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

ORDER MO-2211

Appeal MA-060170-1

The Corporation of the City of London

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NATURE OF THE APPEAL:

The City of London (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1) Copies of all invoices billed to the City of London by [named law firm] with respect to the Leave to Appeal of the OMB Ward Boundary Decision.

2) Copies of all other invoices or cost outside those billed by [named law firm] pertaining to the Leave to Appeal of the OMB Ward Boundary Decision.

The City located responsive records and denied access to them pursuant to the solicitor-client privilege exemption found at section 12 of the *Act*. In its decision letter, the City advised that the matter was then still before the courts, and the total amount invoiced would be disclosed once the final court decision was rendered. The City subsequently disclosed the total amount of the invoices for legal services provided by the named law firm for legal services relating to the ward boundary matter.

The requester, now the appellant, appealed the City's decision to deny access to the invoices themselves.

During the course of mediation, the City advised that it was maintaining its original position with respect to the invoices and would continue to withhold the responsive records pursuant to section 12 of the *Act*. The appellant's representative advised that he would like to pursue access to all of the invoices, in their entirety. No further issues were resolved at mediation and this appeal was moved to the adjudication stage of the appeals process.

To begin the adjudication of the appeal, I sent a Notice of Inquiry to the City and the named law firm, outlining the background and issues in the appeal and inviting their written representations. The City responded with representations, while the law firm decided not to do so. Next, I sent a Notice of Inquiry to the appellant, enclosing the complete representations of the City and inviting the appellant to provide representations. I then provided the appellant's representations to the City and invited its reply representations, which I subsequently received. Upon receipt of the City's reply representations, I sent them to the appellant inviting further submissions by way of sur-reply. I then received sur-reply representations from the appellant.

When seeking representations from the City, the law firm and the appellant for the first time, I provided copies of Orders PO-2483 and PO-2484, which also dealt with requests for legal billing information.

RECORDS:

The records at issue in this appeal consist of 22 pages of invoices from the named law firm.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

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

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1 of the section 12 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 12 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)].

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The City's primary position is that the records are subject to solicitor-client communication privilege under branch 1.

Branch 1 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.)]. 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].

As well, in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". I will bear this in mind in assessing the application of section 12 in this appeal.

The application of solicitor-client privilege to legal billing information was canvassed by the Supreme Court of Canada's decision in *Maranda v. Richer*, [2003] 3 S.C.R. 193 ("*Maranda*"). In the access to information context, and specifically the equivalent solicitor-client exemption at section 19 of the *Freedom of Information and Protection of Privacy Act*, the Ontario Courts have applied *Maranda* and upheld Orders PO-1922 and PO-1952, which ordered disclosure of legal

fee information in fairly summary form. The Divisional Court ruling, reported at *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779, was upheld by the Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (cited above).

I reviewed these decisions in Order PO-2483. With respect to *Maranda*, I stated:

> *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.

I also concluded that although *Maranda* relates to the criminal law context, its presumption and rebuttal approach to privilege in legal account information applies to all cases involving privilege and legal fee information.

As noted in Order PO-2483, the Court of Appeal explained the test for rebuttal of the presumption as follows (at para. 12 of its judgment):

> 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.
>
> 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.

In its initial representations, The City of London states:

> [The information at issue] if disclosed could directly or indirectly result in the disclosure of privileged communications between the client and the external firm. The IPC in its decision (PO-2483) severed all information from the statements of account except for the firm name, date and the combined total fees and disbursements on each invoice prior to disclosure.
>
> All of the remaining information in the documents other than the firm name, date and the combined total fees and disbursements is subject to solicitor-client privilege on the basis that the assiduous inquirer could use the information to deduce or otherwise acquire information protected by the privilege.
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> The requester has not argued that the disclosure of the privileged information is absolutely necessary and there is no basis upon which the requester could make that submission. In the absence of some demonstration that the disclosure of the privileged information contained in the requested documents is absolutely necessary, the request should be denied.

The "absolute necessity" test derives from *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860. In that case, the Supreme Court of Canada states that where a legally mandated action could have the effect of abrogating solicitor-client privilege, "… the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation."

The "absolute necessity" principle was considered in *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31. In that case, the Supreme Court of Canada applied the principle in deciding whether records subject to a claim of privilege should be provided to counsel in a judicial review concerning section 19 of the *Freedom of Information and Protection of Privacy Act* (equivalent to section 12 of the *Act*). Based on this judgment and its predecessors such as *Descôteaux*, I have concluded that the absolute necessity test is relevant in deciding whether a record should be disclosed in circumstances where the record is conclusively privileged, or where the claim of privilege is disputed but not yet resolved, but not where the question is whether a record is actually subject to privilege. There is no question before me as to whether (i) a record should be disclosed that is conclusively privileged (as was the case in *Descôteaux*); or (ii) whether a record that is claimed to be privileged should be disclosed before that claim is resolved (as was the case in *Goodis*). This line of cases does *not* stand for the proposition that the absolute necessity test is a relevant consideration in deciding whether a record should be found to be privileged under section 12 of the *Act* or otherwise. Therefore, in my view, the absolute necessity test is irrelevant in deciding whether or not section 12 applies, and I will not refer further to this aspect of the City's representations.

The appellant's representations take the position that he seeks only the invoices for services rendered and does not seek any direct communication relating to the substance of the case or the advice given to the City. The appellant argues that, since the litigation is now over, the rights of other litigants need not be considered. The appellant's position is summarized in his initial representations as follows:

> The gist of this controversy comes down to whether the requested disclosure would be reasonably likely to disclose confidential communications. In making this determination, the commission should view the information as it would be used in the hands of a skilled and astute investigator. It is our position that there is nothing in the information requested that would act as such a disclosure and that as a result, the City's reliance on the privilege should be rejected. Furthermore, the City has failed to demonstrate what, if any communications would be disclosed by reference to the billing information. The requester, as a party to the proceedings has already received and reviewed all of the substantive communications in the form of court documents. In other words, it is already a matter of public record what documents were prepared in this case, when they were filed, and how long they were.

In its reply representations, the City seeks to refute a number of the arguments forwarded by the appellant. The City submits that at common law, solicitor-client communication privilege is permanent and the fact that the litigation is over is not determinative of this issue. I agree. Unlike litigation privilege, solicitor-client communication privilege is permanent and will outlast the matter for which advice is sought unless an exception to privilege, such as waiver, is established. There is no evidence of any such exception in this case.

The City also states:

> Further, disclosing the dates covered by the records and the number of hours spent by counsel during each period will allow inferences to be drawn about the nature of the activities and/or strategies undertaken during the period and therefore will provide the appellant with an opportunity to infer privileged information. (Orders PO-2483 and PO-2484)
>
> Given their involvement in the litigation, the appellant and the appellant's agent have knowledge that, combined with the detailed information contained in the records including dates and amounts of invoices, will reveal privileged information. The Commission has found (that) knowledge of and participation in the litigation to be a very significant factor justifying a more restrictive approach. (Order PO-2484)

The appellant was given an opportunity on sur-reply to respond to the City's argument. The appellant took the opportunity to comment directly on my Order PO-2483 and how it applies to the records at issue in this appeal, stating:

> The case law is clear that disclosure is not necessarily precluded by assertion of the privilege, and that determining whether or not the presumption of privilege has been rebutted, two questions are of particular interest. These two questions are set out on page 17 (of) Order PO-2483:
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> 1. Is there any reasonable possibility that disclosure will reveal (directly or indirectly) a protected communication? And
>
> 2. Could the assiduous investigator use the information to deduce or otherwise acquire the privileged information?
>
> Requesters have argued that the answer to both questions is in the negative. The City points to the highly assiduous and knowledgeable nature of the requesters, and with this we do not disagree. It remains to be seen, however, exactly what protected communication could possibly be compromised by the release of more detailed billing information. As we have indicated in our earlier representation, the end-product of the solicitors' work in this case was extensive and detailed court filing, already (part of the) public record and within the knowledge of the requester. The billing information will simply indicate how much the city expended for this product, nothing about the product.

In Order PO-2483, I discussed the application of the principles in *Maranda* to lawyers' invoices:

> 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 … 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.

The records before me are legal invoices and I am satisfied that the presumption of privilege applies to them, subject to the question of whether that presumption has been rebutted. As noted above, the following questions will be of assistance in determining whether the presumption is

rebutted in this case: (1) is there any reasonable possibility that disclosure of the invoices 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?

Further elucidation of the impact of the "assiduous requester" 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:
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> -- 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.

As noted above, the records at issue in this appeal involve the actual legal bills provided by the City's counsel (an outside private law firm) for legal services provided and disbursement expenses incurred. The total of the bottom lines of all the invoices has already been disclosed. The invoices themselves remain at issue.

I recognize that the appellant argues that he already knows in considerable detail the services that were performed by the City's lawyers because he has seen the pleadings and other court materials filed. In my view, however, this argument could just as easily be interpreted as meaning that the appellant's level of knowledge makes it likelier that further disclosure carries the realistic possibility of disclosing privileged communications.

The appellant's involvement in the litigation also raises the possible relevance of Order PO-2484, which I issued concurrently with Order PO-2483. Order PO-2484 dealt with a request for information about legal fees for representing the Ministry of Health and Long-Term Care in litigation before the Health Services Appeal and Review Board. Order PO-2484 is subject to an outstanding application for judicial review by the Ministry of Health and Long-Term Care. In the order, I directed disclosure of only the bottom line totals from each invoice because the requester had been counsel in the litigation. I commented as follows on the impact of this:

> In my view, the Ministry is correct when it submits that if the records were disclosed in full, minus non-responsive information, they would still provide the appellant with an opportunity to infer privileged information. For example, disclosing the dates covered by each of the nine invoices, particularly accompanied by the number of hours spent by counsel during each period, would allow some inferences to be drawn about the nature of the activities and/or strategies during the period, particularly if that information is combined with detailed knowledge of the history of the case. As the Ministry points out, the appellant's counsel was involved in the litigation before the HSARB referred to in the request. In my view, the ability to draw inferences from the records is unaffected by the fact that, as the appellant points out, the litigation has concluded. I therefore find that the presumption of privilege is not rebutted with respect to the dates or other information in the records, other than the total dollar figure being charged in each invoice.
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> However, if the only information to be disclosed is the total dollar figure on each invoice, and nothing else (which is the closest thing before me to the information the appellant has repeatedly said she wants), the situation is different. With dates and number of hours severed, I am unable to conclude that the appellant could infer privileged information.
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> …
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> However, as stated above, each case must be determined on its own facts. In reaching my conclusion in this appeal, I have considered the unique circumstance of the role of the appellant's representative in the litigation, as already discussed. As I have already determined, there is a reasonable possibility that, given the involvement of the appellant's counsel in the HSARB proceedings, he has knowledge that, combined with the dates and amounts of invoices, could reveal privileged information, and I find this to be a very significant factor justifying a more restrictive approach in this case than the disposition I arrived at in Order PO-2483. However, if the dates are removed from the records at issue here, and only the total amount from each invoice is disclosed, the result is different. Although I did order disclosure of the dates in Order PO-2483, severance of this information is necessary here because of the appellant's counsel's familiarity with the history of the litigation. By contrast, disclosure of the dollar amounts alone does not, in my view, give rise to any reasonable possibility that privileged

> information such as the nature or content of any solicitor-client communication could be revealed or deduced, even when combined with other information that may already be known to the appellant's counsel.

In the present appeal, the appellant is seeking copies of all invoices for all work performed by the law firm with respect to a particular boundary issue. The appellant has already received the bottom line total amount invoiced by the law firm to the City for the entire matter.

The records at issue are typical lawyers' invoices containing narrative entries in chronological order, including the date, description of the services provided, the name of the individual within the named law firm who provided the services identified in each entry, the number of hours spent, the hourly rate, and the total fee for each entry. These amounts are totalled at the end of each invoice.

As noted, the appellant claims that there is no prospect that privileged information would be disclosed by the invoices. I disagree. While the appellant is clearly aware that the named law firm represented the City in the litigation, and what positions were put forth in the pleadings and other materials he has seen, that does not mean that disclosing the invoices would not reveal privileged information about the client's instructions or other solicitor-client communications. The records reveal this directly in some instances and inferentially in others. As well, I find the appellant to be an "assiduous" requester with background knowledge that could assist him in inferring further privileged information from the records if they were disclosed in their entirety.

In Order PO-2484, the only records before me were a series of invoices. In order to avoid disclosing privileged information, I withheld the invoices in their entirety, except the bottom line of each. No global total was before me in that case, and I ordered disclosure of the most aggregated information available, in the most minimal way possible, with dates and all other information severed.

In the present case, an aggregate total has already been disclosed. As noted, the appellant has significant knowledge of the matter in question, and has received aggregated information similar to what was ordered disclosed in Order PO-2484. Nevertheless, the fact that I ordered the disclosure of a *series* of totals in Order PO-2484, rather than one aggregated total, raises the question of whether I should find that the presumption is rebutted for the bottom line of each invoice as it was in Order PO-2484.

In my view, Order PO-2484 is distinguishable from the present case and the higher level of disclosure ordered there should not occur here. The distinction is based on the different approach taken by the appellants in the two appeals. In Order PO-2484, the appellant was prepared to accept a cumulative total figure but no such figure existed. Here, the appellant has received an aggregated figure but continues to insist on disclosure of the invoices in their entirety. This suggests that the appellant in the present appeal is not merely interested in obtaining general information about fees paid, but also wishes to subject the invoices themselves to further scrutiny. In this circumstance, I am prepared to draw an inference that the requester is very "assiduous", and seeks the full content of the invoices in order to glean further information

about the solicitor-client relationship. On that basis, I find that disclosure of the particulars of the invoices would result in a reasonable possibility that privileged information will be disclosed.

Accordingly, I find that the presumption of privilege is not rebutted for the invoices at issue in this appeal. They are therefore subject to common law solicitor-client communication privilege and exempt under branch 1 of section 12.

ORDER:

1. I uphold the City's decision.

Original Signed by: July 5, 2007
John Higgins
Senior Adjudicator