safety Board was of the view that there was no basis to refuse disclosure.

[26] Subsequently, questions were raised as to whether the information in question should be exempted under section 19 of the Access Act. The Safety Board came to the conclusion that the ATC communications contained personal information. Thereafter, the Safety Board had to determine whether the ATC communications should, in any event, be released because the information was publicly available or because the public interest in disclosure clearly outweighed any invasion of privacy. The Safety Board determined that the information could not be said to be publicly available within the meaning of subsection 19(2) of the Access Act and that the public interest in disclosure did not clearly outweigh any invasion of privacy.

[27] Initially, the appellant agreed with this assessment. He, in particular, did so in the case of Swiss Air Flight 111 in 1998, but has since changed his mind.

The standard of review

[28] The parties do not dispute the application Judge's finding that the standard of review is correctness.

[29] The decision of the Safety Board relates to a mandatory refusal under subsection 19(1) of the Access Act and it has to be correct. Moreover, the application Judge is sitting as a reviewing judge in a section 41 application. She is invested with a *de novo* review power (*Dagg*, at paragraph 107) and her decision also has to be correct.

The key issue in this appeal

[30] The key issue in this appeal is whether ATC communications are "personal information" under the Access Act.

Structure of the relevant legislation

[31] Subsection 19(1) of the Access Act exempts from disclosure “personal information” as defined in section 3 of the *Privacy Act*. Subsection 19(1) of the Access Act reads:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

[32] Section 3 of the *Privacy Act* reads:

3. In this Act,

. . .

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*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, and

(*m*) information about an individual who has been dead for more than twenty years;

[33]Section 4 of the Access Act, which gives the right of access, reads in part:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) 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 any record under the control of a government institution.

[34] The words “including, without restricting the generality of the foregoing”, which are found in the definition of “personal information” in section 3 of the *Privacy Act*, convey the proposition that the opening words (“‘personal information’ means information about an identifiable individual that is recorded in any form”) must be given a generous interpretation and that the enumeration which follows is not limitative but illustrative only. Further down, section 3 contains a list of exceptions to the concept of “personal information”. They apply only “for the purposes of sections 7, 8 and 26, and section 19 of the *Access to Information Act*”. One of these exceptions is paragraph 3(*j*), which includes subparagraph 3(*j*)(iii).

“Personal Information”: The key principles of interpretation

[35] The Supreme Court of Canada has stated on numerous occasions that the *Privacy Act* and the Access Act must be read together as a “seamless code”, following a “‘parallel’ interpretive model” that balances the competing values of access and privacy: see *Dagg*, at paragraphs 45 and 55–57; [*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66], at paragraphs 21 and 22 (*RCMP*); *H. J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* [2006] 1 S.C.R. 441, at

paragraphs 2, 22, 25 (*Heinz*). However, within this balanced legislative scheme, the right to privacy is made paramount in certain contexts, as the Supreme Court recently affirmed in *Heinz*, at paragraph 26:

The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*. [My emphasis.]

[36] In *Dagg*, La Forest J., dissenting but confirmed by the majority on this point (see paragraph 1), described as follows the wide reach of the "personal information" definition (paragraphs 68 and 69):

With these broad principles in mind, I will now consider whether the information requested by the appellant constitutes personal information under s. 3 of the *Privacy Act*. In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289–91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.

As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, "How Much Privacy for Public Officials?", speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture. [My emphasis.]

[37]La Forest J.'s views were cited with approval by the unanimous Court in *RCMP*, at paragraph 23.

[38] The words upon which I need to focus in the present analysis are the following: "'personal information' means information about an identifiable individual that is recorded in any form including" ("*renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment*").

[38] Les mots auxquels je dois m'intéresser dans la présente analyse sont les suivants : « "renseignements personnels" Les renseignements, quels que soient leur forme et leur

support, concernant un individu identifiable, notamment » (« *"personal information" means information about an identifiable individual that is recorded in any form including* »).

[39] The word "about" (*concernant*) should be considered first.

[40] The *Concise Oxford Dictionary of Current English*, 8th ed. tells us that the word encompasses the following definitions:

about: 1 a on the subject of, in connection with (*a book about birds; what are you talking about?; argued about money*). **b.** relating to (*something funny about this*).

[41] The *Petit Larousse illustré* says the following:

concernant: *À propos de, au sujet de.*

[42] The French *Petit Robert* states the following:

***concernant**: À propos de, au sujet de.—**relative** (à), 1. **touchant** . . . en ce qui concerne.*

[43] These two words, "about" and "*concernant*", shed little light on the precise nature of the information which relates to the individual, except to say that information recorded in any form is relevant if it is "about" an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an "identifiable" individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available (Colin H. H. McNairn and Christopher D. Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell, 1992), at page 7–5; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), 39 Admin. L.R. (3d) 112 (Ont. Div. Ct.); affd [*sub nom. Ontario (Attorney General) v. Pascoe*] (2002), 22 C.P.R. (4th) 447 (Ont. C.A.)).

[44] "Personal information" must however be understood as equivalent to information falling within the individual's right of privacy. Section 2 of the *Privacy Act* sets the tone by providing that:

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

[45] The *Privacy Act*, adopted in 1982 [S.C. 1980-81-82-83, c. 111, Sch. II], was one of the legislative responses to the development of the right to privacy. In their seminal work on "The Right to Privacy", [1890–91] 4 *Harv. L. Rev.* 193, Samuel D. Warren and Louis D. Brandeis wrote (at page 193):

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.

[46] The concept of privacy has proven sufficiently robust to live up to its description by Justice Brandeis (*Olmstead v. United States*, 277 U.S. 438 (1928), at page 478), as the "right

most valued by civilized men", and has shouldered its way into U.S. and Canadian constitutional doctrines (see Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril*, (Markham: LexisNexis Butterworths, 2005), at page 9).

[47] In *R. v. Dyment*, [1988] 2 S.C.R. 417, at pages 427 and 428, *per* La Forest J. (*Dyment*), the Supreme Court of Canada spoke about privacy in the following terms:

Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[48] A privacy-based interpretation of the "personal information" definition does not provide a definite resolution to questions concerning the precise scope of "personal information". However, as I explain further below, this interpretation, as wide as it may be, captures the essence of the definition and is, in my view, sufficient to dispose of the appeal at bar.

The concept of privacy

[49] In *Dagg*, La Forest J., at paragraph 67, noted that privacy is a broad and somewhat evanescent concept and that it was necessary to describe with greater precision the particular privacy interests protected. He mentioned his earlier writing in *Dyment*, at pages 429 and 430, in which he referred to the Report of the Task Force established jointly by the Department of Communications and the Department of Justice (1972), entitled *Privacy and Computers*, in these terms:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*. [My emphasis.]

[50] La Forest then added (at paragraph 67):

See also *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 46 ("privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself"); *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 613-15 (*per* L'Heureux-Dubé J., dissenting); Westin, *supra*, at p. 7 ("[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); Charles Fried, "Privacy" (1968), 77 *Yale L.J.* 475, at p. 483 ("[p] rivacy . . . is control over knowledge about oneself"). [My emphasis.]

[51] The Task Force cited in *Dyment* [at page 429], refers to "information about a person . . . in a fundamen-tal way his own, for him to communicate or retain for himself as he sees fit" [my

emphasis]. The same concepts of intimacy and identity are found in the passage from *Duarte* [*R. v. Duarte*, [1990] 1 S.C.R. 30, at page 46], quoted in *Dagg* [at page 435]: ". . . the right of the individual to determine for himself when, how and to what extent he will release personal information about himself" [my emphasis]. Alan F. Westin [*Privacy and Freedom*, New York: Atheneum, 1970] refers to "the claim . . . of individuals to determine for themselves when, how and to what extent information about them is communicated to others" (my emphasis) [quoted in *Dagg*, at page 435]. Charles Fried ["Privacy" (1968), 77 *Yale L.J.* 475, at page 483] says "[p]rivacy … is control over knowledge about oneself" (my emphasis) [quoted in *Dagg*, at page 435].

[52] Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.

[53] The information at issue is not "about" an individual. As found by the application Judge (at paragraph 18 of her reasons) the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals.

[54] The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not about an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is non-personal information transmitted by an individual in job-related circumstances.

[55] The application Judge misapprehended the function of the ATC communications and the object of the Safety Board when she said that "the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong" (paragraph 25). This interpretation is not in the spirit of subsections 7(1), (2) and 29(6) of the Safety Board Act, nor is it to be found in the submissions made by the Safety Board before this Court (paragraph 25 of its memorandum of fact and law, referred to at paragraph 19 of my reasons for judgment). The ATC communications, when combined with other information, may well in certain circumstances be used as a basis for an evaluation of their authors' performances. However, the possibility of such eventual use cannot transform the communications themselves into personal information, when the information contained therein has no personal content.

[56] The application Judge also erred by misapplying *Dagg* when she referred, in the present context, to the evaluation of the performance of the parties to the ATC communications. An analysis of the *Dagg* case is necessary to further my thought on the matter.

The *Dagg* case

[57] As mentioned earlier, the application Judge quoted (at paragraph 14 of her reasons) the following sentence from paragraph 94 of La Forest J.'s reasons in *Dagg*:

. . . information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". [Emphasis added by application Judge.]

[58] She later wrote at paragraphs 25 and 26 of her reasons:

In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.

For these reasons, I conclude that the ATC communications are "about" the individuals involved.

[59] In *Dagg*, the Court was called upon to determine whether copies of logs with the names, identification numbers and signatures of Department of Finance employees entering and leaving the workplace on weekends was information that "relates to the position or functions of the individual, as defined in the exception set out in s. 3(*j*) of the *Privacy Act*" (*per* Gonthier J. in *RCMP*, at paragraph 20; my emphasis).

[60] Speaking for the *Dagg* majority comprised of Lamer C.J., Sopinka, McLachlin [as she then was] and Iacobucci JJ., Cory J. agreed with La Forest J., dissenting, with whom L'Heureux-Dubé, Gonthier and Major JJ. concurred, that the names on the sign-in logs were "personal information" for the purpose of section 3 of the *Privacy Act*. However, he said that he arrived "at a different conclusion with respect to the application of s. 3 'personal information' (*j*)" (paragraph 1).

[61] Cory J. stated the following (at paragraphs 5 and 6 of *Dagg*):

La Forest J. holds, at para. 94, that the purpose of s. 3(*j*) and s. 3(*j*)(iii) of the *Privacy Act* is:

. . . to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". [Emphasis in original.]

I agree. Moreover, I agree with La Forest J. that "[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description", such as "the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range" (para. 95).

[62] Cory J. said that he agreed in principle with that part of paragraph 94 of La Forest J.'s decision which contains the words also quoted by the application Judge in the case at bar. He further agreed with La Forest J. (at his paragraph 95) that "[g]enerally speaking, information

relating to the position . . . will consist of the kind of information disclosed in a job description" such as "the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibi-lities, hours of work and salary range". However, Cory J. applied these conditions differently (paragraphs 8 and 9 of *Dagg*). He disagreed with La Forest J.'s conclusion that since the requested information was not about the nature of a position, but about the individual, it should be kept confidential. Cory J. for the majority held that the requested information "related to the position or functions of the individual" and was excepted from "personal information". He ordered that the requested information be released.

[63] Read in context, La Forest J.'s comment at paragraph 94 of *Dagg* ("the manner in which they choose to perform the tasks assigned to them is 'personal information'") properly relates only to officers and employees of government institutions, that is to the exception contained in paragraph 3(*j*) of the *Privacy Act*. This distinction between information relating to the position versus that relating to the person is inapplicable and indeed irrelevant in respect of the general definition of "personal information" ("information about an identifiable individual") (see also *RCMP*, at paragraphs 37 and 38).

[64] NAV CANADA's employees are not officers or employees of a government institution. So La Forest J.'s comments, concerning the salience of the distinction between information attaching to the position and that relating to specific individuals, are not applicable to them. The application Judge thus erred when she applied this distinction directly in the case at bar.

Paragraph 20(1)(*b*) of the Access Act

[65] Having concluded that the ATC communications at issue are not personal information under section 3 of the *Privacy Act*, I must address the alternative issue raised by NAV CANADA (the only responding party pleading this point), namely, whether the disclosure of such information is prohibited under paragraph 20(1)(*b*) of the Access Act, which reads:

Third Party Information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

. . .

(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

[66] For this paragraph to apply, it must be shown that:

(i) the information is financial, commercial, scientific or technical information;

(ii) the information is confidential;

(iii) the information is supplied to a government institution by a third party; and

(iv) the information has been treated consistently in a confidential manner by a third party.

[67] NAV CANADA claims that as part of its business it is required by law to maintain records of all radiocommunications between controllers and pilots. In the context of its unique business, NAV CANADA claims that ATC communications are “commercial” communications under paragraph 20(1)(*b*) of the Access Act. It also says that because the tapes and transcripts are complex and difficult to understand, they constitute “technical” information.

[68] I disagree.

[69] Common sense with the assistance of dictionaries (*Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.) (*Air Atonabee*), at page 268) dictates that the word “commercial” connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as “commercial”.

[70] It is also incorrect in my view to characterize the entire record collected during an air navigation flight as being “technical” information when only a specific part might be, for instance when precise flight instructions are given.

[71] The second requirement under the paragraph 20(1)(*b*) disclosure exemption is that the information in question must be confidential.

[72] The jurisprudence establishes that confidentiality must be judged according to an objective standard: the information itself must be “confidential by its intrinsic nature” (*Société Gamma Inc. v. Canada (Secretary of State)* (1994), 27 Admin. L.R. (2d) 102 (F.C.T.D.), at paragraph 8 (*Société Gamma*); *Air Atonabee*; *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), 41 C.P.R. (3d) 512 (F.C.T.D.); affd (1992), 9 Admin. L.R. (2d) 161 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2006] 1 F.C.R. 379 (F.C.A.)). In *Air Atonabee*, Mackay J. suggested the following approach to determine whether a particular record contained “confidential information” (at page 272):

. . . whether information is confidential will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely:

(a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,

(b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

(c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

This Court recently endorsed this approach in *Canada (Minister of Public Works and Government Services) v. Hi‑Rise Group Inc*. (2004), 318 N.R. 242 (F.C.A.) (*Hi‑Rise*).

[73] The burden of persuasion with respect to the confidential nature of the information clearly rests upon the responding parties (*Canada (Information Commissioner) v. Atlantic*

Canada Opportunities Agency (1999), 250 N.R. 314 (F.C.A.), at paragraph 3 (*Atlantic Canada*); *Wyeth–Ayerst Canada Inc. v. Canada (Attorney General)* (2003), 6 Admin. L.R. (4th) 73 (F.C.A.), at paragraph 19). To satisfy their burden in this regard, the responding parties must provide "actual direct evidence" of the confidential nature of the information at issue (*Atlantic Canada*, at paragraph 3), which must disclose "a reasonable explanation for exempting each record" (*Wyeth–Ayerst*, at paragraph 20); "evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20 (1)" (*Wyeth–Ayerst*, at paragraph 20).

[74] In my opinion, the evidence provided by NAV CANADA is plainly insufficient to discharge this burden on a balance of probabilities. NAV CANADA's submissions with respect to this issue can be divided into three categories, which I will analyse in turn: first, NAV CANADA has maintained a consistent policy and practice of confidentiality of ATC communications; second, the reasonable expectations of pilots and controllers supports such confidentiality; and third, disclosure for investigative purposes only is in the public interest.

[75] First, NAV CANADA relies upon its own policies and consistent past practice to establish the confidentiality of the records at issue. Such evidence—which essentially only substantiates a heretofore unchallenged subjective belief that the records are confidential—is insufficient to satisfy the objective test (*Wyeth–Ayerst*, at paragraph 21). The evidence does not elaborate, by reference to the information actually contained within the records at issue, as to how or why the information is objectively confidential. The fact that information has been kept confidential in the past—and NAV CANADA's assertion in this regard is disputed by the Commissioner—is at most only a factor to be considered in determining whether the information is confidential for the purposes of paragraph 20(1)(*b*) (*Hi–Rise*, at paragraph 38; *Atlantic Canada*, at paragraph 4; *Société Gamma*, at paragraph 8; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480 (T.D.), at page 487 (*Ottawa Football*)).

[76] Second, NAV CANADA suggests that there is a reasonable expectation of privacy in the ATC communications on the part of the pilots and controllers whose voices and utterances are recorded. NAV CANADA points in this regard to the confidentiality provisions of the collective agreements with its unions. This consideration cannot, however, be determinative of the status of this information under the Access Act: private parties cannot through such agreements alone contract out of the express statutory provisions of the Access Act (*Hi–Rise*, at paragraph 38; *Ottawa Football*, at page 487). At most, such agreements may be taken into account in the final analysis, to support other objective evidence of confidentiality.

[77] Third, NAV CANADA argues that the ATC communications are produced to the Board on demand as required by law, for investigative purposes only. The confidentiality of these records, NAV Canada asserts, reflects Canada's international obligations under Article 5.12, Annex 13 of the ICAO Convention (discussed above at paragraph 13 of these reasons), and is in the public interest.

[78] Considerations of the public interest are indeed relevant to the determination of whether the records at issue are confidential for the purposes of paragraph 20(1)(*b*): the jurisprudence recognizes that the maintenance of confidentiality is justified under the Access Act if it fosters a confidential relationship with public benefit (see *Hi–Rise*, at paragraph 38, *Air Atonabee*, at paragraph 41). In this regard, the considerations mandated by the Access Act appear consistent with Canada's international obligations under Article 5.12, which directs the

maintenance of confidentiality unless "disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations". However, in the case at bar, NAV CANADA has provided no supporting explanation as to how or why the maintenance of confidentiality serves the public interest, in the circumstances of the records at issue. A bald assertion in this regard is insufficient to overcome the general right of access established by the Access Act.

[79] In my view, therefore, NAV CANADA has not satisfied its burden of showing that the ATC communications are confidential within the meaning of paragraph 20(1)(*b*). Since the first two requirements of paragraph 20(1)(*b*) are not met, I need not consider the other criteria of this provision. I conclude that the ATC communications at issue do not qualify for exemption from disclosure under paragraph 20(1)(*b*) of the Access Act.

Conclusion in file A-165-05

[80] The appeal should be allowed with costs in this Court and the decision of the application Judge should be set aside. Rendering the decision she should have rendered, I would grant the four applications for judicial review and would order the Safety Board to disclose the requested records.

[81] The Commissioner is seeking costs throughout. Since the Commissioner, the Safety Board and the Attorney General had agreed not to seek costs against each other in the Federal Court, I find that I should not disrupt their agreement. No costs should therefore be awarded to the Commissioner against those parties in the Federal Court. Considering moreover that the Commissioner indicated, in the Federal Court, that he was not seeking costs against NAV CANADA, no costs should be awarded to the Commissioner against NAV CANADA.

File A-304-05

[82] The appellant appeals an order for costs in favour of NAV CANADA pronounced by the application Judge in an order dated June 8, 2005.

[83] Since I conclude, in file A-165-05, that the appeal should be allowed and the decision of the application Judge should be set aside, her order of costs cannot stand. This appeal should be allowed and her order as to costs should be set aside.

RICHARD C.J.: I agree.

EVANS J.A.: I agree.