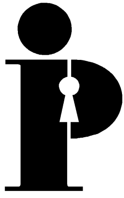

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1407

Appeal MA-000187-2

The Corporation of the Townships of Anson, Hindon and Minden

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NATURE OF THE APPEAL:

The Corporation of the Townships of Anson, Hindon and Minden (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy* (the *Act*) for the following records:

- documentation outlining the salary ranges of all non-unionized staff, including job title, years of service and any bonuses these staff received over the past four years;

- documentation which identifies the legal fees paid by the Township over the past four years, along with information describing the nature of all legal matters and the names of the parties involved;

- Statements of Account from outside solicitors retained by the Township indicating the total legal fees incurred by the Township for each of the past four years.

The Township responded to the request as follows:

- It advised the requester that salary ranges did not exist, but prepared an unofficial salary range for each Township employee which was provided to the requester.

- It informed the requester that no bonuses had been paid to staff during the past four years and, therefore, no responsive records of this nature existed.

- It denied access to records relating to the years of service of individual employees on the basis that disclosure would constitute a presumed unjustified invasion of privacy (section 14(1), with specific reference to section 14(3)(d) of the *Act).*

- It provided the requester with access to the responsive parts of records substantiating legal fees paid by the Township, but denied access to Statements of Account in their entirety under section 12 of the *Act* (solicitor-client privilege).

- It charged the requester a fee of $135.00.

The requester, now the appellant, appealed the Township's decision to charge a fee and the denial of access to the Statements of Account under section 12. He also sought clarification regarding the salary ranges provided by the Township, the Township's position regarding the payment of bonuses, and the Township's view that certain portions of records were not responsive to the request. These latter three issues were resolved during mediation.

After the appeal moved to the adjudication stage, I initially sent a Notice of Inquiry to the Township

asking for representations on the two remaining issues. The Township submitted representations. I then sent the Notice to the appellant, together with a copy of the non-confidential portions of the Township's representations. The appellant also provided representations.

RECORDS:

The records at issue consist of Statements of Account submitted by outside law firms to the Township for the four-year period preceding the appellant's request.

DISCUSSION:

FEES

The charging of fees is authorized under section 45(1) of the *Act* which states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of R.R.O 1990, Regulation 823 also deals with fees. It states:

> The following are the fees that shall be charged for the purposes of subsection 57(1) (*FIPPA*)/45(1)(*MFIPPA*) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Under section 45(5) of the *Act*, my responsibility is to ensure that the amount charged by the Township is reasonable in the circumstances.

The Township's representations include a detailed breakdown of the fees incurred to search for responsive records and prepare them for disclosure to the appellant. Searches took place in two main areas, which reflect the two types of records covered by the appellant's request.

Representations

Salary-related records

The Township's fees for responding to the part of the request dealing with salary levels and bonuses paid to employees consist of the following:

- 1.75 hours to search for the responsive records; and
- 15 minutes to prepare them for disclosure.

The Township points out it was necessary to conduct manual searches of municipal by-laws to locate wage authorization documents, and to then review payroll records covering the four-year period of the appellant's request. The preparation fees involved "organizing and retyping for clarity purposes".

Legal fees

Fees relating to the portion of the request dealing with legal fees were based on:

- 2 hours to search for responsive records; and
- 30 minutes to prepare them for disclosure.

The Township states that the search fees involved screen-by-screen inquires using its computerized accounting system to identify all relevant records, and reconciliation of these records against payment

documents. Preparation charges related to the need to sever non-responsive information and "organizing the information in yearly order for clarity purposes".

The Township did not charge fees for photocopying.

The appellant takes the position that the fees charged by the Township are excessive. He points out that he was charged a much smaller fee for obtaining similar information from another Township, and makes the following statements regarding the search for legal fees:

> These are computer printouts under the heading "General Ledger Detail Inquiry" with the subheadings "Administration-Legals", "Building By-law-Legals", "Property-Legals", "Bus-Park Legals" and "Zoning By-law & Amendments-Legals" with identical accounts corresponding to the headings. I question how long does it actually take to print off material from a computer with these parameters already known? Was a manual screen to screen search really indicated? As well, please note I did not request computer printouts; I requested Solicitors Accounts.

Findings

Salary-related records

As noted earlier, the appellant's request regarding salary and bonus information covered a four-year period, and asked that the information be provided in chart form. The request letter included a sample chart, which the appellant asked the Township to use in responding to his request.

In its decision letter, the Township made it clear that the salary ranges requested by the appellant did not exist, but went on to state:

> In an effort to accommodate your request I have prepared a chart of unofficial salary ranges. I can assure you that the actual salaries are within the ranges outlined in the chart.

In response, the appellant wrote to the Township, apparently satisfied with the Township's decision to create a new record to respond to this aspect of the request. He states:

> Enclosed please find a cheque in the amount of $75.00. Please provide me with the information you have compiled at your earliest convenience in order that the appeal process can begin.

The Report of Mediator provided to the parties at the completion of mediation confirms that the appellant had no outstanding issues with respect to the adequacy of the Township's response regarding salary levels and bonuses.

As far as the actual fees for salary-related records are concerned, I find that the Township's 1.75 hours of search time is reasonable. The Township was required to manually review its payroll records covering the four-year period identified by the appellant and, in my view, 45 minutes per year to deal with all such records, even in a relatively small institution such as the Township, is reasonable in the circumstances. As far as the 15 minutes charged for preparing the records for disclosure is concerned, I find that this is also a reasonable fee, particularly in light of the fact that it represented an effort on the part of the Township to go beyond its technical responsibilities and to provide information that was responsive to both the particulars of the request and the preferred format identified by the appellant.

Accordingly, I uphold the total search and preparation fees of $60 for the salary-related records.

Legal fees

I also uphold the search and preparation fees for documents reflecting legal fees paid by the Township.

The Township explains that a manual screen-by-screen computer search was required in order to identify responsive accounting records. The print-outs generated by these searches do not clearly identify that a law firm was involved in each payment, and I accept the Township's position that a comparison of the computer-generated records and actual cheque numbers and invoices was necessary in order to complete the necessary search activities. While other institutions may have more sophisticated systems that would allow for more efficient search activities, the Township does not, and I find that 30 minutes to search for all responsive records covering each of the four years identified by the appellant is reasonable in the circumstances.

Past orders of this Office have established two minutes per page as a reasonable standard for severing documents in preparation for disclosure (see, for example, Orders P-26, P-184 and P-565). Applying this standard to the 20 pages of records disclosed to the appellant, I find that the Township's charges for 30 minutes are well within the standard.

Accordingly, I uphold the total search and preparation fees of $75 for the legal fees records.

SOLICITOR-CLIENT PRIVILEGE

The Township claims section 12 of the *Act* as the basis for denying access to the various Statements of Account submitted by outside solicitors. In the Township's view, these records are protected by the solicitor-client communication privilege.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Solicitor-client communication privilege

At common law, 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 professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

In order for a record to be subject to the common law solicitor-client communications privilege, the Township must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

[Order 49]

This privilege has been described by the Supreme Court of Canada as follows:

> … all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship …
>
> [*Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The Township submits that the findings in Order PO-1714, and in particular the discussion of the case of *Stevens* v. *Canada (Privy Council)* 1998, 161 D.L. R. (4th) 85 (F.C.A.), are applicable to the current appeal.

The appellant quotes extensively from *Stevens* and then makes the following submissions:

> Order PO-1714 states:
>
> > Accordingly, despite the complexity of issues, the bottom line in *Stevens* is clear. Unless an exception such as a waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption.
>
> I do not agree. *Stevens* does not state that lawyers' bills of accounts, in their entirety, are subject to solicitor-client privilege. *Stevens* does state that "He was provided with 336 pages of legal accounts, receipts and other related documents, but the narrative portions on 73 pages of the disclosed accounts were expunged on the basis of solicitor-client privilege under section 23 of the Act. The appellant was informed by the Information Commissioner [of Canada] that the expurgated material had been properly withheld from disclosure. On application for judicial review to the F.C.T.D., Rothstein J. found that the material was protected by a solicitor-client privilege, as it was "directly related to the seeking, formulating or giving of legal advice or assistance" ... (tab 40 - page 2). *Stevens* also states: "In the case at bar, the narrative portions of the bills of account were communications for the purpose of obtaining legal advice" (tab 40 - page 3).
>
> In other words, I am submitting that I am entitled to the lawyers' bills of accounts but with the narrative portions that pertain to solicitor-client privilege expunged.
>
> Further, Justice Linden acknowledges **... The expenses of government bodies pertaining to legal fees or otherwise, are always of interest to the public. It is public money that is being spent. In so far as the intent of the Act is generally to promote the transparency of governmental activity, the incorporation of the common law doctrine of solicitor-client privilege indicates that it was meant to be discluded from the operation of the Act ...** I am unsure why the Honourable Justices ruled as such as this wasn't the issue at bar being posed; however, because this point represents the very nature and intent of our request, it appears, at this particular point, that this aspect of our request has become a political one, rather than legal one. [appellant's emphasis]

In my view, the appellant has inaccurately described the impact of *Stevens* on the application of solicitor-client communications privilege to solicitors' accounts.

In Order PO-1714, former Adjudicator Holly Big Canoe considered the effect of *Stevens* on the application of section 19 of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 12 of the *Act*) to solicitors' accounts. Her discussion and reasoning is directly relevant to the Statements of Account which are at issue in this appeal. I have reproduced Adjudicator Big Canoe's discussion at length in this order because it is directly relevant to the records at issue in this appeal, and I am in total agreement with her findings. Adjudicator Big Canoe states:

> In my view, the Federal Court of Appeal's recent decision in *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.) has persuasive value in the context of the Information and Privacy Commissioner's decisions relating to lawyer's bills of account and solicitor-client privilege. In that case, the requester and appellant had sought access to billings, cheque requisitions and authorizations for certain named counsel who provided services to the Commission of Inquiry headed by Mr. Justice Parker. The Commission of Inquiry had investigated and reported on allegations that Mr. Stevens had a conflict of interest during his tenure as a minister in the Mulroney cabinet.
>
> The Privy Council Office disclosed approximately 336 pages of accounts, receipts and related documents. The accounts normally showed the name of the lawyer providing services, the dates on which services were being rendered, the time spent each day, and disbursements. Billed amounts were disclosed. However the narrative portions on 73 pages, describing the services, were withheld as being subject to privilege. This decision was upheld on appeal by the Information Commissioner, whose decision was upheld by the Federal Court, Trial Division on judicial review.
>
> The decision of the Federal Court of Appeal contains a detailed analysis of the cases on privilege and legal invoices. Prior to *Stevens*, there appeared to be confusion regarding the privilege that attached to lawyers' bills of account and other kinds of lawyers' accounting records. This confusion has arisen from the apparent contradiction between *Mutual Life Assurance Co. of Canada* v. *Deputy Attorney General of Canada*, 84 D.T.C. 6177 (Ont. H.C.) and other cases. In *Mutual Life*, the Court stated (as quoted at page 103 of *Stevens*):
>
>> The privilege attaches not only to communications made by the client but obviously to communications made by the solicitor to the client as well and generally speaking covers all communications relating to the obtaining of legal advice. That general rule in my view would cover a statement of account.

The cases that appear to disagree with this view arise from the exclusion from privilege of "acts of counsel" or "mere facts" (as referred to at page 97 of *Stevens*). Based on this exclusion, things like a lawyer's trust account ledger have been found not to be privileged (e.g. *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.)). This same exclusion, and the resulting confusion in the law, was the basis for previous Information and Privacy Commissioner orders which found that lawyers' bills, or parts of them, are not privileged and therefore not exempt under section 19 (Orders P-624, M-274, P-676).

The Court in *Stevens* indicates that it thinks the confusion regarding the status of lawyers' bills of account is resolvable (at page 102):

> In modern Canadian jurisprudence, the law is not entirely clear. There is authority that appears to go both ways. A number of authorities have expressly found that solicitor's accounts are privileged, while others seem to disagree. Nevertheless, in my view, bills of account are privileged, but lawyers' trust accounts and other accounting records are not so privileged. What has been considered as two conflicting lines of authority can be reconciled.

After citing several decisions to the effect that lawyers' bills of account are privileged in their entirety, the Court proceeds to distinguish them from cases dealing with "facts" and/or "acts of counsel" as reflected in trust ledgers, etc. The Court concludes (at page 106) that:

> ... the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.
>
> Where a lawyer is involved in the dealings of his or her client, like the disposition of funds held in trust for the client, as in Greymac, or the execution of an agreement for the purchase and sale of property, the existence or contents of these acts are not protected. The lawyer, in the situation, is not in the process of giving advice to the client, but is more like a witness to an objective state of affairs.

> This explains the apparent conflict between the reasons of Southey J. in *Greymac* and *Mutual Life Assurance Co. of Canada*. In the former case the trust account was determined not to be protected by the privilege, while the solicitor's accounts in the latter case were held to be privileged. The statement of account is privileged because it is integral to the seeking, formulating and giving of legal advice. The trust account ledger is not protected because it relates to acts done by counsel.

Later (at pages 107-8), the Court describes the privilege applicable to legal bills of account as a "blanket" privilege:

> In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type is directly related to the giving of advice. Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Court further drives home its conclusion that lawyers' bills of account are privileged in their entirety by means of the following commentary on the fact that severed copies had already been disclosed (at page 109):

> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than

> was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

Another passage from *Stevens* (at page 97) indicates that the law to be relied on in connection with the solicitor-client privilege exemption in the Access to Information Act is the common law of solicitor-client privilege and that this is unaltered by its inclusion in an access statute:

> The effect of the provisions of the Act on the content of the privilege is nil. It was correctly determined by Rothstein J. that section 23 of the Act incorporates holus-bolus the common law of solicitor-client privilege. That term is not defined elsewhere in the Act. Hence, it can only be presumed that what is covered by the words "solicitor-client privilege" is the common law doctrine of solicitor-client privilege. That being the case, it is necessary for the government head to determine, before considering the operation of the Act, whether a document is subject to the privilege. If it is, then he or she may refuse disclosure. But the preliminary question is determined not in the context of the Act, but in the context of the common law. If the material is subject to the privilege, then the discretionary decision under section 23, whether to disclose it or not, is done in the context of the Act along with its philosophical presuppositions.

Accordingly, despite the complexity of the issues, the bottom line in *Stevens* is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption. I agree. Accordingly, in my view, because Records 12, 13, 14, 15 and 20 would be subject to solicitor-client privilege at common law, I find that they are properly exempt under section 19 of the *Act*.

> The public policy objectives referred to in the *Stevens* case are valid, and the same considerations are present here. However, if the institution chooses not to waive privilege and disclose the total amounts charged by legal counsel on the lawyers' bills of account, it is worth noting that this information may not be subject to privilege if it is requested from other sources, such as copies of the institution's accounting records.

(See also Order PO-1822)

Based on *Stevens* and the findings in Order PO-1714, the Statements of Account at issue in this appeal are accurately characterized by the Township as confidential written communications directly related to the seeking, formulating and giving of legal advice between the Township and its legal advisers, and qualify for exemption under the solicitor-client communications privilege component of section 12 of the *Act* on that basis.

As stated in Order PO-1714, the Court in *Stevens* identified the privilege applicable to legal bills of account as a "blanket" privilege. These records are privileged in their entirety and cannot be severed as suggested by the appellant.

In the appellant's view, the finding in *Stevens* detracts from the need for "transparency of government." In this regard, *Stevens* makes the following point:

> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.

In other words, the Township could have decided to provide the appellant with some or all of the information contained in the Statements of Account. However, a decision to do so would be based on the Township's rights as a client to waive the solicitor-client communication privilege, and not through any obligation under the *Act* to sever information from these records which I have determined qualify for exemption under section 12.

ORDER:

I uphold the decisions of the Township.

Original signed by: March 7, 2001
Tom Mitchinson
Assistant Commissioner