

Federal Court



Cour fédérale

Date: 20250722

Docket: T-722-24

Citation: 2025 FC 1308

Ottawa, Ontario, July 22, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

**DIKLA MIZRACHI, IRIS WEINSTEIN HAGGAI, JACQUELINE VITAL, RACHEL
OHNONA and CENTRE FOR ISRAEL AND JEWISH AFFAIRS**

Moving Parties

(Applicants)

and

THE ATTORNEY GENERAL OF CANADA

Responding Party

(Respondent)

ORDER AND REASONS

[1] The motion before the Court arises in the context of the application for judicial review filed by the Applicants challenging the federal government's decision to reinstate Canadian funding to the United Nations Relief and Works Agency (UNRWA).

[2] In connection with that application, the Applicants made a request pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] to obtain further information from the Respondent.

[3] The Respondent objected to aspects of this request on two grounds, claiming: that certain documents in the Certified Tribunal Record were sensitive or potentially injurious within the meaning of s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA], and that some parts of the Rule 317 request were too broad. The s 38 process is proceeding on a separate path. This Order and Reasons deals only with the second objection.

[4] For the reasons set out below, the Applicants request for further disclosure will be dismissed. I am upholding the Respondent's objections because the Applicants have not met their onus of demonstrating that further disclosure is required to ensure meaningful judicial review of the Minister's decision or that the documents they seek were before the Minister when the decision to reinstate funding was made. In addition, some of the documents are already in the possession of the Applicants and thus not subject to Rule 317.

I. Background

[5] The underlying application for judicial review in this matter challenges the decision made on March 8, 2024, by Global Affairs Canada (GAC) to reinstate Canadian funding to UNRWA. That funding had been suspended on January 26, 2024.

[6] It is common ground that Canada and other nations suspended UNRWA funding after the disclosure of allegations that certain UNRWA employees had been involved in the October 7, 2023, attacks by Hamas in Israel, following the launch of investigations into the allegations. The

Applicants challenge the decision to reinstate that funding. In their Amended Notice of Application, the Applicants argue that the decision was unreasonable in light of:

- A. UNRWA’s history and participation with Hamas, a listed terrorist entity pursuant to Criminal Code section 83.05; and/or
- B. The Respondent’s failure to comply with their statutory duties pursuant to:
 - i. The *Department of Foreign Affairs, Trade and Development Act*;
 - ii. The *Official Development Assistance Accountability Act*; and
 - iii. The *Canadian Charter of Rights and Freedoms* (“the Charter”).

[7] It is not necessary for the purposes of this motion to detail all of the elements of the Applicants’ claims. It is important, however, to note that they set out a core element of their challenge in the following way in their Amended Notice of Application:

41. The Minister of International Development announced on January 26, 2024, the suspension of Canada’s funding to UNRWA pending the final results and reports of two independent investigations.

42. On March 8, 2024, the Minister of International Development did not have the final results of either investigation, yet he chose to make the impugned unreasonable decision anyway in violation of the legitimate expectation generated by his January 26 announcement.

[8] The Amended Notice of Application was filed on May 1, 2024. On May 8, 2024, the Applicants filed and served a Request for Material under Rule 317 of the *Rules*. The Applicants requested the following material:

- 1. The Report titled “UNRWA – Connections to Terror” Intelligence Briefing...

2. Confirmation that the Report was provided to the Minister prior to the announcement of reinstatement of funding on March 8, 2024;
3. Evidence and documentation relating to the “significant processes” that Canada stated it learned that the UN had put in place to “address the allegations and reinforce its zero tolerance for terror within the UN”, as referred to in the Announcement of the Government of Canada on March 8, 2024, entitled “Canada announces continued assistance for people in Gaza”;
4. The interim report of the UN Office of Internal Oversight (OIOS) on the matter of UNRWA and its contribution to terrorism by Hamas as referred to in the above noted announcement;
5. All records, including but not limited to notes, communications, briefing notes, and background information that the Government of Canada has relating to Catherine Colonna, and her selection to assess UNRWA’s neutrality mechanisms;
6. All records, including but not limited to notes, communications, briefing notes, reports, and documents relating to the neutrality of the UN assessment of UNRWA’s neutrality in Hamas terrorism and its actions against the State of Israel and Israelis, including when this information was obtained by the Government of Canada and how it was obtained;
7. All records, including but not limited to notes, communications, briefing notes, reports and documents relating to the issue of UNRWA schools supporting terrorist and anti-Israel ideology in schools, including curriculum, teaching tools and teaching methods including when this information was obtained by the Government of Canada and how it was obtained;
8. All records, including but not limited to notes, communications, briefing notes, reports and documents relating the use of UNRWA schools for purposes that support terrorism such the storage of weapons, use of buildings for terrorist purposes, including when this information was obtained by the Government of Canada and how it was obtained; and
9. Any other documents since January 1, 2024, including e-mails, text or Instant messages, slack messages, WhatsApp messages, Signal messages, Twitter/X direct messages, reports, memos, briefing notes, Q&A’s, media lines, etc., regarding the decision to restore funding to UNRWA, on March 8, 2024.

[9] On May 28, 2024, the Respondent objected to portions of the Applicants' request for materials. First, the Respondent claimed that the tribunal record contains information that is sensitive or potentially injurious within the meaning of s 38 of the CEA. The Respondent argues that items 1, 2 and 4 set out above fall within the s 38 claim. As noted previously, the s 38 process has commenced and will proceed on a separate track.

[10] This motion focuses on the second ground for objection put forward by the Respondent, which it expressed in the following way:

The reasons for this objection are as follows:

(a) the request is in the nature of discovery and improper under Rule 317;

(b) additional materials were not before the Minister and do not form part of the record in relation to the decision; and,

(c) to the extent that the request covers such additional materials, it is too broad, vague or general to permit a focused search for records potentially relevant to the decisions subject to this Application.

[11] This is the matter before the Court.

[12] To complete the background, on October 30, 2024, the Respondent filed a redacted Certified Tribunal Record, with a certificate by the Director and Senior Departmental Advisor to the Minister of International Development. That certificate lists 15 documents that "were before the Minister for International Development when he made the decision that is subject of the Applicants' Notice of Application."

II. Rules 317 and 318

[13] Applications for judicial review are usually based on an examination of the record that was before the decision-maker at the time of the decision being challenged: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 125–126. An essential element of judicial review is to assess whether the decision accurately and adequately reflects the legal and factual constraints of the case and this requires an understanding of the material that comprised the “record” for the decision.

[14] Meaningful judicial review, therefore, requires access to that record. Sometimes the applicant has all or almost all the relevant material. Where that is not the case, Rule 317 provides a mechanism by which the applicant and the Court can obtain the material from the decision-maker.

[15] The portion of Rule 317 that is relevant to this matter provides:

Material from tribunal	Matériel en la possession de l’office fédéral
317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu’elle n’a pas mais qui sont en la possession de l’office fédéral dont l’ordonnance fait l’objet de la demande, en signifiant à l’office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[16] Rule 318 provides that the decision-maker shall transmit a certified copy of the requested material to the Registry and to the applicant. If a party objects to a request under Rule 317, they

may inform the parties and the Court, setting out the reasons for their objection. Once that is done, the Court may give directions as to the procedure to be followed in dealing with the objection.

[17] The following principles to guide the analysis of a Rule 318 objection to Rule 317 disclosure can be distilled from the case-law, which was usefully summarized in *Canadian National Railway Company v Canada (Transportation Agency)*, 2023 FCA 245 at paras 13–19 [*Canadian National*], *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2021 FC 624 [*GCT*], and *Tsleil-Waututh First Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 86–115 [*Tsleil-Waututh*]

[18] The first point is that only relevant material must be disclosed. What is relevant is defined by the pleading (here the Amended Notice of Application). The Court must read the pleading with a view to gaining a realistic appreciation of its essential character: *Canadian National* at para 14. Disclosure of relevant materials is the norm, and claims for non-disclosure cannot immunize a decision from meaningful review. It is a fundamental principle of our democratic regime that the exercise of public power be subject to review by independent courts. However, claims based on recognized legal principles such as solicitor-client or national security can be invoked to shield certain material from disclosure.

[19] A Rule 317 request, however, does not serve the same purpose as discovery in an action. As stated in *Canadian National* at para 15: “attempts to conduct discovery of material to see whether a ground of judicial review might exist—the proverbial fishing expedition—also cannot

be permitted... (citations omitted).” In applying this principle, context is important because some judicial review applications concern a single, discrete decision while others may challenge a decision that is part of an ongoing series of decisions involving a particular project or question, or that was based on long-standing policies or practices. In the latter instances, further disclosure may be required to properly understand the context for the decision under review.

[20] In *Canadian National* at para 17, the Federal Court of Appeal provided the following important clarification:

[...] If there is an arguable case that the documents sought might well be relevant to the grounds or relief set out in the pleading, they should be disclosed. Fine, precise and final determinations of relevance are for the judge or panel hearing the merits of the application or appeal. By then, the judge or panel will have the benefit of the parties’ submissions on the complete evidentiary and legal picture and, thus, will be empowered to make the best possible decision on relevance.

[21] The overarching considerations in analyzing a Rule 318 objection were summarized in *Ron W Cameron Charitable Foundation v Canada (National Revenue)*, 2023 FCA 175:

[11] In reviewing an objection to disclosure under Rule 318, a court must seek to provide a remedy that reconciles, as much as possible, three objectives: (i) providing meaningful review of administrative decisions, which the reviewing court will be unable to engage in without being satisfied that the record before it is sufficient; (ii) procedural fairness; and (iii) the protection of any legitimate confidentiality interests while ensuring that court proceedings are as open as possible (*Girouard v. Canadian Judicial Council*, 2019 FCA 252 at para. 18, citing *Lukács v. Canada (Transportation Agency)*, 2016 FCA 106 at para. 15; see also *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2021 FC 624 at para. 27).

[22] These are the principles that I must apply in considering the Rule 317 request.

[23] It is perhaps useful at this stage to step back to discuss the underlying tension in requests under Rule 317. In some cases, the Applicant will not know what was actually put before the decision-maker, but will have an expectation (or suspicion) that certain material was – or should have been – part of the record. Applicants, and the reviewing court, need access to the relevant material so that the decision can be subjected to meaningful judicial review. That is a key way in which our commitment to the rule of law in a constitutional democracy is made real. The exercise of public power by officials must be subject to probing scrutiny by independent courts.

[24] On the other hand, a decision-maker has an interest in ensuring that all of the relevant material is included in the record that is placed before the decision-maker, without overloading the process. This is not only a matter of good administrative practice; if key documents are excluded or missed, the decision-maker may not be able to defend the decision on review. This can involve balancing the vast array of information that may have been gathered by – or have come into the possession of – a government department, board or agency, and the practical realities faced by the decision-maker. In the end, the law requires that the “record” that was placed before the decision-maker for the specific decision be disclosed. If that record is inadequate, or if the key part of it cannot be disclosed because of legal privilege, the decision may be difficult if not impossible to defend on judicial review.

[25] A good example of this is the difficulty that can arise when the Cabinet is asked to make a decision that is subject to judicial review. If the key documents that were considered in reaching the decision cannot be disclosed because they are subject to Cabinet confidence, the government may have a very difficult time defending the decision on judicial review: see *Babcock v Canada (Attorney General)*, 2002 SCC 57.

[26] The question in this case is whether “the record” – meaning all of the material that was before the Minister when the decision being challenged was taken - has been disclosed in the redacted Certified Tribunal Record (CTR).

[27] With this background, I turn to a discussion of the Applicants’ request and the Respondent’s objection.

III. Analysis

A. *Is the Applicants’ request a fishing expedition?*

[28] The Applicants’ application for judicial review does not allege procedural unfairness or bias, which may trigger a broader disclosure obligation: *Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201. Because of that, their Rule 317 request is limited to material that was before the Minister when the decision to reinstate UNRWA funding was made. It cannot extend to documents that may be in the possession of GAC or some other government department, if that material was not before the Minister when the decision was made: *Tsleil-Waututh* at para 114.

[29] A shorthand summary of the parties’ position (which is elaborated below) boils down to this. The Applicants point to a number of important documents that they say were provided to the government or the Minister before the decision was taken, arguing that these should have been before the Minister. They want to know whether those documents were put before the Minister, and in regard to the first document (an intelligence briefing reported on by the National Post), they want confirmation of when it was provided to the Minister.

[30] I pause here to note that a claimant's argument that certain material "should" have been before the decision-maker often takes two forms. One example is where a draft decision document was disclosed to an individual with a request for their reaction to it, and a promise that their input would be put before the decision-maker. That is the process followed by the Canadian Human Rights Commission, for example. A complaint is filed, an investigation is done, and the investigation report is sent to the parties for comment, on the understanding that their input will be included in the material put before the Commission when it makes its decision. If one party's submissions are not included in the CTR, they likely have a valid procedural fairness claim.

[31] On the other hand, a claimant will sometimes argue that a certain document should have been included in the record that was assembled for the decision-maker, because it was essential evidence needed for a full and fair consideration of the matter and it was in the possession of the department or agency. To be clear, this speaks to a situation where there has been no undertaking that this material would be put before the decision-maker; the argument is that the record is inadequate because relevant information was not provided to the decision-maker. That is a different matter. This kind of argument goes to the merits of the judicial review.

[32] Turning back to the case at bar, the Respondent argues that the Applicants' requests for "all records" as set out in items 5 to 9 of the Rule 317 request are far too vague and broad. They say this amounts to a fishing expedition. Rather than identifying specific documents, the Applicants request "[a]ll records, including but not limited to notes, communications, briefing notes and background information" on a range of subjects that may be related to the background or context for the Minister's decision, in particular the relationship between UNRWA and Hamas, as well as the investigation of the alleged involvement of UNRWA staff in the October 7

attack in Israel. The Respondent submits that the Court has characterized comparable requests as fishing expeditions, and it should do the same here.

[33] The Respondent says that the documents listed in the CTR certificate are the only materials that were before the Minister when the decision was made, and that the Applicants have not demonstrated that any of the other material was part of the record before the Minister.

[34] For the reasons set out below, I am not persuaded that the Applicants have met their onus to provide evidence to justify their request: *Ford v Canada (Attorney General)*, 2023 FC 1513 at para 24, *aff'd* 2025 CAF 26.

[35] The Applicants point to three categories of information that they say should have been before the Minister but are not included in the redacted CTR. The first group are documents that they provided to the Minister. For example, on February 1, 2024, Shimon Koffler Fogel, the Chief Executive Officer of the Centre for Israel and Jewish Affairs (CIJA) – one of the Applicants in this proceeding – sent a letter to the Minister of International Development expressing concerns about UNRWA’s links to Hamas and its involvement in the October 7, 2023, attack on Israel. The following day, the CIJA’s Vice President (External Affairs) and General Counsel sent a second letter to the Minister elaborating on these concerns. The Applicants point out that neither of these documents are included in the redacted CTR.

[36] I pause here to note that these letters are appended as exhibits to the affidavit sworn by Mr. Fogel in connection with the underlying application. Such documents therefore fall outside of Rule 317, which only requires the disclosure of information that is not in the possession of the

party making the request. Because of this, nothing further needs to be said regarding the letters, they simply do not fall under Rule 317.

[37] A second category are documents that were provided to the Minister by others, according to the Applicants. This includes a 22-page Israeli intelligence report entitled “UNWRA – Connections to Terror” that was allegedly provided to the government before it decided to resume funding to UNRWA. The Applicants rely on an article published in the National Post on April 12, 2024, for this claim. Second, the Applicants point to an article in the Canadian Jewish News, dated March 26, 2024, which reports on an interview with Israel’s ambassador to Canada in which he states that Israel had shared certain intelligence information with the Canadian government before the decision under review was made.

[38] A third category of documents are various reports prepared by non-governmental organizations such as UN Watch, that are said to provide details regarding the nature and history of UNRWA involvement with or connections to Hamas. The Applicants submit that this kind of information should have been before the Minister in order to inform the decision-making process.

[39] The Respondent opposes the Applicants’ request for these documents, arguing that this amounts to a fishing expedition. The fact that certain documents may have been submitted to some government official at some point is not relevant to the Rule 317 inquiry, according to the Respondent. Instead, the question is whether the Applicants have met their onus of establishing that specific documents that are not already in their possession were part of the record before the Minister at the time the decision was made. The Respondents submit that the Applicants have not established that further disclosure should be ordered.

[40] As discussed previously, whether a particular document should have been before the Minister when the decision was made is a matter that goes to the merits of the underlying judicial review. The only question before me is whether there is sufficient proof that a particular document was put before the Minister as part of the record for this decision. I can find no basis to draw that conclusion in regard to the types of material reports referred to by the Applicants.

[41] As a first point, if any of these documents are part of the record that was before the Minister but are currently subject to the s 38 claim, they will be addressed through that separate process.

[42] As for the other records sought by the Applicants, I accept that there is evidence that some other documents relating to alleged connections between UNRWA and Hamas were provided to the Minister and/or GAC and/or other government departments or agencies. However, that is not the test for disclosure under Rule 317. Much of the evidence relied on by the Applicants is of a general nature. On the evidence, the Applicants have been unable to establish a basis to determine that those documents were before the Minister when the decision was made.

[43] I acknowledge that in these sorts of cases, an applicant may feel that they are at somewhat of a disadvantage, because although they may genuinely suspect or believe that other documents were put before the decision-maker, they have no way of proving that. That is an understandable concern. However, as noted above, one of the grounds for granting judicial review is that relevant documents were not before the decision-maker and the record is therefore incomplete. Because of that, decision-makers have an incentive both to ensure the relevant

documents are included in the record, and to disclose the entirety of the record when judicial review is launched so that their decision can be defended.

[44] In this case, the Applicants have not put forward any basis to question the certificate filed with the redacted CTR. Their belief that an Israeli intelligence briefing was made available to Canadian officials before the decision to reinstate funding was made is based on the reporting in the National Post article. Even accepting that this is true, that fact does not mean that this report should be disclosed in response to the Rule 317 request. To repeat, the question is not whether other information was in the possession of GAC or the Minister, but rather whether additional documents that part of the “record” were when the decision was taken should be disclosed beyond what is contained in the redacted CTR.

[45] There can be no doubt that the department had other material in its possession, and perhaps the Minister did too. Whether that material was needed for the Minister to make a reasonable decision is not for decision here; that will be dealt with in the hearing on the merits. The only question at this stage is whether all of the material that actually was put before the Minister has been disclosed in the redacted CTR. A related question is whether any redactions should be lifted or summaries prepared in the currently redacted CTR, which will be decided in the context of the s 38 process.

[46] For the reasons set out above, I am not persuaded that the Applicants’ Rule 317 request should be granted. The Applicants have not established a basis to believe that documents that were before the Minister when he took the decision under review have not been disclosed.

[47] One particular aspect of the Rule 317 request merits additional comment. The Applicants' first request is for disclosure of an intelligence briefing. Their second request is for "[c]onfirmation that the Report was provided to the Minister prior to the announcement of reinstatement of funding on March 8, 2024." In my view, this request goes well beyond the scope of Rule 317, because it is asking for the Respondent to answer a question rather than providing materials that were placed before the Minister. This request is clearly more in the nature of discovery, which is beyond the scope of Rule 317.

[48] For the reasons set out above, the Respondent's objection to the Applicants' Rule 317 request is upheld. No further disclosure will be ordered under Rule 317.

[49] No costs are awarded on this motion. Each party shall bear its own costs.

ORDER in T-722-24

THIS COURT ORDERS that:

1. The Applicant's request for further disclosure under Rule 317 is dismissed. The Respondent's objection under Rule 318 is upheld.
2. No further disclosure shall be ordered.
3. No costs are awarded.

"William F. Pentney"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-722-24

STYLE OF CAUSE: DIKLA MIZRACHI, IRIS WEINSTEIN HAGGAI,
JACQUELINE VITAL, RACHEL OHNONA and
CENTRE FOR ISRAEL AND JEWISH AFFAIRS

PLACE OF HEARING HELD BY VIDEOCONFERENCE

DATE OF HEARING APRIL 4, 2025

ORDER AND REASONS: PENTNEY J.

DATED: JULY 22, 2025

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