Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3821

Appeal PA17-110

Social Justice Tribunals Ontario

February 27, 2018

Summary: The Social Justice Tribunals Ontario (SJTO) received requests under the *Freedom of Information and Protection of Privacy Act* for access to information relating to the requester found in certain identified files of the Human Rights Tribunal of Ontario (HRTO). The SJTO identified responsive records and granted partial access to them, ultimately relying on section 49(a) (discretion to refuse requester's own information), in conjunction with section 19 (solicitor-client privilege) to withhold access to a handwritten notation on a document and an email chain. In this order, the Adjudicator finds that the information at issue qualifies for exemption under section 49(a) in conjunction with section 19 and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) "definition of personal information", 19 and 49(a).

Orders considered: PO-3078 and PO-3582.

Cases Considered: *Ontario (Ministry of Community and Social Services) v. Cropley*, 2004 CanLII 11694 (ON SCDC); *R. v. Campbell*, 1999 CanLII 676, [1999] 1 S.C.R. 565; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Social Justice Tribunals Ontario (SJTO) received three separate requests[1] under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to view information relating to the requester found in certain identified files of the Human Rights Tribunal of Ontario (HRTO).

[2] The SJTO identified responsive records and granted partial access to them, withholding certain information that it asserted was subject to solicitor-client privilege and qualified for exemption under section 19 of the *Act*. After being permitted to view the information in the records that the SJTO was prepared to disclose, the requester asked for copies of those records. The requester then received those copies upon payment of a fee for photocopies.

[3] The requester (now the appellant) asserted that he should be provided access to the portion of the records that were withheld and appealed the SJTO's access decision.

[4] At mediation, the SJTO clarified that it was relying on section 49(a) (discretion to refuse requester's own information) in conjunction with section 19 of the *Act*, to deny access to the portion of the records that it withheld.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During my inquiry into the appeal, I sought, and received, representations from the SJTO and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I find that the information at issue qualifies for exemption under section 49(a), in conjunction with section 19, and I dismiss the appeal.

RECORDS:

[8] At issue in this appeal is a handwritten notation on page one of a document entitled "Activities – Case Summary" (responsive to request 017004) and pages one to four of email correspondence (responsive to request 017006).

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[1] Identified by the SJTO as requests 017004, 017005 and 017006.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the discretionary exemption at section 49(a), in conjunction with section 19, apply to the withheld information?

Preliminary matters

[9] In his wide-ranging representations, the appellant sets out his concerns regarding procedural fairness in the HRTO proceedings, which include allegations of bias and conflict of interest. One of the issues that the appellant raises is his concern regarding the conduct of the HRTO and a named decision maker in relation to his matters that were before HRTO. He also asks that the HRTO confirm what was before the decision maker in the HRTO proceeding. Furthermore, the appellant argues that as a matter of procedural fairness, if the decision maker in his HRTO proceeding had access to solicitor-client communications, and may have relied on them in making their decision, it would be unfair for them not to be disclosed to him. I do not have the power to determine the fairness of the HRTO proceeding involving the appellant, or to compel the HRTO to answer the queries posed by the appellant and I decline to make any comment upon it. The interaction between procedural fairness before HRTO and the claiming of solicitor-client privilege in this access request under the *Act*, is discussed below.

[10] The appellant also indicates his desire to cross-examine SJTO's counsel with respect to the content of the representations the counsel prepared on behalf of the SJTO, which he asserts contain hearsay and irrelevant evidence. He adds that it would be an abuse of process to allow the representative to provide representations on the appellant being declared a vexatious litigant. In support of his position, the appellant provides extensive representations on why a solicitor should not provide affidavit evidence in a proceeding. The solicitor acting for the SJTO provided written representations not an affidavit and this office has a written hearing process. In this process the appellant was given the opportunity to review the SJTO's representations and he provided extensive representations in response. The appellant was aware of the case he had to meet and he was given ample opportunity to do so. While acknowledging that written representations may contain hearsay evidence, in this appeal, I determined it was not necessary to permit a cross-examination of SJTO's counsel with respect to the content of the representations he prepared on behalf of the SJTO. Finally, as explained by the SJTO, and set out in more detail below, the status of the appellant being declared a vexatious litigant was provided to explain why one of the solicitor-client communications took place.

[11] I now turn to the issues in the appeal.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except where they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
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> (g) the views or opinions of another individual about the individual, and
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> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.[2]

[14] Sections 2(3) and 2(4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[16] I find that the records remaining at issue, which relate to matters involving the appellant in HRTO proceedings, contain the personal information of the appellant that falls within the scope of the definition of personal information in section 2(1) of the *Act*.

Issue B: Does the discretionary exemption at section 49(a), in conjunction with section 19, apply to the withheld information?

[17] Under section 49(a) of the *Act*, where a record contains the personal information of the appellant and section 19 would apply to the disclosure of that information, the SJTO may refuse to disclose that information to the appellant.

[18] Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; …

[19] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[20] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[21] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[6] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[7] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[8]

[22] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[9]

Loss of privilege

Waiver

[23] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[10]

[24] An implied waiver of solicitor-client privilege may also occur where fairness

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[6] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[7] Orders MO-1925, MO-2166 and PO-2441.
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[10] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[11]

[25] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[12] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[13]

Branch 2: statutory privileges

[26] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The SJTO's representations

[27] The SJTO explains that the information that it claims to be subject to section 49(a), in conjunction with section 19, consists of the following:

- A handwritten note included on an internal document related to HRTO application [application number] from SJTO legal counsel to HRTO staff providing legal advice about procedural issues with respect to the application.

- A chain of emails related to HRTO application [application number] between an HRTO member, the HRTO Associate Chair, senior HRTO staff, and the Counsel to the Executive Chair/Manager of SJTO Legal Services with recommendations, including legal advice with respect to resolving an issue related to the application.

[28] The SJTO takes the position that the withheld information is subject to the Branch 1 common law solicitor-client privilege. The SJTO submits:

> The withheld note from legal counsel with respect to HRTO application [application number] is communication of a confidential nature between SJTO legal counsel, and a client, the HRTO, giving professional legal advice. The note was made on an internal HRTO document related to the application file that included a section for "CPO Notes." In the notes, the Case Processing Officer (CPO) assigned to the file sought legal advice

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[11] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[12] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[13] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

> about how to appropriately process the application and indicated the file would be forwarded to "Legal." The withheld note was written by SJTO legal counsel and provided the advice the CPO requested and additional advice about processing the application. The communication from legal counsel was intended specifically to respond to the CPO who requested the advice. The note is implicitly confidential and should be considered to be subject to solicitor-client communication privilege pursuant to Branch 1.

[29] Relying on Orders PO-3078 and PO-3582, the SJTO submits that solicitor-client privileged communications include emails that are forwarded to counsel as part of an email chain. This is because, the SJTO submits, they formed part of the continuum of communications aimed at keeping the solicitor informed so that advice could be sought and given as required. The SJTO submits:

> The withheld chain of emails related to HRTO application [application number] concerns an issue that had arisen during the processing of the application. The issue was flagged by an HRTO member. In the originating email, the member asked for input in resolving the issue from a number of recipients including Counsel to the Executive Chair/Manager of SJTO Legal Services. The various recipients of the original email, including counsel, responded. The emails were an internal exchange intended to resolve the concerns raised by the HRTO member. The exchange was implicitly confidential there was no intention to disclose the email exchange to anyone other than the recipients and the HRTO staff responsible for carrying out the recommendation for resolving the issue. All emails in the chain should be viewed as part of the continuum of communication between counsel and client and subject to solicitor-client communication privilege pursuant to Branch 1.

[30] Regarding whether any privilege in the information was waived, the SJTO submits that:

> When responding to the requests, the SJTO inquired with SJTO Legal Services about whether they intended to waive privilege with respect to the withheld information. SJTO Legal Services made clear they did not waive privilege.

[31] The SJTO submits that the information also falls within Branch 2 of section 19. It submits that the withheld note was prepared by legal counsel who was a part of the SJTO Legal Services Branch for the purpose of giving legal advice and that legal Counsel in the SJTO Legal Services Branch are employed by the Ministry of the Attorney General. It further submits that the withheld email chain was an exchange between an HRTO member, the HRTO Associate Chair, senior HRTO staff and Counsel to the

Executive Chair/Manager of SJTO Legal Services in which the HRTO member sought advice about resolving an issue concerning the application. It submits that the email chain includes legal advice from Counsel to the Executive Chair, who is employed by the Ministry of the Attorney General.

The appellant's representations

[32] The appellant argues that the information at issue does not qualify for exemption under section 49(a) in conjunction with section 19.

[33] With respect to Branch 1, he submits that the SJTO has not adequately defined who the client was and in what capacity they received the advice. The appellant's alternative position is that, as a matter of procedural fairness, if the decision maker in his proceeding had access to solicitor-client communications, and may have relied on them in making their decision, it would be unfair if the information was not disclosed to him.

[34] He also asserts that Branch 2 does not apply. He submits that the SJTO has failed to provide "any law supporting its position that legal advice secretly received by a Judge can be subject of 'solicitor-client privilege'".

[35] He further submits that the privilege resides with the recipient of legal advice, not the one providing that advice and that the SJTO contacted the "wrong person" to request a waiver of any privilege, if it existed.

SJTO's reply representations

[36] With respect to waiver of privilege, the SJTO agrees with the appellant that privilege resides with the recipient of legal advice, not the one providing that advice. They explain:

> In this case it is the SJTO (and/or the HRTO, which is a constituent tribunal of the SJTO) that holds the privilege. The assertion of non-waiver of privilege by SJTO Legal Services was intended to have been made on behalf of its client (i.e. SJTO/HRTO), although this may have been unclear in SJTO's earlier submissions. For greater clarity, neither the HRTO nor SJTO waive privilege.

[37] With respect to the appellant's argument that the withheld information could have been seen by an adjudicator and could have had an impact on his or her decision, thereby resulting in a loss of privilege, the SJTO submits:

> This note provided advice to HRTO staff on procedural issues and steps unrelated to any issue ever decided by any adjudicator. In-house SJTO counsel routinely provides summary advice to HRTO staff members on

> procedures relating to the proper processing of applications. In this case, the advice was provided and procedural steps related to that advice were undertaken prior to any review by any adjudicator.

[38] The SJTO submits that the advice provided was analogous to the type of procedural advice provided in *Ontario (Ministry of Community and Social Services) v. Cropley*[14], ("*Cropley*"), in which it asserts the Ontario Divisional Court confirmed that procedural advice of this nature is properly within the scope of solicitor-client privilege which an institution may claim. The SJTO adds:

> Unlike in *Cropley*, where there was to some extent a dispute about whether the advice was general in nature, in the instant case, the procedural advice pertained to the particular legal context of this particular legal proceeding.
>
> Even if seen by an adjudicator the advice provided to staff could have had no bearing on any matter decided by an adjudicator and is not subject to any loss of privilege.
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> The opinion provided to tribunal staff by counsel was a summary legal opinion. It was provided to the tribunal by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege.

[39] The SJTO adds that the email string arose in one of 21 human rights applications filed by the appellant who, at the time it was being processed, had been declared a vexatious litigant by the HRTO. It explains that a term of that declaration was the requirement to file "leave" submissions in any other applications filed with the tribunal. The SJTO submits that the email string includes confidential advice from counsel to the tribunal on the appropriate procedure in the context of this particular application and the extant vexatious litigant declaration.

[40] The SJTO further submits that:

> The submissions above pertaining to 'the note' apply equally to the email string. As above, the advice provided within the email string falls squarely within the scope of protected solicitor-client advice contemplated in *Cropley* and *Pritchard*[15]. And as above, the advice provided by tribunal counsel to the tribunal did not relate to any issue decided by an adjudicator.

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[14] 2004 Canlii 11694 (ON SCDC).
[15] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31.

[41] The SJTO specifically asserts that the advice in question was provided to the HRTO as an institution and was unrelated to any issue in dispute between the parties in either proceeding, which would at any point have been decided by an adjudicator in the course of either proceeding.

The appellant's sur-reply representations

[42] In sur-reply the appellant takes issue with the SJTO's characterization of the substance of the note and asserts that *Cropley* is distinguishable. He submits that *Cropley* deals with investigation procedures, rather than records in the custody or control of a decision-maker in an adversarial proceeding.

[43] He further submits that *Pritchard* is also distinguishable on the basis that the Ontario Human Rights Commission has many functions and cannot be considered a decision-maker in an adversarial proceeding.

[44] He also takes issue with statement of the SJTO that the email string did not relate to any issue decided by the adjudicator as the SJTO also wrote in its representations that the email string includes confidential advice from counsel to the tribunal on appropriate procedure. He submits that an inference can be drawn that the withheld information relates to the application in general. In his view, it is "common sense" that the information had some connection to his files.

Analysis and finding

[45] This appeal deals with specific information provided by in-house counsel to his client, being HRTO's staff or employees. Although dealing with the Ontario Human Rights Commission, the Supreme Court of Canada's decision in *Pritchard* established that privilege applies to counsel advising an administrative tribunal, which in my view includes HRTO. After referring to the Supreme Court of Canada's decision in *R. v. Campbell*[16] discussing the scope of that privilege, Major J wrote at paragraphs 20 and 21 of the decision in *Pritchard* that:

> Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50.

[16] 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565.

> Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

[46] Even though *Cropley* dealt with different records, it stands for the principle that the legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law but the type of communication must be construed as broad in nature, including advice on what should be done, legally and practically.[17]

[47] I find that the withheld information at issue falls within the scope of section 19 because disclosure of this information would reveal communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice and aimed at keeping both informed so that advice can be sought and given or would reveal the substance of the confidential communication or legal opinion provided, and/or would qualify as a record "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation".

[48] With respect to waiver, as indicated above, the appellant argues that as a matter of procedural fairness, if the decision maker in his HRTO proceeding had access to solicitor-client communications, and may have relied on them in making their decision, it would be unfair for them not to be disclosed to him. For the purposes of access under the *Act*, I do not agree. The interaction between procedural fairness and access to solicitor-client privileged communication in the context of administrative boards or tribunals was squarely addressed in *Pritchard*, where at paragraph 31 of the decision Major J. explained that privilege and procedural fairness co-exist without being at the expense of the other:

> Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. … The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

[49] Those excerpts from *Pritchard* stand for the principle that HRTO cannot be compelled to disclose a solicitor-client privileged communication, and the failure to

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[17] *Cropley*, at paragraph 22.

disclose the opinion does not itself amount to a breach of the rules of natural justice.

[50] On the facts before me, I am satisfied that no waiver of privilege has occurred with respect to the information at issue in this appeal. Accordingly, I find that this information qualifies for exemption under section 49(a) of the *Act*, in conjunction with section 19.

[51] Finally, I have considered the representations provided by the SJTO and the appellant on the SJTO's exercise of discretion, which I have not reproduced in this order. I am satisfied that in all the circumstances, the SJTO properly exercised its discretion under section 49(a) of the *Act.* It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[18]

[52] I have also considered whether the records at issue can be severed and portions of the withheld information be provided to the appellant. In my view, in light of the appellant's familiarity with underlying matters in the records at issue, I am satisfied that the records cannot be severed without disclosing information that I have found to fall within the scope of section 49(a) in conjunction with 19 of the *Act*. Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.[19]

[53] Therefore, I find that the withheld information is solicitor-client privileged information and qualifies for exemption under section 49(a) in conjunction with section 19.

ORDER:

I uphold the SJTO's decision and dismiss the appeal.

Original Signed by: February 27, 2018
Steven Faughnan
Adjudicator

[18] 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.
[19] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).