



Federal Court applications under the *Privacy Act*

Under [section 41 of the *Privacy Act*](#), an individual may request a hearing before the [Federal Court of Canada](#) only in relation to a refusal by a government institution to provide an individual access to his or her personal information held by the government institution about which a complaint was made to the Office of the Privacy Commissioner of Canada (OPC).

A section 41 application is a legal proceeding commenced in the Federal Court of Canada. The OPC has prepared the following information to help complainants understand their rights and guide them through the process of applying for a court review of a government institution's refusal to give them access to their personal information.

Introduction

This document is intended to provide helpful information to guide complainants through the process of applying to the Federal Court for a review under section 41 of the *Privacy Act*¹ (the Act) of a refusal to give access to personal information. For more information, please refer to the *Federal Courts Rules*,² which can be found on the [Department of Justice Canada](#) website.

What is a section 41 application?

A section 41 application is a request for a hearing in the Federal Court regarding a refusal by a government institution to provide an individual access to his or her personal information held by the government institution about which a complaint was made to the Privacy Commissioner of Canada. The complainant may make this application only after the Commissioner has investigated the matter and has issued a final report.

What are the issues involved?

A section 41 application is made **only** in relation to a complaint regarding a refusal by a government institution to provide the complainant with access to his or her personal information after the complaint has been investigated and the results reported to the complainant by the Privacy Commissioner. A section 41 application may not be made in regard to the collection, use or disclosure of a complainant's personal information by a government institution.

What is the purpose of a section 41 application?

The purpose of a section 41 application is to ask the Court to determine whether the government institution respected the applicable provisions of the Act in refusing to provide access to personal information sought by an individual. It is not to review the report prepared by the Privacy Commissioner.

¹ *Privacy Act*, R.S.C., 1985, c. P-21 [the Act].

² *Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court*, SOR/98-106 [Federal Courts Rules].

What evidence must be brought forward?

The Federal Court takes a fresh look at the evidence produced by both parties. Any evidence on which the applicant wishes to rely must be set out in a detailed affidavit. However, the government institution bears the ultimate burden of establishing that it was authorized under the Act to refuse to disclose the requested personal information.

The nature of the government institution's burden will depend on whether the government institution refused to disclose the personal information based on a "mandatory exemption" or a "discretionary exemption."

In the case where the government institution refuses to disclose personal information sought by an individual based on a "mandatory exemption" (that is, the Act requires the government institution to exempt the information from disclosure), the government institution must show that the personal information requested comes within the definition of the information which the Act requires to be exempt. Where the government institution has discretion in determining whether to disclose the information, the government institution must show that it exercised its discretion in good faith and for a reason rationally connected to the purpose for which that discretion was granted.³

Why would I want to file an application under section 41 of the Act?

Since the recommendations in the Privacy Commissioner's report are not legally binding, applicants may bring a section 41 application to have those recommendations relating to a government institution's refusal to provide access to the applicant's personal information enforced by a Court. The applicant may also ask the Court to make other orders against the respondent government institution. For more information on the remedies available, see Question 4.

In cases where the Privacy Commissioner finds the complaint is not well-founded, the complainant may disagree with that finding and ask the Court to issue a ruling to the contrary.

What can the Federal Court order in the context of a section 41 application?

Sections 48 and 49 of the Act provide the Court with the discretion to order any of the following:

- that the personal information be disclosed subject to any conditions the Court deems appropriate; and/or
- such other order that the Court deems appropriate.

Do I need to have a lawyer to bring an application to the Federal Court?

You do not need to have a lawyer to commence and proceed with a section 41 application in Federal Court. Although the experience and expertise of legal counsel may assist you in this process, you may choose to represent yourself.

Who can file an application with the Federal Court?

Under the Act, it is only the individual complainant who may file a section 41 application in Federal Court, and not the government institution.

³ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (Justice LaForest in dissent concurred with by the majority on this point), para. 110.

What is the role of the Privacy Commissioner in this process?

Under section 42 of the Act, the Privacy Commissioner can appear on behalf of a complainant who has applied for a review under section 41 or, with the Court's permission, can appear as a party to the proceedings.

Even if the complainant chooses not to proceed with a section 41 application, the Privacy Commissioner can apply to the Federal Court for a review of any refusal to disclose personal information where the Commissioner has completed the investigation and has the consent of the complainant. In such cases, the Privacy Commissioner's Office will contact the complainant in order to obtain his or her consent prior to applying for a court hearing.

The Privacy Commissioner does *not*, however, represent the complainant before the Federal Court or provide the complainant with legal advice.

When can a section 41 application be filed?

Upon concluding the investigation of a complaint, the Privacy Commissioner will issue a report to the complainant summarizing the results of the investigation. A complainant may only file a section 41 application **after the results of an investigation have been reported to the complainant**.

Are there time limits on when I can file my application?

Section 41 of the Act requires that the applicant bring the application within 45 days after the results of the investigation into the complaint by the Privacy Commissioner are reported to the complainant, or within any further time allowed by the Court.

What happens if I miss the deadline?

There are instances in which the time limit for a section 41 application can be extended. However, this decision does not lie with the Office of the Privacy Commissioner. The applicant is required to bring a motion to the Federal Court requesting an extension. This involves filing and serving a Notice of Motion.

The Court has discretion to permit the applicant to bring the application, despite missing the filing deadline. The Court will examine whether the applicant meets the criteria established in the case law when deciding whether to exercise its discretion. The case law outlines the relevant criteria, including the following:

1. whether the applicant intended to apply to the Court within the limitation period set out;
2. the length of the period for which an extension would be required;
3. whether any and what prejudice to an opposing party would result from an extension being granted; and
4. whether the applicant has an arguable case.⁴

Who is the respondent (i.e. the other side) in a section 41 application?

A section 41 application is not a review of the Privacy Commissioner's report. Rather, it is a determination of whether the government institution respected the provisions of the Act in refusing to disclose personal

⁴ *Clearwater v. Canada (Minister of Canadian Heritage)*, [1999] 177 F.T.R. 103 at para. 16.

information. As such, the only proper respondent in a section 41 application is the government institution in relation to which the applicant brought the original complaint to the Privacy Commissioner.

What are the steps involved in a section 41 application?

Step 1: Notice of Application

Within 45 days after the results of the investigation into the complaint by the Privacy Commissioner are reported to the complainant, the applicant must file a Notice of Application with the Federal Court Registry. This document includes the names of the parties and informs the respondent government institution that it is the respondent in a section 41 application under the Act.

The Notice of Application must set out the precise remedies sought, and state the grounds to be argued before the Court. The Notice of Application must also indicate whether the applicant will be relying on one or more affidavits.

Once the Notice of Application is stamped and, therefore, issued by the Registry, it must be served on the respondent, as well as on the Privacy Commissioner, within 10 days. The applicant must file proof with the Court that they have served the respondent government institution and the Privacy Commissioner within 10 days of serving the Notice of Application, by filing an Affidavit of Service.

Step 2: Notice of Appearance

Within 10 days of receiving the applicant's Notice of Application, the respondent is required to serve the Applicant with its Notice of Appearance. The respondent then files its Notice of Appearance with the Court. This document indicates that the respondent will participate in the section 41 Court proceeding.

Under *Federal Courts Rule* 145, if the respondent does not acknowledge the Notice of Application with a Notice of Appearance, the applicant is no longer required to serve the respondent with further documentation that it files with the Court prior to final judgment.

Step 3: Applicant's Affidavits and Documentary Exhibits

The applicant's affidavit has to be served on the respondent and then filed with the Federal Court Registry within 30 days from when the applicant filed the Notice of Application with the Registry. For more information on affidavits, see Question 15 below.

Step 4: Respondent's Affidavit and Documentary Exhibits

The respondent's affidavit has to be served on the applicant and filed with the Federal Court Registry within 30 days from the date the respondent was served with the applicant's affidavits. For more information on affidavits, see Question 15 below.

Step 5: Cross-examination on Affidavits

The applicant and respondent must complete the cross-examination on each other's affidavits within 20 days after the filing of the respondent's affidavit or the expiry of the time for doing so, whichever is earlier. For more information on cross-examining on affidavits, see Question 16 below.

Step 6: Applicant's Record

The Applicant's Record is required to be served on the respondent and filed with the Federal Court within 20 days after the parties have completed cross-examining each other, or the time limit provided for them to do so, whichever is earlier.

Note: The full Applicant's Record and Respondent's Record includes the following documentation:

- table of contents with nature and date of each document included;
- Notice of Application (Applicant's record only);
- each supporting affidavit with its documentary exhibits;
- transcript of any cross-examination on the affidavits that the party has conducted;
- description of any physical exhibits the party intends to use at the hearing; and
- the party's Memorandum of Fact and Law.

For more information on the Memorandum of Fact and Law, see Question 17 below.

Step 7: Respondent's Record

The respondent's record must be served on the applicant and filed within 20 days from the date of service of the applicant's record, or the expiry of the time for doing so, whichever is earlier. For more information on the documentation required for the Respondent's Record, see the list outlined under Step 6 above.

Step 8: Requisition for Hearing Date

The Requisition for Hearing Date must be prepared by the applicant, served on the respondent and filed with the Registry within 10 days of either the date the respondent served the Respondent's Record or the time allotted for him or her to do so, whichever is earlier.

Federal Courts Rule 314 provides that the requisition should include:

- (a) a statement that the requirements of subsection 309(1) have been satisfied [service and filing of Applicant's Record] and that any notice required under section 57 of the Federal Courts Act [notice of constitutional question] has been given;
- (b) set out the place at which the hearing should be held;
- (c) set out the maximum number of hours or days required for the hearing;
- (d) list any dates within the following 90 days on which the parties are not available for a hearing;
- (e) set out the name, address, telephone number and fax number of the solicitor for every party to the application or, where a party is not represented by a solicitor, the person's name, address, telephone number and any fax number; and
- (f) indicate whether the hearing will be in English or French, or partly in English and partly in French.

Are there particular formatting requirements for documents filed with the Federal Court?

All documents filed with the Court must be printed on letter size (8.5"X 11") white paper, with top and bottom margins of not less than 2.5 cm and left and right margins of not less than 3.5 cm and text should only appear

on one side of the page (other than a book of authorities). The font must not be smaller than 12 point. There can be no more than 30 lines per page, not including headings.

What is involved in serving documents on the respondent?

There are various ways that documents can be served on (i.e. delivered to) the other parties involved, including handing them to the relevant person and sending them by registered mail, courier or in some cases fax. The Notice of Application must be served personally on the respondent, and *Federal Courts Rules* 128 to 137 describe the process for personal service which will vary according to whether the party being served is an individual, a corporation, a partnership, etc. For every document that the applicant serves on the respondent, the applicant must also file proof of service with the Registry, through an affidavit of service that affirms the documents were served within the appropriate timeframe.

For more information on serving documents, see the [Federal Courts Rules](#), which can be found on the Department of Justice Canada website.

What is involved in preparing an affidavit to support my application to the Federal Court?

The affidavit should state the complete facts of the applicant's case without making legal arguments or attempting to interpret the evidence. The Court will base its findings and ultimate decision on the evidence found in the parties' affidavits and exhibits filed with the Court (as well as any cross-examinations on the supporting affidavits).

The applicant's affidavit should outline, at minimum, the following information:

- The complete factual context of the alleged breach of the Act by the respondent government institution;
- Any relevant correspondence between the complainant and the respondent government institution;
- The fact that the person brought a complaint to the Privacy Commissioner;
- The fact that the Privacy Commissioner issued a report; and
- Along with the affidavit, the applicant should provide copies of any documentary evidence that is relevant to the hearing and will form part of the evidence to be reviewed by the Court. These documents should be attached to the affidavit and referred to as "exhibits" in the affidavit.

Affidavits must be limited to facts within the personal knowledge of the individual swearing (or affirming) the affidavit (usually the applicant). An applicant may also wish to include one or more affidavits from other individuals where there are relevant facts outside the personal knowledge of the applicant.

Affidavits must include the signature of the person giving the information, the city where the affidavit was signed, and the date the document was signed. The affidavit must be signed in the presence of an authorized official, known as a Commissioner of Oaths, and the individual making the affidavit must make an oath or affirm the truth of the contents (see form 80 of the *Federal Courts Rules*). The Registry Office will have an official available to commission the affidavit and each exhibit attached to the affidavit.

What is the process for cross-examining on an affidavit?

Federal Courts Rule 83 provides the right to cross-examine on affidavits filed in support of an application. Each party may cross-examine the opposing side after their affidavits have been filed with the Court. The cross-examinations generally take place in a boardroom setting, under oath, and in the presence of a stenographer who will record the examination. Rule 88 also permits cross-examination to be conducted in writing.

Applicant May Cross-examine the Respondent

The applicant should be prepared to cross-examine the respondent on its supporting affidavit if the applicant believes any of the information contained within the affidavit is untrue or inaccurate. In addition, cross-examination may cover any other matters relevant to the determination of the issues on the application.

Applicant May be Cross-examined by the Respondent

The applicant should also be prepared to be cross-examined by the respondent on their affidavit. The respondent will require the applicant to attend and answer questions in regard to any matters relevant to the determination of the issues on the application or motion in respect of which the affidavit was filed. The applicant may refuse to answer questions that fall outside of those matters. Where there is a disagreement as to whether or not a question should be answered, it may be resolved by negotiation between the parties or by motion in front of a judge.

Costs Related to Cross-examination

There are costs involved in the cross-examination process. The party that requests the cross-examination will be required to pay for the associated costs. These costs include:

- securing a location for the examination;
- hiring a stenographer to transcribe the questions and answers;
- hiring an interpreter if the party being examined does not speak English or French; and
- producing transcripts and copies and serving them on the opposing party.

What is a Memorandum of Fact and Law?

Under *Federal Courts Rule 309(2)(h)*, a Memorandum of Fact and Law, often referred to as a *factum*, forms part of the Applicant's Record. The document must be served, as part of the record, on the respondent and then filed with the Federal Court 20 days after the completion of cross-examination, or the time set out for the cross-examination, whichever is earlier.

The *factum* sets out the facts of the applicant's case, the legal arguments the applicant is making, and the authorities on which the applicant is relying. *Rule 70* sets out the required contents of the *factum*:

"70. (1) A memorandum of fact and law shall contain, in consecutively numbered paragraphs,

1. a concise statement of fact, as Part I of the memorandum;
2. a statement of the points in issue, as Part II of the memorandum;
3. a concise statement of submissions, as Part III of the memorandum;

4. a concise statement of the order sought, including any order concerning costs, as Part IV of the memorandum;
5. a list of the authorities to be referred to, as Part V of the memorandum;
6. in a proceeding other than an appeal, the provisions of any statutes or regulations cited or relied on that have not been reproduced in another party's memorandum, as Appendix A to the memorandum; and
7. in a proceeding other than an appeal, a book of the authorities to be referred to that have not been included in another party's book of authorities, as Appendix B to the memorandum."

Rule 70 also states that any federal statutes or regulations included with the Memorandum of Fact and Law should be included in both official languages, and that the memorandum should not exceed 30 pages in length, excluding Part V and the appendices listed above.

Will the Privacy Commissioner forward the documentation from the investigation file to the Federal Court?

No. The Act requires the Privacy Commissioner keep investigations confidential. Therefore, in order to uphold this general obligation, the Privacy Commissioner has consistently objected to requests made by applicants under *Federal Courts Rule 317* to transfer documentation held in the investigation file to the Federal Court, and the Court has maintained the Commissioner's objections.

Exceptionally, the Privacy Commissioner may disclose information in the course of a court hearing under paragraph 64(1)(b) of the *Privacy Act*. Whether the Commissioner does so remains at their sole discretion, and the Commissioner cannot be compelled to produce this evidence.

This being said, individual complainants remain free to produce into evidence any portion of the investigation file that they may have received through correspondence with this Office.

What is involved in the hearing? What should I expect?

Generally, no witnesses are called at a section 41 hearing since the judge will already have the parties' affidavits and transcripts of cross-examinations on affidavits. The applicant will speak first, outlining the facts of the case, the legal arguments he or she is making, and the orders sought from the court. The respondent will then have a chance to respond. The respondent's comments may be followed by a brief reply by the applicant on matters raised for the first time by the respondent.

The hearing generally takes between half a day to one day, and can take up to several days in rare circumstances.

Under section 51 of the Act, a government institution may invoke a "foreign confidence" or "national security" exemption allowing for applications to be heard *in camera* (that is, in the absence of the public, and sometimes, in a private office) and in the National Capital Region (if the government institution so requests). The "foreign confidence" exemption relates to personal information obtained in confidence from the government of a foreign state or an international organization, and the "national security" exemption relates to personal information, the disclosure of which could be detrimental to international affairs or national defence.

Subsection 51(3) of the Act further provides that the government institution who invokes the “foreign confidence” or “national security” exemptions can make representations *ex parte* (that is, where the applicant is excluded from the proceedings) if the government institution so requests. However, subsections 51 and 53 have been interpreted to mean that it is only the *ex parte* submissions that may proceed *in camera* (i.e. those submissions relating to the application of the “foreign confidence” or “national security” exemptions).⁵ A reviewing court retains the discretion, pursuant to section 46, to conduct the remainder of the hearing, in whole or in part, either in public, *in camera*, or *in camera* and *ex parte*.

Will I be informed of the Court’s decision?

Typically, the judge does not render a decision immediately following the hearing. The Court will release its decision several weeks or months later, sending copies of the decision to the parties by fax or through registered mail. The Court can decide to allow or dismiss the application and may also award costs. For information on costs, see Question 23(c) below.

Either party can decide to appeal the decision of the Federal Court to the Federal Court of Appeal if they are not satisfied with the Court’s ruling.

Are hearings held in English or in French?

Under the *Federal Courts Act*,⁶ the Court conducts itself in both official languages. At the request of the parties, the hearing can be held in French or in English, or partly in French and partly in English.

In order to have simultaneous translation of one language to another, *Federal Courts Rule* 31 allows the applicant to make a request, in writing, to the Court Administrator before the hearing begins to request an interpreter under the *Official Languages Act*. Similarly, under *Rule* 93, if the applicant has to be cross-examined on his or her affidavit, the party requesting the examination will have to arrange and pay for a translator to be present.

Where will the hearing be held?

The *Federal Courts Act* entitles the Court to sit at any place in Canada and hold hearings in various locations. Generally, the hearing is held in the city that is requested by the applicant, both in the Notice of Application and the Requisition for a Hearing. The respondent can contest the applicant’s suggestion and request a hearing through other means, for example, teleconferencing.

As noted above under Question 19, a section 41 application must be heard in the National Capital Region if:

- the application is in relation to a refusal to disclose personal information obtained in confidence from the government of a foreign state obtained in confidence from a foreign state or which could be detrimental to international affairs or national defence; and
- the government institution has so requested.

⁵ *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at paras. 1 and 60.

⁶ *Federal Courts Act*, R.S. 1985, c. F-7.

What are some practical considerations to take into account when deciding whether to bring a section 41 application under the Act?

How often do cases go to Court?

During the investigation phase, the Privacy Commissioner helps to settle a significant portion of complaints amicably between the parties. Many are ultimately resolved when the government institution in question agrees to adopt and implement the Commissioner's recommendations. Few cases result in section 41 applications being brought in Federal Court, and even fewer proceed to a hearing.

For example, between August 2006 and January 2008, there were six new applications brought to the Federal Court under section 41 of the Act. None of these applications resulted in decisions. Most applications are settled by the parties before or during the hearing, are abandoned by applicants, or are discontinued for various reasons.

What kind of time investment is involved in the process?

Section 44 of the Act requires the Court to hear and determine applications under section 41 in a summary way, to make the process as expedient as possible. For various reasons, however, such as additional motions and objections, the time between when the application is originally filed with the Court and when the hearing takes place can sometimes take up to two years.

The process can also be time consuming for the parties involved. Bringing the application requires preparing the relevant documents (for example, Notice of Application, affidavits, Memorandum of Fact and Law), filing the documentation with the court, cross-examining and being cross-examined on affidavits, as well as attending the hearing.

What will the application process cost?

There are various costs involved in the application process. Expenses can include, but are not limited to:

- lawyers' fees, where applicable;
- Federal Court filing fees (for example, there is a \$50 filing fee for the Notice of Application, and a \$50 filing fee for the Requisition for a Hearing Date);
- hiring a stenographer to transcribe cross-examinations;
- ordering transcripts;
- photocopying charges; and
- fees associated with mailing documents, or hiring a courier to deliver documents to the opposing party, where the applicant is unable to deliver them in person.

It is important to note that the Court has the discretion to order costs in favour of the successful party (i.e. a portion of the successful party's costs, including legal fees will be reimbursed by the opposing side). However, where the Court is of the opinion that a section 41 application raises an important new principle in relation to the Act, the Court must order that costs be awarded in favour of the applicant, even if the applicant is ultimately unsuccessful in the result (subsection 52(2)).

The current case law suggests that a cost award made in favour of a self-represented litigant may include disbursements and possible “opportunity costs” for lost time pursuing the applicant’s interests.⁷

However, applicants should also consider the possibility that they will have to pay the respondent’s costs (i.e. its expenses including a portion of its legal fees) if their section 41 application is ultimately unsuccessful and if the application does not raise an important new principle in the opinion of the Court.

How is a section 41 application different from an application under section 18.1 of the *Federal Courts Act*?

Under section 18.1 of the *Federal Courts Act*, applicants can bring an application for judicial review which is different from a section 41 application under the Act. Judicial review applications can be used to challenge the decision of the Commissioner and the process he or she used in arriving at his or her decision. These applications may be pursued only on very limited grounds, including if the applicant believes the Commissioner:

- refused to exercise his or her jurisdiction;
- acted without jurisdiction; or
- surpassed the boundaries of the jurisdiction outlined in the Act.

Judicial review may also be available in other limited circumstances, for example, where the complainant feels that the Commissioner has breached obligations of procedural fairness.

Where are the offices of the Federal Court currently located?

A list of [Federal Court Registry Offices](#) can be found on the Courts Administration Service website.

For more information and for sample documents, please refer to the Federal Courts Rules, which can be found on the [Acts, Rules & Forms web page of the Justice Laws website](#).

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⁷ *Rahman v. Canada (Minister of Citizenship and Immigration)* (2002), 216 F.T.R. 263; *Entreprises A.B. Rimouski Inc. v. Canada* (2000), 262 N.R. 276 (Fed. C.A.); *Sherman v. Canada (M.N.R.)*, 2003 FCA 202 (Fed. C.A.).