Federal Court  Cour fédérale

Date: 20180328

Docket: T-2052-16

Citation: 2018 FC 344

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 28, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

PMG TECHNOLOGIES INC.

Applicant

and

TRANSPORT CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review dated November 29, 2016, filed under section 44 of the *Access to Information Act*, RSC, 1985, c A-1 [ATIA], of the decision [Decision] made by the respondent, Transport Canada [Transport Canada], and communicated to the applicant, PMG Technologies Inc. [PMG], in a letter dated November 2, 2016, to disclose to

a third party the documents attached to said Decision, in the context of access to information request A-2016-00032 [the Access to Information Request].

[2] For the reasons that follow, the application is allowed in part.

II. Facts

[3] The applicant operates the Motor Vehicle Test Centre [MVTC] under an operating agreement entered into with Transport Canada on October 25, 2007, for the MVTC site.

[4] As a contractor operating a government institution, PMG communicates with Transport Canada representatives on a regular basis regarding the MVTC's activities.

[5] On July 10, 2014, the City of Blainville served a formal notice to PMG, Transport Canada and G1 Tour, a PMG customer, to cease or have ceased all luxury sports car rental events by G1 Tour or any other party. According to the City, the named parties were violating municipal noise and zoning by-laws. After the parties failed to comply with the formal notice, counsel for the City of Blainville stated that they had been mandated to initiate legal proceedings.

[6] On July 21, 2014, the City of Blainville and five residents filed an originating notice of motion for an interim injunction, an interlocutory injunction and a permanent injunction before the Terrebonne Superior Court against PMG and G1 Tour. Transport Canada was not named as a respondent in the motion.

[7] In a letter dated May 26, 2016, the Transport Canada Chief, Access to Information and Privacy, notified the Executive Director of PMG that an Access to Information Request had been filed and that it was intended to obtain [TRANSLATION] "correspondence between Transport Canada and PMG as part of their landlord–tenant relationship with respect to the use of the leased premises and, incidentally, its total or partial subletting," as well as correspondence with the applicant regarding the rental activities as advertised on its website.

[8] Transport Canada subsequently invited PMG to file its written submissions to explain why the documents attached to the letter dated May 26, 2016, should not be subject to full disclosure.

[9] PMG sent its submissions to Transport Canada in a letter dated June 30, 2016, raising several grounds for exception to disclosure, including litigation privilege.

[10] Negotiations between PMG and Transport Canada regarding what was to be disclosed took place on August 17, 2016, and August 22, 2016.

[11] In a final letter dated November 2, 2016, Transport Canada informed PMG of the Decision, further to the additional submissions filed by the applicant. That Decision consists of disclosing to the author of the Access to Information Request documents attached to the letter dated November 2, 2016, [the Documents] that do not bear the phrase "consult witheld" [*sic*].

[12] Before the hearing, the parties agreed that certain communications were in fact subject to litigation privilege. Consequently, this application for judicial review involves disclosure of redacted copies of communications between the parties, including pages 1, 8, 24, 34, 36, 37 and 38, and full exclusion of the internal memo on pages 40, 41 and 42 of the Documents.

III. Legal framework

[13] Section 23 of the ATIA is relevant in this case:

Solicitor-client privilege	**Secret professionnel des avocats**
23 The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.	**23** Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

IV. Issues and standard of review

[14] At the hearing, the respondent stated that it was not going to attempt to exercise its discretion as to whether it was nonetheless appropriate to disclose the Documents, even though it was determined that they are privileged. Consequently, the sole issue before this Court is whether the applicant discharged its burden of proof with respect to the litigation privilege applicable to the Documents or certain excerpts thereof.

[15] Notwithstanding the primary object of the ATIA, discretion exercised by a federal institution must coincide with the objectives of the effective administration of justice and the protection essential to an efficient adversarial process, which includes applying the principles of litigation privilege. It is recognized that this issue is subject to the correctness standard: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at paragraphs 27−31 [*Blank*]; *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 FC 268.

V. Analysis

A. *State of the law*

[16] Litigation privilege ". . . is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process)": *Blank*, above, at paragraph 28, citing R. J. Sharpe (now a Court of Appeal judge), "Claiming Privilege in the Discovery Process" (1984) Spec. Lect. of the LSUC, 163, at pages 164−165.

[17] The party invoking litigation privilege must demonstrate its existence. To do so, it must establish that the primary or dominant purpose of the documents in question is preparation for litigation and that this litigation is ongoing or reasonably apprehended: *Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 SCR 521, at paragraph 19; *Blank*, above, at paragraph 60.

[18] The British Columbia Court of Appeal recently set out the parameters required for a request for privilege in *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259, at paragraph 32 [*Gichuru*], citing *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180, at paragraphs 96−99, which the Court also adopts, as follows:

> [96] Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
>
> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
>
> 2. that the dominant purpose of creating the document was to prepare for that litigation.
>
> (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* (2005), 40 B.C.L.R. (4th) 245, 2005 BCCA 4 (CanLII) at paras. 43-44.)
>
> [97] The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. (*Hamalainen v. Sippola, supra.*)
>
> [98] To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. 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.

[19] In *Gichuru*, the Court also recognized at paragraphs 38 and 39 that these requirements were not necessary if the dominant purpose is plain and obvious on the face of the documents.

[20] The respondent's main objection in this case is that, based on the Documents under review, the applicant has not sufficiently demonstrated the circumstances to support invoking litigation privilege.

[21] The Court agrees with the respondent that the applicant's explanation for invoking the privilege, as stated at paragraph 41 of Gilles Marleau's confidential affidavit dated January 31, 2017, lacks detail. The affidavit states that the Documents concern [TRANSLATION] "communications between PMG representatives and Transport Canada representatives that relate to analyses by PMG's counsel regarding the state of the law, details of defence strategies and the collaboration between PMG and Transport Canada to defend themselves against the City of Blainville's proceedings." Consequently, unless the Court finds that the Documents demonstrate, on their face, their dominant purpose of the ongoing litigation between the applicant and the City of Blainville, the request for privilege should be denied.

[22] Despite this, the Court finds that the respondent has come a long way in implicitly supporting the applicant's cause by agreeing to redact large excerpts of most of the Documents at issue (namely those on pages 013, 018, 024–025, 028–029, 038 and 042). These redactions can only indicate the acceptance that their contents warrant being protected by litigation privilege.

[23] Although the respondent did not implicitly recognize the application of litigation privilege, the Court is of the view that there is sufficient evidence of the plain and obvious dominant purpose being the ongoing litigation in the majority of the contentious correspondence between the applicant and Transport Canada officials. This correspondence demonstrates that the

parties share a common interest with regard to a potential negative outcome arising from the litigation as a result of zoning changes or other restrictions that could lead to the maintenance of the City's application for a permanent injunction. The corrective measures sought by the City could have an adverse effect on the use of the property owned by Transport Canada and used by the applicant.

[24] The Court finds that the applicant and Transport Canada shared a common interest in defending themselves against Blainville's legal proceedings. Thus, the principles of the common interest privilege apply in the same way, such that the disclosure of information by the applicant to Transport Canada does not constitute a waiver of any privileged information: *Buttes Gas and Oil Co. v. Hammer*, [1980] 3 All ER 475 (HL); *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at paragraphs 23−24. The Court also acknowledges that the Documents in question make their dominant purpose plain and obvious based on their originating date, July 11, 2014, since which time the applicant has been attempting to convince Transport Canada to participate in its dispute against the City. The communications intended to obtain the support of interested parties, either to intervene as a joint respondent or simply to provide assistance with the dispute, are certainly protected by litigation privilege.

[25] The Court's only concern is whether a communication from a client to a third party concerning involvement and assistance with a dispute, that is not made by the client's counsel, or that is not sufficiently detailed so as to be made at the request of the client's counsel, is subject to litigation privilege. The privilege applies both to counsel and to unrepresented individuals, but there does not appear to be any cases where a represented client undertakes on their own

initiative to discuss privileged information with a third party. In the Court's view, privilege should be upheld, perhaps even on the basis of an involuntary waiver of the privilege. In any event, given the respondent's acceptance of the litigation privilege applicable to the other communications, without raising any issue relating to the waiver of the common interest privilege, the Court declines to examine the issue in this case.

[26] In summary, the Court finds that the respondent's arguments with respect to the adequacy of the dominant purpose evidence do not apply, since it recognizes that material correspondence between the applicant and Transport Canada is protected by litigation privilege, and the correspondence itself clearly indicates that the disputed information was created for the purpose of defending a common interest against the ongoing litigation with the City. The Court's analysis is therefore limited to considering the objections in the disputed Documents, namely whether or not each specific piece of correspondence should be recognized as falling within the privacy created by litigation privilege.

B. *Analysis of the correspondence in the Documents allegedly protected by litigation privilege*

[27] The dispute between the parties concerns the disclosure of specific excerpts found on the listed pages of the Documents involving exchanges between the applicant and Transport Canada, as well as the disclosure of an internal memo containing the applicant's instructions to an employee for the purpose of obtaining information pertaining to the dispute with the City of Blainville. The specific pages of the Documents are listed in paragraph 13 of Gilles Marleau's confidential affidavit dated March 28, 2017, in Attachment GMC-3.

(1) Applicant's email to Transport Canada dated July 11, 2014 (page 001 of GMC-3)

[28] The respondent already redacted short excerpts on the page as being protected by litigation privilege.

[29] The Court acknowledges that the disputed excerpt beginning with "PMG entered" and ending with "the complaints" is not protected by litigation privilege. The correspondence provides basic facts that should be disclosed during the discovery process or the trial.

[30] The rest of the document, which already contains some excerpts protected by litigation privilege, is protected as a work product of the applicant concerning the dispute with Blainville. Furthermore, it is noted that the paragraph starting with "Of concern" describes the common interest of the parties in the dispute, as well as the involvement of counsel.

(2) Series of emails between the applicant and Transport Canada, dated from July 21 to 23, 2014 (pages 008–9 of GMC-3)

[31] The Court finds that the excerpts that the applicant objects to disclosing should be subject to litigation privilege. The email exchange refers to the measures taken by the applicant with respect to the dispute and Transport Canada's questions about the issues relating to the dispute.

(3) Emails between the applicant and Transport Canada dated July 25 and 28, 2014 (page 024 of GMC-3)

[32] The majority of the content on page 024, which includes parts of page 025, was redacted as privileged. Similarly, the first two paragraphs from the Transport Canada employee relate to the strategy that addresses the shared concerns about the outcomes of the litigation and the positive leverage factors in support of the applicant's case.

(4) Applicant's email to Transport Canada dated August 26, 2014 (page 034 of GMC-3)

[33] The Court denies the request for litigation privilege as presented with respect to this document, insofar as its primary purpose is to provide responses to the complaints contained in a briefing note to the Minister.

(5) Transport Canada emails to the applicant dated August 25 and 26, 2014 (page 036 of GMC-3)

[34] The excerpts beginning with the words "As you point out" in the third paragraph and ending with the words "their noise case" at the end of the fifth paragraph, which contain previously redacted information in each of the three paragraphs, also constitute correspondence protected by litigation privilege. The disputed portions of the paragraphs refer to shared concerns and assistance from Transport Canada, as well as joint actions taken or to be taken.

(6) Email between Transport Canada and the applicant dated August 25, 2014 (page 037 of GMC-3)

[35] Once again, significant portions of the Document were written in recognition of the fact that they were privileged communications. Transport Canada asked for an update through a

series of questions to which the applicant responded, all relating to the ongoing dispute and strategic concerns. These communications are protected by litigation privilege.

(7) Applicant's email to Transport Canada dated May 7, 2015 (page 038 of GMC-3)

[36] The first two paragraphs are not protected by litigation privilege, insofar as they merely relate facts that should be disclosed as part of the examinations for discovery or the trial and of which the disclosure does not constitute an incursion into the privileged part of the dispute.

[37] The following three paragraphs, beginning with the words "Afin d'éviter" [TRANSLATION] "In order to avoid" and ending with "Transports Canada" [TRANSLATION] "Transport Canada," are protected by litigation privilege. They describe the problems and strategies for responding to them, tasks to be completed within a certain timeframe and requests for assistance from Transport Canada. All this information relates to strategies and the conduct of the ongoing dispute.

[38] The last two paragraphs, including the reference to the attached summary, which comprises the three last pages (040–042) containing the disputed communications, are not challenged as being subject to litigation privilege.

(8) Internal memo from the applicant dated May 5, 2015, attached to the email dated May 7, 2015 (pages 040 to 042 of GMC-3)

[39] The memo was prepared specifically for the dispute and already contains extensive portions that were redacted in recognition of the fact that the communication is protected by litigation privilege. It is not obvious to the Court why the entire Document, which was prepared specifically for the purposes of litigation and communicated to Transport Canada along with the analysis carried out by counsel for the applicant, should not be subject to litigation privilege.

VI. Conclusion

[40] Given that the results are somewhat mixed, although primarily in favour of the applicant, the applicant shall be awarded 75% of its costs, in accordance with Column III of the Federal Court tariff: *Federal Courts Rules*, SOR/98-106, section 407, Tariff B. If the parties cannot agree on the costs, brief submissions may be filed for examination by the Court.

JUDGMENT in T-2052-16

THE COURT ORDERS that the applicant's requests for litigation privilege are confirmed or dismissed in accordance with the above reasons; costs are awarded to the applicant and shall be assessed at 75%, in accordance with Column III of the Federal Court tariff: *Ibid.*

"Peter Annis"
Judge

Certified true translation
This 9th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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