

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4255

Appeal PA19-00497

Social Benefits Tribunal

April 28, 2022

Summary: This order addresses one of two related requests made by the same individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Social Benefits Tribunal (SBT) for records relating to the SBT's processing of new SBT appeal files for him. The SBT identified a number of emails as responsive to the request and withheld one of them pursuant to the discretionary exemption for solicitor-client privileged information at section 19 of the *Act*. In this order, the adjudicator finds that section 19 applies to the email and that the SBT's exercise of discretion not to disclose it was appropriate. She upholds the decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 19.

OVERVIEW:

[1] An individual with a number of appeals before the Social Benefits Tribunal (the SBT) had questions about the manner in which the SBT was processing his appeals. The individual was concerned that the SBT was placing restrictions on the number of appeals that he could make to the SBT with respect to decisions made pursuant to the Ontario Disability Support Program (ODSP).

[2] In an attempt to gain some clarity, the individual submitted two requests to the SBT under the *Freedom of Information and Protection of Privacy Act* (the *Act*). This order addresses SBT's denial of access to one of the records identified as responsive to one of the requests.

[3] In the request that is the subject of this appeal, the requester sought access to all records related to a "tribunal member's instructions to staff" which was referred to in correspondence sent to him by the SBT. Referring to a comment in the letter that he believes suggests that such instructions had been given, the requester specifically asked for "...a copy of the tribunal member's instructions to staff as well as all related documents that precipitated the coming about of the tribunal member's instructions."

[4] The SBT issued a decision granting the requester access to one email exchange between SBT staff.

[5] The requester, now the appellant, appealed the SBT's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to facilitate a resolution between the parties.

[6] During mediation, the appellant stated he is appealing the SBT's decision because he believes that additional records responsive to his request should exist.

[7] As a result of the appellant's position, the SBT conducted another search for responsive records. It located two additional email exchanges and issued a revised decision letter denying access to one of the newly located emails pursuant to section 19 (solicitor-client privilege) of the *Act*. The SBT granted the appellant access to the other email.

[8] The appellant confirmed that he seeks access to the email that was withheld.

[9] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues in this appeal to the SBT. The SBT provided representations.

[10] I then sought representations from the appellant. I provided him with a Notice of Inquiry and a copy of the SBT's representations, in their entirety, which I shared in accordance with the IPC's *Code of Procedure and Practice Direction Number 7*.

[11] Upon review of the file and the parties' representations, I decided that I did not need any further information from the parties.

[12] In this order, I uphold the SBT's decision to deny access to the email under section 19 and dismiss the appeal.

RECORD:

[13] The record that is at issue in this appeal is an email from the Assistant Registrar of the SBT to SBT counsel, dated April 4, 2019.

DISCUSSION:

Does the discretionary exemption at section 19 apply to the email?

[14] The issue to be determined in this appeal is whether the discretionary exemption at section 19 applies to the email. For the reasons that follow, I find that it does.

[15] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

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

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[16] Section 19 contains two different exemptions, referred to in previous IPC decisions as “branches.” Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

Branch 1: common law privilege

[17] At common law, solicitor-client privilege encompasses two types of privilege:

- i. solicitor-client communication privilege, and
- ii. litigation privilege.

[18] The SBT argues that the email is subject to solicitor-client communication privilege at common law.

Common law solicitor-client communication privilege

[19] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.¹ This privilege protects direct communications of a confidential nature between lawyer and client, or their agents and employees, made for the purpose of obtaining or giving legal advice.² The privilege covers not only the legal advice itself and the request for advice, but also

¹ Orders PO-2441, MO-2166 and MO 1925.

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.³

[20] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁴ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.⁵

Branch 2: statutory privilege

[21] The branch 2 exemption is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

[22] The SBT argues that the email is also subject to statutory communication privilege.

Loss of privilege

[23] Under the common law, a client may waive solicitor-client privilege. The statutory privilege can also be lost through waiver.⁶

[24] An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.⁷

[25] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.⁸

[26] Generally, disclosure to outsiders of privileged information is a waiver of privilege. However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁹

Representations

The SBT’s representations

[27] The SBT submits that the email is from the Assistant Registrar of the SBT to SBT counsel and is therefore, a direct communication of a confidential nature between a

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

⁴ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁵ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁶ See Order PO-3627 and *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

client (the SBT) and its legal counsel. The SBT submits that it is subject to solicitor-client communication privilege pursuant to branch 1.

[28] The SBT submits that the email documents a request by SBT staff for professional legal advice from legal counsel with respect to how to process the appellant's SBT appeals and is implicitly confidential. It explains that at the time, legal counsel was part of the Tribunals Ontario Legal Services Branch and employed by the Ministry of the Attorney General. The SBT submits that "[t]he email was prepared specifically for the purpose of seeking legal advice and the statutory privilege applies."

[29] The SBT relies on Order PO-3821 which considered an email in which a member of the Human Rights Tribunal of Ontario (HRTO) sought legal advice about procedural issues about an application before that tribunal. In that order, the IPC held that legal advice covered by solicitor-client privilege is not confined to a solicitor telling his or her client the law, but includes advice on what should be done, legally, with respect to practical issues. The SBT submits that, in that order, the adjudicator found that the withheld information was exempt under section 19.

[30] The SBT also submits that there was no intent to waive privilege on its part because "[t]he SBT would not waive privilege with respect to requests for legal advice regarding a specific issue, whether administrative or adjudicative."

The appellant's representations

[31] The appellant submits that in response to his request, he was granted access to copies of several emails in which SBT staff were directed not to open appeals from him.¹⁰

[32] The appellant submits that the SBT has provided no explanation as to why they have denied him the right to appeal. He submits that if no other responsive records exist that contain instructions to SBT staff to refuse to open new appeals for him, the email that has been withheld must contain that information. He requests a copy of the email. He submits that his "right to appeal a decision by ODSP and the seriousness of a denial of [said] appeals [by] SBT should not be protected under section 19, especially in the absence of other documentation available."

[33] The appellant also submits that despite the fact that the SBT refuses to confirm that it has denied him the right to appeal decisions under the ODSP, he has had conversations with SBT staff that indicate the contrary. To support his position, the appellant provided both written and audio transcripts of those conversations in which SBT staff state "we are not opening appeals for you" and direct him to contact a manager.

[34] The appellant submits that SBT is part of Tribunals Ontario and decisions are not

¹⁰ The appellant has provided me with copies of the emails which he submits reveal that SBT staff were directed not to open appeals from him. From my review, these emails instruct SBT staff to contact managerial staff if the appellant wishes to open a new appeal.

made verbally. He submits that the email that has been denied must contain the explanation and it "cannot be withheld because it relates to a legal decision by a Tribunal Member."

Analysis and finding

[35] Based on my review of the email that is at issue and the parties' representations, I am satisfied that it is subject to solicitor-client communication privilege and as a result, section 19 applies to exempt it from disclosure.

[36] The email is a direct communication from a tribunal member of the SBT to legal counsel. Its content clearly reveals that the tribunal member is requesting advice from counsel on a particular matter. Disclosure of the email would therefore reveal the nature of a confidential communication between that tribunal member and their counsel, specifically the substance of legal advice sought by that member from their legal counsel. There is no evidence before me that the SBT has waived its privilege with respect to the email or the information that it contains.

[37] I appreciate the appellant is frustrated that none of the records to which he has been given access provide him with the information he seeks. However, as the email was created in a confidential context for obtaining legal advice, it is part of the continuum of communications between solicitor and client and falls squarely within solicitor-client communication privilege. Subject to my review of the SBT's exercise of discretion below, I find that the email is exempt under section 19.

[38] As I have found that the email is subject to solicitor-client communication privilege at common law, it is not necessary for me to also determine whether the statutory privilege applies.

The SBT's exercise of discretion under section 19

[39] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[40] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[41] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ The IPC may not, however,

¹¹ Order MO-1573.

substitute its own discretion for that of the institution.¹²

[42] The SBT submits that it properly exercised its discretion under section 19 of the *Act* by taking the following considerations into account:

- section 19 recognizes the importance of the solicitor-client relationship and its focus on the preservation of the confidentiality of communications between solicitor and client in the course of seeking and giving legal advice;
- 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;
- the rationale for the privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter and the privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and the client aimed at keeping both informed so that advice can be sought and given;¹³
- in *Ontario (Ministry of Community and Social Services) v. Cropley*,¹⁴ applying *Balabel*, the Divisional Court held that "... in most solicitor and client relationships, especially where a transaction involves protected dealings, advice may be required or appropriate on matters great or small at various stages."

[43] The SBT explains that by applying the considerations listed above to the email, it concluded that the email relates to the SBT's attempts to resolve issues related to the processing of two of the appellant's many SBT appeals.

[44] The SBT explains that it does not typically waive privilege in circumstances such as the one in which the email was created and to do so would impact the independence of the SBT adjudicator. It also submits that, were the SBT to exercise its discretion to disclose the email, it could result in adjudicators not freely approaching their legal counsel. The SBT argues that the appellant has not demonstrated any compelling need to receive access to the email and confirms that the appeal file to which the email relates is closed.

[45] The SBT submits that it exercised its discretion in good faith and for no improper purpose. It also submits that the email at issue is the only responsive record that was not disclosed and it cannot be severed.

[46] The appellant submits that SBT is part of Tribunals Ontario and decisions are not made verbally. He submits that the email that has been denied must contain the explanation and it "cannot be withheld because it relates to a legal decision by a

¹² Section 54(2).

¹³ *Descôteaux v. Mierzwinski* (1982), 1982 CanLII 22 (SCC) and *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046.

¹⁴ 2004 CanLII 11694 (ON SCDC).

Tribunal Member.”

[47] The appellant argues that the fact that the SBT decided not to open new appeals for him is a serious decision and he has the right to know why they made their decision. The appellant submits that he believes that this information is contained in the email. He submits that the fact that the email contains legal information should not be sufficient to justify it being withheld from him.

Finding

[48] The *Act* allows institutions to withhold from disclosure information that is subject to discretionary exemptions. In this case, the SBT has applied the discretionary exemption at section 19 to withhold the email, which contains solicitor-client privileged information. I find that the considerations the SBT took into account when exercising its discretion not to disclose the email were relevant, and not irrelevant, considerations. There is no evidence to suggest, and I also find, that the SBT has not considered any irrelevant factors, or exercised its discretion in bad faith, or for an improper purpose.

[49] While I appreciate that the appellant wants to know the content of the email, he has not provided me with any evidence to support a finding that the SBT erred in its exercise of discretion in denying access to the email under section 19 of the *Act*. As a result, I have no basis upon which to order the SBT to re-exercise its discretion.

[50] For these reasons, I find the SBT’s exercise of discretion was appropriate and I uphold its reliance on section 19 to exempt the email from disclosure. I uphold the SBT’s decision not to disclose the email and I dismiss the appeal.

ORDER:

I uphold the SBT’s decision and dismiss the appeal.

Original Signed by: _____

Catherine Corban
Adjudicator

April 28, 2022