



Second Decision on Application to Compel Production of Unredacted Government of Canada Records

1. Freedom 2022 Human Rights and Freedoms not-for-profit corporation (“Freedom Corp.”) brought an application seeking access to unredacted versions of documents that have been produced to the Commission by the Government of Canada (“Canada”). Specifically, Freedom Corp. sought an order that Canada remove all redactions applied based on Parliamentary privilege and all redactions based on irrelevance, subject to a proposed *in camera* hearing mechanism to consider the issue of irrelevance.
2. Freedom Corp.’s application was sent by email on November 24. Given the timing, I made two interim orders in relation to that application – an interim order at 10:26 p.m. that evening (“First Order”), and a further order at 9:22 a.m. on November 25 (“Second Order”).
3. This decision elaborates on the reasons for the First and Second Orders and addresses the balance of the application.

Background to the Application and Applicable Rules and Statutes

4. Freedom Corp. made an application by email at 10:14 a.m. on November 24, 2022. Freedom Corp.’s application was sent while the Deputy Prime Minister was testifying on the second to last day of the evidentiary phase of the Commission’s hearings. Freedom Corp. requested that I make an order “at the break,” scheduled to occur approximately an hour from the time the email application was sent. It sought the following relief:
 - (1) All redactions on the basis of Parliamentary Privilege in any record of the Government of Canada in Relativity are ordered removed immediately.



- (2) All redactions in any record of the Government of Canada on the basis of irrelevance are ordered removed, subject to (3).
- (3) In respect of any record the Government of Canada seeks to be redacted as irrelevant, Canada can apply for same *in camera* with counsel present, and the implied undertaking rule applies to that *in camera* proceeding.
5. I did not order any relief at the break. As I will explain, even if such an order had been made, it could not have been complied with in a timely manner. Further, procedural fairness required that the Commission seek the parties' positions, including Canada's, on Freedom Corp.'s application. I therefore requested that submissions be provided by 1:30 p.m. that day, November 24.
6. The CCLA supported Freedom Corp.'s request for an order requiring the removal of redactions based on Parliamentary privilege. The JCCF supported the CCLA's position and requested that any further documents ordered produced or unredacted be produced in a legible format. JCCF also requested a further "bulk entry" list such that the parties could request that recently-produced documents be marked as exhibits prior to the deadline for closing submissions. The CCCDL/CLA supported undoing any redactions that are not supported by law or are inconsistent with any Commission ruling. The Ottawa Coalition supported the removal of redactions, but noted that the principle of proportionality demanded the identification of specific documents.
7. The Government of Canada did not provide any responding submissions.
8. I had addressed both issues – redactions based on Parliamentary privilege and irrelevance – in my *Decision on Application to Compel Production of Unredacted*



Government of Canada Records dated November 22, 2022 (“Redaction Decision”). This decision refers to and should be read in conjunction with the Redaction Decision.

Analysis

9. By way of background, I will briefly refer to the basis for my Redaction Decision and will also expand on why I made the First and Second Orders, as well as the scope of those orders.

The Redaction Decision

10. In the Redaction Decision, I explained that reliance upon Parliamentary privilege as a basis upon which to prevent disclosure of information or to redact documents appeared to be novel. As a result, I was not prepared to accept Canada’s position that the doctrine of Parliamentary privilege had the broad application suggested. I explained that, having reviewed an unredacted version of the documents that were provided to the Commission, it was clear to me that, assuming Parliamentary privilege included a right of redaction, a basis for redaction had not been made out for those documents. In essence I left for another day whether a right to redact for Parliamentary Privilege exists and how it would apply. If that day comes, full submissions can be made and the underlying basis for the exercise of such a privilege can be fully explored in that context.

First Order

11. On this application, neither Canada nor any other party provided authority or basis upon which to permit redactions based on Parliamentary privilege beyond what was provided in the context of the Redaction Decision. Given the urgency, I decided to order that Canada lift redactions for Parliamentary privilege (provided there was no



other basis to maintain the redaction) on documents that the parties had identified as possibly relevant to their cross-examination of the witnesses from the Prime Minister's Office ("PMO") who were scheduled to testify in the afternoon of November 24, or to their cross-examination of the Prime Minister. Although the documents were not available in time for use in the cross-examination of the PMO witnesses, they were available to be put to the Prime Minister if the parties so chose. The email conveying the First Order stated as follows:

The Commission received no responding submissions from the Government of Canada by the set deadline. Pending a decision on the full application, the Commissioner has determined that, to assist the parties who are to cross-examine the witness tomorrow, the following interim order should issue:

The Government of Canada shall lift redactions for Parliamentary privilege on all documents that the parties have identified as relevant to (a) the Prime Minister's Office panel that testified today (listed on the PMO Panel Summary sheet of the attached Excel entitled Witness List summaries – Day 30 – Nov 24) and (b) the Prime Minister (identified on the Justin Trudeau Summary sheet of the attached Excel entitled Witness List summaries – Day 31 – Nov 25), provided there is no other basis to maintain the redaction.

The Government of Canada shall produce versions of the documents without such redactions by email directly to counsel for all parties by **11:30 p.m. tonight**, and shall take steps to make them available in the Party Database by 9:00 a.m. tomorrow.

12. Eight documents were within the scope of the First Order. Canada produced unredacted versions of five of them to all parties at 2:36 a.m. on November 25. Canada sent the Commission copies of the three others (PB.CAN.00001844, SSM.CAN.00007982, and SSM.NSC.CAN.00002941) with see-through redactions



applied, as well as a letter asking that I reconsider my order in respect of those documents. I address this request later in these reasons.

13. The First Order was an interim one because I was not prepared at that stage to order Canada to unredact all documents over which Parliamentary privilege had been claimed. No party had confirmed the number of documents over which this basis of redaction had been applied. Moreover, a blanket order including redaction for irrelevance had the potential to be disproportionate and unachievable in time to assist counsel with their cross-examination of the remaining witnesses. Such an order, even if warranted, would be of little practical assistance to the parties. On the other hand, an order requiring Canada to unredact documents that the parties had already identified as relevant to the Prime Minister's testimony and that of his senior staff appeared to be more appropriately tailored to the circumstances.

14. Further, it may well have been that Canada made the redactions based on Parliamentary privilege but could rely on other bases for the redactions, such as Cabinet confidence. As such, I ordered the redactions for Parliamentary privilege lifted *provided there is no other basis to maintain the redaction*.

15. The First Order did not address redactions based on irrelevance. I had addressed that issue in the Redaction Decision, and Freedom Corp.'s application was in effect an attempt to relitigate that decision. In any event, Freedom Corp.'s request for a blanket order was not proportionate considering the time constraints under which the Commission and all parties were operating. It was incumbent on Freedom Corp. to identify specific documents for which it sought a ruling on the appropriateness of Canada's redactions. Finally, the *in camera* mechanism that Freedom Corp. proposed



would not have been workable given the number of parties, the timing, and the nature of this public inquiry.

Second Order

16. The morning of November 25, I reviewed the three documents in respect of which Canada asked that I reconsider the First Order. Canada's letter described the nature of the redacted text, but did not make additional substantive submissions.

17. I was not satisfied that, even if Parliamentary privilege could be a basis for the redactions, any of the redactions in the three documents met the necessity test set out in *Canada (House of Commons) v. Vaid*; that is, that the redactions were necessary in light of the purposes of Parliamentary privilege, and that ordering their removal would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.¹

18. At 9:22 a.m. on November 25, Commission Counsel circulated my decision:

The Commissioner has reviewed the three documents in respect of which the Government of Canada asked that he reconsider his decision. For the reasons set out in the Commissioner's prior decision regarding the issue of Parliamentary privilege, the Commissioner is not satisfied that the Government of Canada has met its onus to show that the redactions for Parliamentary privilege in these three documents are appropriate.

The Commissioner directs the Government of Canada to send copies of those three documents with the redactions lifted by **10:30 a.m. today**, failing which the Commission will circulate the copies that it has received to the parties.

¹ 2005 SCC 30, at para. 46; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, at para. 29



19. Counsel for Canada sent unredacted versions of the three documents to the parties at 10:27 a.m. As a result, they were available to the parties for use in their cross-examination of the Prime Minister.

The merits of the Application

20. I turn now to the merits of the application. As noted earlier, Freedom Corp. served the application while testimony was underway on the second last day of the Commission's evidentiary hearings. It asked for the issuance of an order in less than an hour. That order, if granted, would have affected an unknown number of documents.

21. In my view, the preferable, proportionate way to proceed would have been for Freedom Corp. to identify the documents for which it disputed the redactions applied by the Government of Canada. This would have permitted counsel for Canada to make submissions on each document, and potentially produce versions with redactions lifted for my eyes only. This is how Freedom Corp.'s first application was structured, and all parties benefitted from that structure.

22. Moreover, many Government of Canada documents containing redactions for Parliamentary privilege or irrelevance were available to the parties prior to the start of the hearings. If Freedom Corp. disputed Canada's right to make such redactions, or the application of those categories to specific documents, it could have brought this application sooner. Had this happened, it would not only have resolved the issue in a more timely way for all parties, a decision from me could have informed Canada's redaction practices as it continued to populate the Party Database. Seeking a blanket order directed at both redactions for Parliamentary privilege and irrelevance, on the second last day of the factual hearings, after virtually all the witnesses had testified, was



of little practical assistance to the parties. Nor would such an order substantially assist the Commission with its fact-finding function. As a result, I have concluded that the application with respect to the redactions for irrelevance ought to be dismissed. Making such a broad generic challenge and creating an unwieldy process for addressing those redactions at this late stage of the proceedings is neither proportionate nor fair.

23. Following the close of the factual hearings, Commission counsel communicated with counsel for the Government of Canada regarding the issue of redactions for Parliamentary privilege. It was determined that the number of documents affected, beyond those already dealt with in my interim orders, was relatively limited. Having now had an opportunity to consider my rulings respecting Parliamentary Privilege contained in the November 22 Redaction Decision and the two interim orders, Canada agreed to remove redactions for Parliamentary privilege from all 20 documents in the Party Database to which that redaction had been applied. These unredacted documents will be entered in the Party Database shortly and available to be used and referred to in final submissions if the Parties so choose.

24. For the benefit of the parties, the 20 documents on which the Government of Canada has agreed to lift redactions for Parliamentary privilege are as follows:

SSM.CAN.00001529_REL

SSM.CAN.00002004_REL

SSM.CAN.00007537_REL

SSM.CAN.00007870_REL

SSM.CAN.00006180_REL

SSM.CAN.NSC.00002814_REL



SSM.CAN.NSC.00002890_REL

SSM.NSC.CAN.00002938

SSM.CAN.00007769

SSM.CAN.00007781

SSM.NSC.CAN.00002407_REL

SSM.NSC.CAN.00003045_REL

SSM.NSC.CAN.00003039_REL

SSM.CAN.00008125_REL

SSM.CAN.00008186_REL

SSM.CAN.00008628_REL

SSM.NSC.CAN.00003151_REL

SSM.NSC.CAN.00003178_REL

SSM.NSC.CAN.00003081_REL

SSM.NSC.CAN.00003082_REL

Disposition

25. The portion of the application pertaining to Parliamentary privilege is moot. For the reasons set out above, I dismiss the balance of Freedom Corp.'s application.

Signed

The Honourable Paul S. Rouleau
Commissioner

December 1, 2022