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

ORDER PO-2548

Appeal PA-040304-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

Both the Ministry of Health and Long-Term Care and the Ministry of Education received requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Any and all records, including but not limited to correspondence and briefing notes, pertaining to all costs incurred and budgeted by the Ministry, including all in-house costs, contract costs and fees for services associated with [two identified legal proceedings] from the inception of both to the present time.

The requester is a Member of the Provincial Parliament. The litigation relates to actions brought on behalf of approximately 30 children with autism who are under the age of six. The litigation seeks to challenge the constitutionality of the Ministry's decision to refuse to provide funding for "Intensive Behavourial Intervention" on behalf of these children. The requests were transferred to the Ministry of the Attorney General (the Ministry) pursuant to section 25(2) of the *Act*, which then issued a decision letter denying access to the 1,981 pages of responsive records. Access to the records was denied on the basis that the information was non-responsive to the request or exempt under the mandatory exemptions in sections 17(1) and 21(1) or the discretionary exemption in section 19 of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to deny access to the records.

During mediation, the appellant narrowed the scope of her request to include only those records relating to payments made by the Ministries of Health and Education for legal representation by both outside counsel and lawyers employed by the Ministry of the Attorney General's Constitutional Law Branch (the CLB), along with the documentation supporting these payments. The appellant advised that she is not seeking access to those portions of the records to which the Ministry has identified as subject to the mandatory exemptions in section 17(1) and 21(1) and those portions that the Ministry has described as not responsive to the request.

Further mediation was not possible and the appeal was moved to the adjudication stage of the process. The Court of Appeal for Ontario heard an appeal from a decision of the Divisional Court in an application for the judicial review of IPC Orders PO-1922 and PO-1952 involving similar issues concerning access to records that contain the amounts of legal fees paid by the Ministry of the Attorney General to outside counsel. Following the release of the reasons of the Court of Appeal, I sought and received the representations of the Ministry, the majority of which were shared with the appellant along with a Notice of Inquiry setting out the facts and issues in the appeal. Portions of the Ministry's representations, along with the Appendices that contained copies of the records, were withheld from the appellant due to confidentiality concerns. I also received representations from the appellant, and shared them with the Ministry, which made additional submissions in reply.

In Orders PO-2483 and PO-2484, issued in July 2006, Senior Adjudicator John Higgins addressed in great detail the impact of a number of recent decisions of the Supreme Court of Canada and the Ontario Court of Appeal on the subject of privilege over solicitor's billing information. I shared copies of these decisions with the Ministry and invited it to provide representations on the impact, if any, they have on the issues before me in the present appeal.

The Ministry did not submit any additional representations, arguing that because one of the decisions, Order PO-2484, is the subject of an application for judicial review, it is "premature" for it to comment on their potential impact. I note that the Ministry has chosen not to seek the judicial review of Order PO-2483 and that the reasoning contained therein remains unimpeached.

RECORDS:

The information remaining at issue consists of approximately 1,980 pages of records including legal bills of account and disbursements, along with the supporting emails, memoranda and accounting records relating to them. The Ministry submits that Records 168, 843 to 844, 849 to 850, 1733, 1734 to 1736 and 1772 to 1775 were erroneously included in the records that were identified as responsive to the request. It states that these records relate to litigation in which the Ministries are involved other than the actions identified in the request. I accept the submissions of the Ministry that these documents include information relating to legal proceedings other than those referred to in the request and they are not, therefore, responsive to the request, as framed. I will not, therefore, address Records 168, 843 to 844, 849 to 850, 1733, 1734 to 1736 and 1772 to 1775 further in this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

When the request in this matter was filed, section 19 stated as follows:

> 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.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal. Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

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 [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); PO-2538-R].

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].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct

> of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations of the parties

The Ministry's position

The Ministry has provided me with representations which pertain to each of three types of documents that comprise the records at issue in this appeal. It first addresses the "legal bills of account for legal services and disbursements", as follows:

> The vast majority of the records in issue are legal bills of account relating to legal fees and disbursements for legal advice and litigation services provided by the Ministry on behalf of MOHLTC and [the Ministry of Education]. As noted above [in an extensive review of the law relating to the application of solicitor-client privilege to records containing legal accounts], the Courts and the IPC have consistently held that legal bills of account are subject to solicitor-client privilege. The Court in *Re Stevens and Prime Minister of Canada* (1998), 161 D.L.R. (4th) 85 held that a legal account, including disbursements is privileged in its entirety, stating that this should benefit from a blanket protection. The Courts have indicated that 'the itemized disbursements and general statements of account detailing the amounts charged for that time are all privileged" (*Stevens, supra* at para 52; *Maranda v. Richer,* [2003] 3 S.C.R. 193). The IPC has taken a similar position in Orders PO-1714, MO-1445 and MO-1465. In Order PO-1714, Adjudicator Holly Big Canoe stated:
>
> > 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 as an exemption.

The Ministry goes on to submit that these same principles apply to other "financial information relating to the payment of legal costs", such as disbursement charge reports, inter-ministerial

journal entries and Financial Information System reports which it characterizes as "accounting records". It states that:

> The records of fees and disbursements in issue clearly relate to the seeking and formulating or giving of legal advice. Financial information relating to payment of legal costs reflect a communication between solicitor and client in a way that transactions on behalf of a client contained in a trust account do not. As *Descoteaux* noted, solicitor-client privilege extends to all communication made within the framework of the solicitor-client relationship, even if they deal with matters of an administrative nature. The substance of the communication remains privileged, whether it is found in a 'statement of account', or in an 'accounting record'. Disclosure of financial information relating to payment of legal costs which reproduce the information found in the statements of account, only in different form, would effectively render the court's protection of legal accounts nugatory. If the information was required to be disclosed from accounting records but the bills of account and disbursements remained privileged, this would permit the obtaining indirectly of what could not be obtained directly.

In addition, the Ministry addressed the possible application of the decision of the Ontario Court of Appeal in *Ministry of the Attorney General v. Mitchinson*, [2005] O.J. No. 941 in which that court upheld two decisions of the Commissioner's office ordering the disclosure of records created during the mediation of an appeal containing a global dollar figure representing an amount paid for legal fees and a summary of certain invoices paid for the provision of legal services. The Ministry distinguishes the reasoning contained in both *Maranda* and *Mitchinson* by pointing out that in those cases, the information sought consisted of "aggregate amounts of litigation costs". It argues that "none of the responsive records in this case contain a global figure setting out the aggregate amount of the fees and disbursements incurred in the [subject] litigation" and that "all of the responsive records were prepared within the solicitor-client relationship with a view to communicating details of the legal services rendered and the nature [of the] disbursements incurred."

The Ministry further submits that:

> Disclosure of the financial information relating to payment of legal costs would be contrary to the rationale for the protection afforded to accounts by undermining candid communications in the solicitor and client relationship. As the Court stated in *Stevens*:
>
> > The rationale of the privileges is to ensure that a client is free to tell his or her lawyer anything and everything that is pertinent to the case, without any fear that this information may subsequently be divulged and used against them. Without this freedom, there is the possibility that the lawyer may not have the benefit of all

> relevant information, and may be able to do his or her job effectively.
>
> This concern is highly relevant in the context of high profile litigation that attracts intense media and public scrutiny, such as the litigation in issue. If the records of fees and disbursements relating to each step of the seeking, formulating or giving of legal advice were made public and subject to scrutiny, it would eviscerate the solicitor-client relationship.
>
> Further, much of the trial preparation undertaken in the [subject] litigation will be repeated for the forthcoming proceedings before the Ontario Human Rights Tribunal and possibly in the civil actions. Given the existence of parallel litigation, which raises many of the same issues, the disclosure of the records in issue would trigger many of the same concerns identified by the B.C. Supreme Court in *Municipal Insurance Assn of B.C. v. B.C. (Information and Privacy Commissioner)*, (1996) 143 D.L.R. (4th) 134 in support of its decision to refuse disclosure of interim legal costs in the course of ongoing litigation. Disclosure of the legal accounts and disbursements risks revealing strategies employed; for example, whether trial preparation was done with or without substantial time involvement of senior counsel. Further, matching dates and hours billed during trial may reveal how much time was spent preparing individual witnesses.

The Ministry also submits that a third category of records at issue in this appeal form part of the "continuum of communications" between its legal representatives and their clients relating to the taking and giving of instructions and other trial-related issues that arose during the litigation. These records consist of briefing notes, opinions and emails that speak directly to issues that have arisen through the course of the litigation. Accordingly, it argues that these documents fall within the ambit of "litigation privilege" or are part of solicitor-client communication privilege.

The appellant's position

The appellant points out that she is seeking only the total amount of expenses incurred by the Ministries in their defence of the litigation referred to in her request. She states that she is not interested in obtaining information that is subject to solicitor-client privilege but continues to seek only the total amount of fees and disbursements paid for legal services, as was the case in the decisions reviewed by the Court of Appeal in *Mitchinson, supra*. To be clear, the appellant has limited the scope of her request to include only the aggregate totals of all of the amounts indicated as having been paid for fees and disbursements which are contained in the responsive records. As a result, I find that the third category of records identified by the Ministry is no longer at issue in this appeal and I will not address these documents further.

The appellant has also offered to accept the creation of a record, or two records for each of the Ministries named in the request, that describes only the "amount of money spent to date". By doing so, the appellant argues that a record containing only this information:

> . . . would not disclose any information identifying lawyers, experts, communications, advice, government strategy, etc. Nor would the disclosure of a final record with total costs only, impact ongoing litigation - - the appeal of Justice Kiteley's decision or other cases involving autistic children, as none of the government's previous strategy, advice or communications, would be revealed.

The Ministry's reply submissions

The Ministry submits that it is not required under the *Act* to create the sort of record referred to by the appellant in her representations. It adds that:

> It is important to note that the information which the appellant has requested be compiled by the Ministry into a new record is information which the Ministry believes is subject to exemption from disclosure under section 19. . .

Analysis and findings

In Order PO-2483, Senior Adjudicator Higgins carefully described the progression of jurisprudence relating to the application of privilege to information about lawyer's fees. Specifically, he quotes extensively from the decision of the Supreme Court of Canada in *Maranda v. Richer*, [2003] 3 S.C.R. 193 and relies on the reasoning contained therein. He states:

> *Maranda* involved the search of a lawyer's office for documents relating to fees and disbursements charged to a client suspected of money laundering. The Supreme Court judgment in *Maranda* sets out a new approach for determining the application of privilege to lawyers' billing information. Unlike previous cases on this subject, the Supreme Court adopts the principle that information about lawyer's fees is presumptively privileged. The presumption of privilege is rebutted where the information is "neutral", i.e. does not disclose, either directly or inferentially, information that is subject to solicitor-client privilege.
>
> In formulating this approach, the Supreme Court rejects the "facts" and "communications" distinction as the sole or primary basis for the rule in relation to privilege as applicable to lawyers' billing information. This distinction had been discussed in the context of legal billing information in *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.) ("*Stevens*", discussed in more detail below), and was also relied on by the Quebec Court of Appeal in that court's *Maranda* decision. The Supreme Court states (at paras. 30-33):
>
> > [The] rule cannot be based on the distinction between facts and communication… The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence. It recognizes that not everything that happens in the

> solicitor-client relationship falls within the ambit of privileged communications…
>
> However, *the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege*.
>
> *The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements*.
>
> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.… [emphases added]

The Senior Adjudicator summarized his interpretation of the decision in *Maranda* as follows:

> Based on my review of *Maranda*, I am not persuaded that the Supreme Court endorsed a view of privilege that automatically protects solicitors' invoices in their entirety, including the amount of fees and disbursements, but applies the presumption/rebuttal approach to lawyers' fee and disbursement information in other kinds of records. A careful examination of the Court's discussion of the facts/communications distinction at paragraphs 30-33, which I have reproduced above, supports this view. The Court characterizes both "the bill of account and its payment" as a "fact" (para. 32). However, it says that the "fact" of the bill and its payment "cannot be separated from acts of communication", and then states the presumed privilege rule to deal with this type of information. In formulating the rule, the Court indicates that "[b]ecause of the difficulties inherent in determining the extent to which the information contained in *lawyers' bills of account* is neutral information, … recognizing a presumption that such information falls within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved." (para. 33, emphasis added) The Court's intention to include not only the amount of fees and disbursements actually paid in the presumptively privileged category, but also lawyers' bills of account, could not be more clearly stated.

Evaluating the impact of the decision in *Maranda* on the principles established in *Stevens* as they relate to the treatment of solicitor's invoices for fees and disbursements, Senior Adjudicator Higgins concluded that:

> In my view, a distinction in the treatment of information about legal fees and disbursements based on whether it appears in an invoice or some other kind of record is untenable. I find that the distinction drawn by the Ministry does not provide a sound basis to distinguish *Maranda* from *Stevens* and allow the latter to continue to govern the application of privilege to solicitors' invoices as the Ministry submits. For these reasons, I have concluded that the *Maranda* decision overrules *Stevens* regarding the application of privilege to information about legal fees and disbursements.

The decision goes on to find that the approach set forth in *Maranda* applies in both the criminal and the civil context, in accordance with the approach taken by the Court of Appeal in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779, referred to in Order PO-2483 as *Attorney General #1*. In that decision, the Court of Appeal set out the test for rebuttal of the presumption of privilege as follows:

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.

Senior Adjudicator Higgins then summarized the above-noted approach as follows:

> Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is

> neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

Further elucidation of these principles can be found in the decision of the British Columbia Supreme Court in *Municipal Insurance Assn of B.C. v. B.C. (Information and Privacy Commissioner)*, (1996) 143 D.L.R. (4th) 134. In that decision, the Court identified certain types of information which "knowledgeable counsel" might deduce or otherwise acquire from communications that included the "interim legal fees to date" paid in a lawsuit that was ongoing at the time of the request. The Court specifically stated, beginning at paragraph 48, that:

> Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.
>
> Some examples, certainly not intended as exhaustive, which might be reasonably discerned from knowledge only of the type of information contained in the document record in issue here, being basically the total of interim legal fees to date in a lawsuit, could include:
>
> -- the state of preparation of a party for trial;
> -- whether the expense of expert opinion evidence had been incurred;
> -- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
> -- where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;
> -- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
> -- whether legal accounts were being paid on an interim basis and whether payments were relatively current;
> -- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.

I adopt the approach taken by both Senior Adjudicator Higgins in Order PO-2483 and the B.C.S.C. in *Municipal Insurance* for the purpose of the present appeal. Accordingly, I will seek to determine whether the presumption of privilege has been rebutted with respect to each of the two remaining types of records, the bills of account and accounting records, as outlined in the Ministry's representations, taking into account the types of information outlined in *Municipal Insurance* and in Order PO-2483.

Legal bills of account for services and disbursements

As noted above, the vast majority of the records at issue in this appeal involve the actual legal bills provided by the Ministry's counsel, internal and external, for legal services provided and

disbursement expenses incurred. In Order PO-2483, Senior Adjudicator Higgins addressed the application of the principles described above to similar records in the following manner:

> The statements of account in the records at issue in this appeal contain narrative descriptions of services rendered and identify particular activities, who performed them and how much time was spent on each. The Ministry and several of the affected party law firms submit that this information could directly or indirectly disclose privileged communications between the Ministry and the solicitors retained. I agree. There is no doubt that disclosing these records in their entirety would reveal privileged information.
>
> However, I have also concluded in this instance that severing all but the firm name, date and the combined total for fees and disbursements in each invoice would protect confidential privileged information and avoid disclosures that could allow even an "assiduous requester" to gain access to privileged communications (such as, for example, instructions given by the client). As noted previously, most of the firm names have already been disclosed and, in any event, the identity of one's lawyer is generally not privileged. The government's extensive participation is well known. The dates of the Walkerton Inquiry hearings, and their outcome, are in the public domain and can be ascertained from the published report. As the Court of Appeal found in *Attorney General # 1*, there is in my view no "reasonable possibility" that any confidential solicitor-client communication could be revealed (even to the most "assiduous" requester) by disclosing the firm names, dates and global figures billed, nor could this information be connected with other available information order to draw an accurate inference about any such privileged communication. Accordingly, this information is "neutral" and the presumption of privilege is rebutted in relation to it.
>
> Accordingly, I find that the category 2 records are subject to solicitor-client privilege and therefore exempt under branch 1, with the exception of the firm name, date and combined grand total of fees and disbursements in each invoice.

In the present appeal, the appellant has clearly indicated that she is seeking access only to the aggregate dollar amounts that are contained in each of the records that represent the legal fees and disbursements incurred by the Ministries in conducting the litigation in question.

Relying on the reasoning contained in the orders cited above, I find that the "bottom line" amounts of fees and disbursements that are indicated on each of the responsive records which are sought by the appellant do not qualify for exemption under section 19. I find that by limiting the scope of her request to include only the totals calculated of the dollar amounts contained in the records, the appellant has satisfied me that no reasonable possibility exists that an "assiduous requester" or "knowledgeable counsel" could use information relating to the total paid for fees and disbursements to deduce or otherwise acquire information contained in communications that are protected by the privilege. The appellant specifically indicated that she is not seeking access

to information relating to "identifying lawyers, experts, communications, advice, government strategy, etc". Accordingly, without identifying information such as the names of law firms or the dates of the invoices, I find that it is not reasonably possible to deduce or discern information that would qualify as privileged. In my view, restricting the scope of her request to include only the aggregate totals of the fees and disbursements that are contained in each of the records ensures that the information is neutral in its nature.

I find that the disclosure of the aggregate amounts covering both fees and disbursements from each of the responsive records would not result in the disclosure of or allow for the ascertaining of any of the types of information listed in the decision in *Municipal Insurance*. I find that the disclosure of these "bottom line" dollar amounts would not allow either an assiduous requester or knowledgeable counsel to discern information relating to the litigation strategies pursued by the Ministry in the defence of these actions and any other type of information that may be subject to privilege. In addition, I note that the information relating to fees in the records at issue in *Municipal Insurance* represented interim accounts while litigation remained ongoing. In my view, the disclosure of information relating to the payment of interim accounts, particularly in situations where the litigation continues to be ongoing, would more easily enable an assiduous requester or knowledgeable counsel to ascertain privileged information relating to litigation strategies than would be the case with the aggregate amounts paid for fees and disbursements that are at issue in the present appeal.

I conclude, therefore, that the information sought by the appellant is neutral in its nature and is not subject to privilege. The presumption described in *Maranda* has, in this case, been rebutted with respect to the aggregate dollar amounts that are contained in each of the responsive records. I will address the application of branch 2 of section 19 to this information below.

Accounting records

The Ministry takes the position that its own internal records containing financial information relating to the payment of legal costs are also subject to solicitor-client privilege on the basis that they contain information that relates directly to privileged communications. These records include information relating to disbursement charge reports, inter-ministerial journal entries and Financial Information System reports.

In my view, the principles governing the application of branch 1 to the legal bills of account described above relating to the amounts of fees and disbursements are equally applicable to the internal "accounting records" created for administrative purposes within the Ministry. I find that, given the appellant's clearly stated position that only the total dollar amounts paid for fees and disbursements in each of the records are being sought in this appeal, only this information forms part of the appeal. The remaining information which pertains to other administrative matters or which might reveal some aspect of the communications passing between solicitor and client is no longer being sought and is not, accordingly, at issue in the appeal.

As a result, I find that, for the reasons set forth above, there is no "reasonable possibility" that any confidential solicitor-client communication could be revealed, even to the most "assiduous requester" through the disclosure of the aggregate totals for fees and disbursements in each of the responsive records alone. As was the case in the appeal giving rise to Order PO-2483 and with the legal accounts described above, I find that this information is "neutral" and the presumption of privilege in it has been rebutted. Again, I will address the application of branch 2 of section 19 below.

Branch 2 – statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. It arises from the last part of section 19, which refers to records "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

The Ministry submits that all of the responsive records were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation" and that "without litigation, these records would not have been created". It goes on to add that "[W]ithout the creation of these records and the resultant funding that they provide, counsel would not be able to give advice or carry out litigation."

In Order PO-2483, Senior Adjudicator Higgins addressed similar submissions respecting the application of branch 2 to internal invoices prepared by the Ministry in order to bill other ministries for certain legal services provided in the following way:

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.
>
> This conclusion is reinforced by my decision in Order MO-2024-I. In that case, I had to determine whether similar information was excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)1 of that statute, on the basis that the records were collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution. The record at issue was a two-page document containing payments made to a law firm on a series of dates, including a total amount, with respect to an action against the City by a former employee. Based on the nature of the request, however, only the total figure was at issue. I stated:

> The question I must decide … is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".
>
> …
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared *to be used in* actual or contemplated litigation. In my view, they were not.

I find that branch 2 does not apply to any part of the records.

In my view, precisely the same analysis applies to the invoices in this case. They were not prepared "for use in" giving legal advice, or in litigation. I find that branch 2 does not apply to the category 2 invoices.

I adopt the approach taken by the Senior Adjudicator for the purposes of the present appeal and conclude that the internal Ministry invoices which form many of the records at issue in the present appeal are not subject to branch 2 of section 19. As was the case with the records at issue in Order PO-2484, I find that there isn't any obvious relationship between the records at issue and the actual conduct of the litigation. In answer to the question posed by Senior

Adjudicator Higgins in Order PO-2484, specifically, whether the records were prepared for use in or, as he stated the question, "to be used in" actual or contemplated litigation, I must conclude that they were not. Accordingly, I conclude that the invoice records at issue in this appeal are not subject to exemption under branch 2 of section 19.

ORDER:

1. I order the Ministry to disclose the aggregate total amounts for fees and disbursements contained in each of the responsive records that relate to the litigation referred to in the request by providing her with a copy by **March 8, 2007**. I have provided the Ministry with a highlighted copy of the records at issue. Only the information which is highlighted on the copy provided to the Ministry is to be disclosed to the appellant. If it so chooses, the Ministry may disclose the information from the records by creating a composite record that shows all of the non-exempt information from each invoice, rather than severing all of the invoices.

2. I uphold the Ministry's decision to deny access to the remaining records and parts of records identified as responsive to the request.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: February 14, 2007
Donald Hale
Adjudicator