Order F22-49

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

David Goodis
Adjudicator

October 27, 2022

CanLII Cite: 2022 BCIPC 56
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 56

Summary: An individual made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the British Columbia Human Rights Tribunal (Tribunal) for records relating to two complaints he had made to that office. In response, the Tribunal withheld the records in their entirety under s. 14 (solicitor client privilege) of FIPPA. The adjudicator confirmed the Tribunal's s. 14 decision.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 14.

INTRODUCTION

[1] The applicant requested access to records about him held by the British Columbia Human Rights Tribunal (Tribunal) relating to two complaints he had made to that office.[1] The Tribunal withheld the records in their entirety under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Tribunal's decision to refuse him access to the records. Mediation failed to resolve this matter and it proceeded to inquiry.

ISSUE AND BURDEN OF PROOF

[2] The issue for me to decide in this inquiry is whether the Tribunal is authorized to refuse to disclose the records under s. 14 of FIPPA. Section 57 of FIPPA says it is up to the Tribunal to prove s. 14 applies.

[1] Applicant's revised request dated December 1, 2019.

BACKGROUND

[3] The Tribunal is a provincial government agency created by the *Human Rights Code*.[2] The Tribunal accepts, screens, mediates, and adjudicates human rights complaints.[3] Parties to a Tribunal matter may ask the Supreme Court of British Columbia (BCSC) to judicially review a decision of the Tribunal. A party to a BCSC judicial review decision may appeal that decision to the Court of Appeal for British Columbia (BCCA).

[4] The applicant brought two separate human rights complaints to the Tribunal against two separate sets of respondents. The Tribunal resolved the matters through adjudication.

[5] In each case, the applicant brought a judicial review application to the BCSC seeking to overturn the Tribunal's decision. In both cases, the Tribunal and the respondents sought to uphold the decisions made by the Tribunal. The BCSC issued decisions in both judicial review cases.

[6] The applicant appealed the BCSC decisions to the BCCA. The BCCA has heard but not yet decided the outcome of the two appeals as of the date of my decision.

RECORDS IN DISPUTE

[7] There are 41 records in dispute consisting of 84 pages. All of the records in dispute are emails.

SECTION 14 – LITIGATION PRIVILEGE

Introduction

[8] Section 14 of FIPPA states the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. That section encompasses both types of solicitor-client privilege found at common law, legal advice privilege and litigation privilege.[4] The Tribunal submits that litigation privilege applies to the records. The applicant submits that litigation privilege does not apply to any of the records.

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[2] RSBC 1996, c. 210.
[3] Tribunal's website at www.bchrt.bc.ca.
[4] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

[9] Litigation privilege protects a party's ability to effectively conduct litigation. Its purpose is to ensure the efficacy of the adversarial process.[5] It does so by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop and prepare their contending positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.[6]

[10] Litigation privilege protects a record from disclosure if the party asserting the privilege establishes that:

1. litigation was ongoing or was reasonably contemplated at the time the document was created, and
2. the dominant purpose of creating the document was to prepare for that litigation[7]

[11] Litigation privilege expires "with the litigation of which it was born" unless related litigation remains pending or may reasonably be apprehended.[8]

[12] I will apply the two-part test set out above.

Was litigation ongoing or reasonably contemplated at the time the records were created?

[13] The Tribunal submits that all of the records were created after the applicant commenced his two judicial review applications. The applicant does not specifically address this part of the test for litigation privilege.

[14] I note that the applicant received a copy of the two indices of records which the Tribunal provided in this inquiry. Those indices indicate the dates on which the records were created. Also, the applicant is aware of the dates on which he commenced his judicial review proceedings.

[15] The Tribunal's indices of records and the records themselves establish that, at the time the records were created, the applicant had already commenced his two judicial review applications, and this litigation was still ongoing. Therefore, the first part of the test for litigation privilege has been met for all of the records in dispute.

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[5] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, para. 27.
[6] *Blank*, *Ibid* at para. 27; *Raj v. Khosravi*, 2015 BCCA 49, para. 7.
[7] *Birring Development Co. Ltd. v. Binpal*, 2021 BCSC 1298, para. 31, citing *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180, para. 96; *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, paras. 43-44.
[8] *Blank*, *supra* note 5 at paras. 8, 34-41; Order F22-24, 2022 BCIPC 26, para. 50.

Were the records created for the dominant purpose of preparing for the litigation?

[16] The party asserting the privilege must present evidence of the circumstances surrounding the creation of the record, including with respect to when it was created, who created it, and how it was used.[9]

[17] The Tribunal submits that the purpose for which the records were created was for counsel for the Tribunal and counsel for the respondents to discuss legal issues and strategic decisions in the two judicial review proceedings.

[18] The applicant does not specifically address the question of what the purpose was for the creation of the records. However, he argues that he is not in a position to address the application of litigation privilege because he has not been given an adequate description of each of the records. He cites the BCCA case of *Gichuru v. British Columbia (Information and Privacy Commissioner)*[10] (*Gichuru*) for the proposition that the Tribunal should have given him more information about the records so that he may assess the validity of the litigation privilege claim.

[19] I accept that it is normally preferable for an institution relying on the s. 14 solicitor client privilege exemption to describe each record with a reasonable degree of detail to allow the applicant to make informed submissions. On the other hand, the courts have stated that care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.[11]

[20] I do not accept the applicant's submission that he is not in a position to make submissions on the "dominant purpose" part of the test for litigation privilege. In my view, the Tribunal provided the applicant with a reasonable amount of detail about each of the records in dispute. This detail consisted of:

- the specific dates of the emails,
- the sender and recipient of the emails, and
- the specific court matter to which the emails relate.

[21] The applicant's request is very narrow and specific, and it is clear he understands that the records are emails between counsel for the Tribunal and counsel for the respondents, and that they were created in the context of the litigation. In addition, the Tribunal's general description of the records is

[9] *Keefer*, *supra* note 7 at para. 98.
[10] 2014 BCCA 259, paras. 39-43.
[11] *Keefer*, supra note 7, at para. 98.

understandable in light of the need for a public body to be careful not to disclose too much information about records over which privilege is claimed.

[22] The applicant relies on *Gichuru*, in which the court found that general descriptions of certain documents were inadequate in order to ground a claim for litigation privilege.[12] That case is distinguishable on its facts. The court ruled that the descriptions of seven of the records were too vague to allow this office to reach a conclusion that it was plain and obvious they were subject to litigation privilege *on the basis of the description alone*. In this case, I have the benefit of being able to review the contents of the records themselves. In addition, the descriptions of the seven records in *Gichuru* lacked the particularity of the records in this case, in the sense that they variously omitted either the subject matter of the communication, or the names of the senders or recipients.

[23] I find that the records in dispute in this case were created for the dominant purpose of preparing for the litigation. This conclusion is fully supported by:

- the specific nature and context of the request
- the dates of the records
- the contents of the records, and
- the Tribunal's submission that the records were created to discuss legal issues and strategic decisions in the two judicial review proceedings

[24] There is no doubt that but for the litigation, these records would not have been created in the first place. The respective counsel would have no reason to communicate with one another about the applicant outside the litigation. I conclude that all of the records in dispute meet the dominant purpose test.

[25] Further, as I indicated above, the BCCA has heard but not yet decided the outcome of the two appeals of the BCSC's two judicial review rulings as of the date of my decision. Therefore, the litigation in question has not expired.

[26] To conclude, the Tribunal has established that the records in dispute are subject to litigation privilege.

[27] Below I will consider whether that privilege has been lost due to waiver.

Did the Tribunal waive litigation privilege, or is the privilege maintained due to the common interest exception to waiver?

[12] 2014 BCCA 259, paras. 46-52.

[28] Litigation privilege may be lost where a public body is found to have waived privilege. Waiver of privilege is ordinarily established when it is shown that the holder of the privilege: (a) knows of the existence of the privilege, and (b) voluntarily evinces an intention to waive the privilege. Waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.[13]

[29] Generally, where a party discloses litigation privileged information to an outsider (that is, anyone other than the client and their lawyer, or their agents), this will constitute waiver of the privilege.[14] However, waiver will not apply if the "outsider" has a common interest with the disclosing party in the outcome of the litigation.[15]

[30] The Tribunal acknowledges that in some circumstances communications between its lawyer and a lawyer for an outside party would constitute waiver of privilege. However, the Tribunal argues that it did *not* waive litigation privilege in this case because it and the respondents in the judicial review litigation had a common interest in relation to those proceedings, including on legal issues raised in the matters and in effectively responding to the applications.

[31] In particular, the Tribunal states that:

- the courts in British Columbia have recognized the Tribunal's role in judicial reviews of its own decisions
- in the judicial review matters, both the Tribunal and the respondents sought to uphold the Tribunal's decision, and
- the Tribunal and the respondents have a common interest in legal and factual issues arising from the litigation, including the standard of review of the Tribunal's decision to be applied by the court, and the Tribunal's record of proceedings before the court.

[32] The applicant submits that the Tribunal does not have a common interest with the respondents. The applicant argues that, in judicial reviews of its decisions, the Tribunal has a very limited role as circumscribed by the courts, due to concerns about compromising the Tribunal's impartiality. He relies on a BCCA decision in *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000* where the court stated:

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[13] *Malimon v. Kwok*, 2019 BCSC 1972, para. 19, citing *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.), para. 6.
[14] *Malimon*, para. 19, citing Lederman, Bryant and Fuerst, *The Law of Evidence, 5th ed.* (Toronto: LexisNexis, 2014), para. 14.168; Order F22-24, para. 35.
[15] Dodek, Adam M., *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014), paras. 2.21, 7.162-7.163; *Western Potash Corp. v Amarillo Gold Corp.*, 2020 BCSC 17, para. 66.

> …[I]t is common to give administrative tribunals standing with respect to the standard of review to be applied…The tribunals have a general interest in the standard of review applied by the courts to their decisions and in ensuring that the courts accord them the appropriate level of deference. By limiting its submissions to the standard of review to be applied by the courts in all cases of a like nature, the administrative tribunal is not entering the "fray" of the litigation between the parties and is not discrediting its impartiality.[16]

[33] The applicant goes on to explain that there is an exception to the general rule limiting a tribunal's standing which may permit a tribunal to take an adversarial role on judicial review of one of its own decisions. The applicant refers to the following passages from the BCSC decision of *Grewal v. British Columbia (Workers' Compensation Appeals Tribunal)*:

> …[I]n cases such as this, where the employer is not present, the Supreme Court of Canada's decision in *Ontario (Energy Board)* is of particular assistance. At para. 54, the Court reasons that, "[i]n a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court to ensure it has heard the best of both sides of a dispute."
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> . . .
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> While I am of the view that administrative tribunals, as impartial statutory decision-makers, must be careful not to enter the adversarial fray, I found WCAT's submission in this judicial review very helpful in understanding both the general legislative context and its application, as well as the specific evidentiary and medical circumstances at issue in the case. As discussed in *Ontario (Energy Board)*, I did not find that WCAT's submissions were improper, compromised its impartiality, or amounted to "bootstrapping." Accordingly, I have accepted it has the standing to make the decisions it did.[17]

[34] The applicant submits that the more permissive approach to tribunal standing does not apply to the Tribunal in this case because the respondents were active participants in the judicial review matters.

[35] The applicant concludes by submitting that the Tribunal in these judicial review cases did not have an "expanded role" and therefore it cannot have a common interest with the respondents.

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[16] 2014 BCCA 496, para. 35.
[17] 2022 BCSC 594, paras. 51, 53.

[36] I accept that the Tribunal does have a limited role in judicial reviews of its own decisions. The scope of a tribunal's standing in any given case is a matter for the court's discretion, and the court must strike an appropriate balance between two fundamental values: the need to maintain tribunal impartiality and the need for a fully informed adjudication of the issues on review.[18]

[37] I agree with the Tribunal that the courts in BC have consistently recognized the Tribunal's role as a party to judicial reviews of its decisions. In all such judicial reviews, the Tribunal will have the ability to make submissions on the standard of review of its decision, even where the respondents are active participants.[19] Further, regardless of the level of participation of the respondents, the courts will normally permit the Tribunal to make submissions regarding the contents of the record of the proceedings before the Tribunal.[20]

[38] I accept the applicant's submission that the court may exercise its discretion in these types of cases to circumscribe a more restrictive or more permissive role for the Tribunal. Despite this, in cases such as these where both the Tribunal and the respondents are all seeking to uphold the Tribunal's decision, these parties have a sufficient common interest in the outcome of the litigation itself, and of the factual and legal issues arising from the standard of review and the content of the record of proceedings.

[39] In my view, this finding is consistent with the purpose of litigation privilege which, as I described above, is to ensure the efficacy of the adversarial process. There is a benefit to the adversarial process by allowing parties in the position of the Tribunal and the respondents in this case to cooperate by sharing information within a "zone of privacy." In doing so, the parties can be helpful to the court and to the efficient disposition of the case by:

- avoiding unnecessary duplication in oral or written submissions
- minimizing conflicting or confusing arguments, and
- possibly "splitting" issues so that only a single party need address a particular point

[40] Finally, a finding that the Tribunal has a common interest with the respondents in the judicial review litigation does not undermine the fundamental value of maintaining impartiality. The fact that the Tribunal and the respondents have a common interest in the judicial review litigation does not mean that those parties are aligned for all purposes, on all current or future issues. I see no reason

[18] *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494, para. 51.
[19] *Pacific Newspaper Group Inc.*, para. 35
[20] *The Hospital v. X.P.*, 2018 BCSC 2079, paras. 45-51; *Buttar v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 129, para. 46.

why the sharing of information to enhance the efficiency and efficacy of the judicial review litigation would significantly compromise the Tribunal's impartiality.

[41] I find that the common interest exception to waiver applies in this case, subject to my discussion below about waiver applying in the absence of an intention to waive, where fairness and consistency so require.

[42] The Tribunal has disclosed a number of records to the applicant. My understanding is that the Tribunal considers the records it disclosed to the applicant to be non-confidential, because they are records to which the applicant would already have been given access. These are clearly distinguishable from the records in dispute, to which the applicant has not had access. In the circumstances, I see no basis to conclude that "fairness and consistency" would require that I find the Tribunal has waived privilege over the records in dispute.

[43] In conclusion, I find that litigation privilege applies to the records in dispute and there was no waiver of privilege. As a result, the Tribunal is authorized to refuse to disclose all of the records in dispute under s. 14 of FIPPA.

CONCLUSION

For the reasons given above, I make the following order under s. 58(2) of FIPPA:

I confirm the Tribunal's decision that it is authorized to refuse access to all of the records in dispute under s. 14 of FIPPA.

October 27, 2022

ORIGINAL SIGNED BY

David Goodis, Adjudicator

OIPC File No.: F20-82710