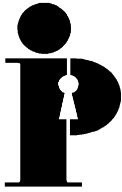

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2208

Appeal MA-040276-1

The Corporation of the Town of Thessalon

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NATURE OF THE APPEAL:

The Corporation of the Town of Thessalon (the Town) received a request from a union representative under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

(a) the amount budgeted for and the amount spent for legal services pertaining to collective bargaining and collective agreement administration for each individual the fiscal years of:

- 1999-2000
- 2000-2001
- 2002-2003
- 2003-2004

(b) the amount budgeted for this current round of bargaining, the hourly rate and daily rate charged by your Legal Counsel and the amount incurred to date for current negotiations.

The Town responded to the request by denying access under the exemption at section 12 of the *Act* (solicitor-client privilege). The requester (now the appellant) appealed the Town's decision.

During mediation, the Town provided an Index of Records which indicated that it also relies on section 11(c) (economic and other interests of an institution) to withhold access. This additional exemption claim was made within thirty-five days after the Township received notice of the appeal, thus meeting the requirement in section 11.01 of the IPC's *Code of Procedure* for claiming additional discretionary exemptions after an appeal has been filed. The Index of Records identifies three records and refers to them as record 1, record 2 and record 3.

The Town also provided an affidavit by its Clerk-Treasurer confirming that the Town did not set a budgeted amount for legal services pertaining to collective bargaining and collective agreement administration for the fiscal years 2000-2003. In addition, the Town indicated during mediation that it would disclose the amount budgeted for 2004 for legal expenses in relation to collective bargaining, and subsequently did so. This portion of the request is no longer at issue.

With respect to the appellant's request for the hourly and daily rates charged by legal counsel for current negotiations, the appellant narrowed the scope of her request to only the total dollar amount spent on legal fees for collective bargaining during 2003-2004.

In a further development during mediation, the Town identified portions of the records that were non-responsive to the request. The appellant accepted that these portions were non-responsive and agreed to only seek access to record 3.

Mediation did not resolve the outstanding issues and this appeal was transferred to me for adjudication. Initially, I placed the adjudication of the appeal on hold pending the resolution of the judicial review of Orders PO-1922 and PO-1952, which was under consideration by the Ontario Court of Appeal. Both these orders dealt with requests for legal fee information and therefore it appeared likely that the judicial review would have a bearing on the issues in the

current appeal. In the result, the Court of Appeal's judgment (reported as *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65 (also found at [2005] O.J. No. 941)) affirmed the previous Divisional Court ruling that had upheld Orders PO-1922 and Order PO-1952.

After the Court of Appeal issued this judgment, I sent a Notice of Inquiry to the Town and the law firm identified in record 3 (the affected party) and included copies of the Court of Appeal and Divisional Court decisions. My preliminary review of the records suggested that parts of all three records might be responsive. I decided to include this as an issue in the Notice of Inquiry, which sought representations on the following issues: responsiveness of records, section 11(c), section 12 and the Town's exercise of discretion. I received representations in response from the affected party and the Town. The Town's representations were provided by its counsel.

The Town submitted that the information at issue was exempt under section 11(c) and 12 and that it had properly exercised its discretion. The Town also provided representations on whether the records are responsive to the appellant's narrowed request. The Town asked that parts of these representations not be shared with the appellant based on confidentiality considerations.

The affected party provided representations supporting the Town's application of section 12. The affected party did not provide representations about section 11(c) but did raise several additional provisions of the *Act*. In particular, the affected party claimed the application of the section 10(1) third party information exemption, the section 14(1) personal privacy exemption, and also claimed that the records fall outside the scope of the *Act* because of section 52(3). As well, the affected party provided representations on whether the records are responsive to the appellant's narrowed request. The affected party asked that parts of these representations not be shared with the appellant based on confidentiality considerations.

I subsequently issued Orders PO-2483 and PO-2484, in which I applied the Court of Appeal judgment in *Ontario (Attorney General)*, cited above. Like that judgment, Orders PO-2483 and PO-2484 address the issue of whether information about legal fees is subject to solicitor-client privilege, one of the central issues in this appeal. Order PO-2484 is the subject of an application for judicial review.

I then wrote to the Town and affected party and sought their supplementary representations on the application of section 12 in light of Orders PO-2483 and PO-2484, and enclosed copies of these orders. I also invited them to provide representations on the affected party's claim that the responsive records are not subject to the *Act* under section 52(3), and provided a copy of Order MO-2024-I for their comment. In that decision, I had found that section 52(3) did not apply to records relating to legal fees paid by the City of Toronto to a former City of Toronto employee who commenced a civil action against the City of Toronto. I also invited further representations from the Town and the affected party regarding the affected party's claim that the section 14(1) personal privacy exemption and the section 10(1) third party information exemption apply.

Both the Town and the affected party provided supplementary representations, and again asked that portions of them not be shared with the appellant based on confidentiality considerations.

As noted, both the Town and the affected party asked that portions of their representations be withheld from the appellant based on confidentiality. In my view, the confidentiality of this information is, for the most part, not substantiated under the criteria for the exchange of representations found in Practice Direction 7, issued by this office. However, because I determined that it was not necessary to seek representations from the appellant, it was not necessary to address the exchange of representations in order to complete the adjudication of this appeal. If I had needed to deal with the exchange of representations, I would have rejected the bulk of the Town and affected party's confidentiality claims as not meeting the criteria in Practice Direction 7. For example, the affected party claims confidentiality for a broad generic description of an invoice from a law firm, which merely indicates that the invoice discloses information such as lawyers' hourly rates and number of hours, without actually identifying the hourly rate or number of hours billed. The affected party claims that disclosing this broad generic description would disclose the actual contents of a record. This argument is absurd.

In order to write these reasons, I must address the arguments that have been put to me. To that end, just as it is generally necessary to disclose the broad outline of the arguments that a party must meet in order to achieve procedural fairness, without disclosing information that meets the confidentiality criteria identified in Practice Direction 7, it is also necessary, when producing these reasons, that I refer to these arguments in a similar fashion. I will therefore discuss the affected party's arguments in this order but will not disclose information that falls within the confidentiality criteria in Practice Direction 7.

As noted above, I initially invited representations from the Town and the law firm identified in record 3, the record that was identified as being responsive during mediation. In the discussion below that deals with responsiveness of records, I conclude that parts of records 1 and 2, which refer to two additional law firms, also contain responsive information. However, given the nature of the information I have found to be responsive to the appellant's narrowed request, it was not necessary to invite representations from the other firms as affected parties. One of these firms provided representations on behalf of the Town in this appeal.

RECORDS:

The following records were identified by the Town as responsive at the request stage:

Record 1: Computer generated extracts from the Town's accounting records for "Legal Expense", "Negotiations", "Interest on Borrow", and "Audit Expense" (5 pages)

Record 2: Computer generated extracts from the Town's accounting records for "Negotiations" (3 pages)

Record 3: Page 5 of an invoice from a law firm retained by the Town for "Lawyers' Summary: Total Invoice" (1 page)

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request. As stated in Order P-880 (decided under the *Freedom of Information and Protection of Privacy Act*, the equivalent of the *Act* with respect to provincial government organizations):

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

As noted above, the appellant accepted during mediation that parts of the records were non-responsive and agreed not to pursue access to those parts. As a result of this, only record 3 appeared to be at issue. The appellant also narrowed her request to information relating to

2003-4. My review of the records indicated that records 1 and 2 might contain information "reasonably related" to the request, and therefore responsive, and I decided to include this as an issue in adjudication as outlined in the Notice of Inquiry. I did not do so lightly, as the exclusion of records 1 and 2 appeared to be one of the results of mediation. However, the appellant had not seen the records when she agreed to remove non-responsive information, and given my view that some of the information in records 1 and 2 might be responsive, I decided that, in the interest of fairness, it was necessary to raise this as an issue in my adjudication of the appeal.

In an index provided to this office during the intake stage of the appeal, the Town describes the records as follows:

> Record No. 1. General Ledger Transactions Listing created September 30, 2004. This record includes excerpts from the Listing which contain *amounts paid to the Town's lawyers for services pertaining to collective agreement administration* from the years 2000 through to the end of 2003.
>
> …
>
> Record No. 2. General Ledger Transactions Listing created Sept. 30, 2004. This record includes excerpts of the Listing which contain *amounts paid to the Town's lawyers for services pertaining to the 2004 collective agreement negotiations*.
>
> …
>
> Record No. 3. Excerpt from invoice from [named law firm]. This record includes the billable rate for the Town's lawyers retained for its 2004 contract negotiations with the union.
>
> [Emphases added.]

As well, the copies of the records provided to this office contain handwritten notations identifying those parts of all three records initially considered responsive by the Town, including a number of entries in records 1 and 2, along with the exemptions claimed to deny access to those portions. Some non-responsive parts were also noted as "not [union]-related".

In its initial representations, however, the Town argues that records 1 and 2 in their entirety, and part of record 3, are not responsive to the appellant's narrowed request:

> Record #1 contains excerpts from the Town's general ledger transactions listing which contains amounts paid to the Town's lawyers for the years 2000 through to the end of 2003. The Union has withdrawn their request for information contained in these records at mediation and therefore is no longer responsive.
>
> Record #2 contains amounts paid to the Town's past lawyer for services pertaining to labour relations matters in 2004. These amounts, however, do not

> represent legal fees strictly for collectively bargaining negotiations but also other general labour matters. The amounts are not broken down into separate amounts and therefore the amounts shown on the general ledger transaction listing are not in themselves responsive to the Union's request.
>
> Record #3 contains an invoice from the Town's past lawyers which include the billable rate charged by said lawyers for legal advice related to contract negotiations with the Union. The Union has withdrawn their request for the billable rate charged by the Town's past lawyers at mediation and therefore is not responsive.

The Town further states that:

> To satisfy the request …, the Town would be breaching solicitor client privilege by having to disclose the invoices, or in the least, parts of the invoice provided by its past lawyer because the invoices contain detailed accounts of work and advice provided. Further, the Town would not be able to provide this information without first going back to its past lawyer to review each bill in detail in order to correctly and accurately separate which amounts were invoiced strictly for collective bargaining negotiations.

The affected party's position is that none of the three records respond to the appellant's narrowed request. The affected party states:

> [T]he Records are not responsive to the request; that is, they do not represent the total … spent on legal fees pertaining to collective bargaining that is the subject of the request.
>
> Consequently, Record 3, consisting of one page … cannot be "severed" to be responsive to the request. Similarly, Records 1 and 2 cannot be "severed", as they are dependent upon Record 3.

In representations that it has claimed are confidential, the affected party elaborates on the Town's argument that some of the invoiced amounts contain charges that do not relate to the request.

In my view, taken together, the series of positions taken by the Town that I have just reproduced does not adequately reflect the objective of the *Act* that requesters should receive suitable assistance, where required, in order to formulate a request that is in keeping with the Town's record holdings. Rather than helping the appellant to determine which records or portions would contain information that reasonably relates to the request, as required by section 17(2), the Town has instead argued that the dollar figures include charges for other matters. The Town somewhat cryptically states that it could not provide accurate information "… without first going back to its past lawyer to review each bill in detail in order to correctly and accurately separate which amounts were invoiced strictly for collective bargaining negotiations." If this was required in

order to produce responsive records, my question is: why didn't the Town do so?

There is no suggestion that the Town does not have this information within its custody or under its control. I will not allow the Town to claim that the identified records are non-responsive, based on over-inclusiveness of amounts billed, when by the Town's own admission it could have determined an accurate response by undertaking consultations. As noted above, the issue of responsiveness is a fundamental one, and requests should be given a liberal interpretation. Moreover, as stated in Order 50 (decided under the provincial *Freedom of Information and Protection of Privacy Act*), the fact that information may not be in the exact form requested does not determine the issue of responsiveness:

> In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the [*Freedom of Information and Protection of Privacy Act*, which is equivalent to section 17 of the *Act*] imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format. …
>
> The *Act* requires the institution to provide the requester with access to all relevant records, however, in most cases, the *Act* does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the *Act* gives requesters a right (subject to the exemptions contained in the *Act*) to the "raw material" which would answer all or part of a request, but … the institution is not required to organize this information into a particular format before disclosing it to the requester.

In my view, applying this approach, the information initially identified as responsive in records 1, 2 and 3 for information created during 2003-4 is "reasonably related" to the request.

However, considering the arguments put forward by the parties and the circumstances of this appeal generally, there are several other possible bases for concluding that parts of the records that relate to the 2003-4 period, and were initially identified as responsive, might in fact be non-responsive. These are:

- the narrowed request refers to "legal fees" and should not be interpreted to include disbursements;

- record 1 is non-responsive because it deals with collective agreement administration rather than collective bargaining;

- one of the figures in record 2 is a duplication of a figure in record 3.

I will deal with these arguments in turn.

In my view, a request for "total dollar amount spent on legal fees" is implicitly asking for the total of legal fees and disbursements. I would not exclude disbursements based on this wording. The term "legal fees", while sometimes used specifically to describe payments for lawyers' services, is also used broadly to refer to both types of expenses [see, for example, *Port Colborne (City) v. Rubber Recovery Specialists Inc.*, [2002] O.J. No. 4070 (S.C.), *Clients of JNP Financial Services Inc. v. Paul* [2001] O.J. No. 1616 (S.C.), *Bahadoor v. York Condominium Corp. No. 82*, [2007] O.J. No. (S.C.)].

No one has provided an explanation of how "collective agreement administration" differs from "collective bargaining" or explicitly argued that record 1 should be excluded on that basis. In my view, legal fee information about collective agreement administration is reasonably related to a request for legal fee information about collective bargaining. I would not exclude record 1 on this basis.

One of the figures in record 2 is duplicative of the invoiced cost information in record 3. Both refer to the same invoice number. Because the record 3 total amount includes disbursements while the record 2 amount does not, I find the record 3 amount to be responsive. I will not include the record 2 figure as responsive as it would create a misleading total if included with the other numbers.

The Town submits that record 1 contains the amounts paid to the Town's lawyers for the years 2000 through to the end of 2003. In fact, record 1 contains two responsive entries referring to legal fees paid during 2003-4. Both entries are followed by smaller amounts presumably representing the disbursements paid. Record 2 contains five entries referring to legal fees paid in 2004. One entry for legal fees is duplicated in record 3, as noted above. The other four entries in record 2 are followed or preceded by smaller amounts presumably representing the disbursements paid. Based on the foregoing analysis, I find all of these figures (except the duplicative amount in record 2) to be responsive, for a total of six responsive entries for legal fees, plus six entries for disbursements, in records 1 and 2, as well as the total amount of fees and disbursements in record 3 as discussed above.

Because the appellant has asked only for a total dollar figure, information that does not pertain to dollar amounts is not responsive. I therefore find that the remaining information in the records, including dates, invoice numbers, firm names, individual lawyers' names, and lawyers' hourly rates, to be non-responsive.

I will proceed to determine: (1) whether the portions of the records I found to be responsive to the request are excluded from the *Act* under section 52(3), and if I find they are not, (2) whether they are exempt from disclosure pursuant to sections 10(1)(c), 11(c), 12 or 14 of the *Act*.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

Section 52(3) states:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

As stated above, the affected party's original representations indicate that it relies on the application of sections 52(3)1, 52(3)2 and 52(3)3 of the *Act* to deny access to the records. In the supplemental Notice of Inquiry, I invited representations on section 52(3), including the applicability of Order MO-2024-I. In that order, I had found that the labour relations/employment records exclusion in section 52(3) of the *Act* did not apply to records relating to the total amount of legal fees the City of Toronto paid to a law firm with respect to a former City of Toronto employee who commenced a civil action against the City of Toronto. Although invited to do so, the Town did not provide representations regarding the application of section 52(3) of the *Act*. Since the section is jurisdictional, I have decided to address it in this order although it was raised by the affected party alone, not the Town.

The affected party stated the following in its initial representations:

> Unlike other areas of the law, the actual dollar amount of the legal costs can be considered [as] information that has a value in the labour and employment relations between an employer and its trade union. That value could be reasonably be brought to the table in ongoing negotiations, and discussions in respect of dollars available to be spent in respect of bargaining employees. In the Supreme Court of Canada case *Maranda v. Richer* [2003] 3 S.C.R. 193, it was explicitly recognized that there are "difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information." … In this instance, the dollar amount contained in such bills of account, and the record of payment, is not "neutral information". For the same policy reasons that other negotiations and meetings are not subject to access, for planning and open discussion, the numbers sought here ought not to be. The substance of the information, that is, the legal costs associated with labour and employment-related matters contained in Records 1, 2 and 3, we would submit, could be employed in communications with the Town's unionized employee, and in negotiations with the Town, and accordingly, represents information that the Act does not, and was not, intended to apply to.

In view of the fact that the request seeks access to legal fees paid in relation to collective bargaining, it would appear that section 52(3)2 is most relevant, and I will begin my analysis there.

Section 52(3)2: negotiations

For section 52(3)2 to apply, each of the following requirements must be met:

> 1. the records were collected, prepared, maintained or used by an institution or on its behalf;
>
> 2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
>
> 3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.
>
> [Orders M-861, PO-1648]

I am satisfied that the record was collected, prepared, maintained or used by the Town or on its behalf, meeting requirement 1. I am also satisfied that the labour relations negotiations took place between the institution and a bargaining agent, meeting requirement 3.

The question I must decide under requirement 2 is whether the collection, preparation, maintenance or usage of the records by the Town was in relation to negotiations or anticipated negotiations relating to labour relations, or to the employment of a person by the Town.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In Order MO-2024-I, I rejected the City of Toronto's argument that records disclosing the total amount of legal fees paid to its lawyer to defend a wrongful dismissal action by a former employee were created, prepared, maintained or used "in relation to" legal proceedings involving the former employee. While this decision was made under section 52(3)1, it is equally applicable in determining whether the communications were "in relation to" negotiations. I stated:

> In my view, meeting this definition [of "in relation to"] requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> 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.

Having reviewed the affected party's confidential and non-confidential representations and the records themselves, I find that records of payments the Town made to its lawyers are too remote to qualify as being "in relation" to the negotiations. The records in this appeal are similar to the record at issue in Order MO-2024-I in that they consist of extracts from the Town's accounting records relating to the payment of legal fees, and part of an invoice for legal fees prepared by the affected party. There is nothing in the records themselves that supports the affected party's position that the Town's collection, preparation, maintenance or use of these records is substantially connected to actual or anticipated labour relations negotiations. Significantly, there

is no evidence that the information at issue was discussed or used by the Town during collective bargaining negotiations.

In representations whose details the affected party requested to remain confidential, the affected party speculates about possible use of the information by the appellant. This is irrelevant in the context of section 52(3), which applies to "records collected, prepared, maintained or used *by or on behalf of an institution…* " in relation to the subject matters described in paragraphs 1, 2 or 3 of the section (emphasis added). Use by the appellant will not satisfy this requirement.

As part of this same argument, the affected party seeks to distinguish Order MO-2024-I because the latter is not in a labour relations context. This argument also hinges on the appellant's possible use of the information, and since that is not relevant in this context, it is also not a valid basis for distinguishing Order MO-2024-I.

The affected party also submits that disclosure of the record could reasonably be expected to prejudice its competitive position. This argument, however, is better addressed in my discussion as to whether or not the third party information exemption in section 10(1) of the *Act* applies. Here, the question is whether the connection between the records and the negotiations is strong enough to mean that the collection, preparation, maintenance or usage of the records was "in relation" to the negotiations and I find that they were not. Accordingly, I find that requirement 2 is not met, and section 52(3)2 does not apply.

Section 52(3)1: proceedings or anticipated proceedings

For section 52(3)1 to apply, each of the following requirements must be met:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

I am satisfied that the records were collected, prepared, maintained or used by the Town or on its behalf, meeting requirement 1. I am, however, not satisfied that requirement 2 has been met.

The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F]. For proceedings to be "anticipated", they must be more than a vague or theoretical possibility.

In a passage whose specifics the affected party requested to remain confidential, the affected party refers to an activity that it alleges was a proceeding before a "tribunal or other entity", and to a court action. I am not satisfied that the collection, preparation, maintenance or usage of the records was "in relation to" any such proceeding, for substantially the reasons outlined under section 52(3)2, above. There is no evidence that the information at issue was discussed or used by the Town during any proceeding referred to by the affected party. I find further support for this conclusion in Order MO-2024-I, in which I found that section 52(3)1 did not apply in analogous circumstances.

In conclusion, I find that requirement 2 is not met and section 52(3)1 does not apply.

Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, all of the following requirements must be met:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

As with section 52(3)2, I am satisfied that the record was collected, prepared, maintained or used by the Town or on its behalf, meeting requirement 1. I am also satisfied that meetings, consultations, discussions or communications about labour relations took place, and that the Town had an interest in such matters as the employer.

Turning to requirement 2, the issue here, as it was under section 52(3)2, is whether the Town's collection, preparation, maintenance or usage of the records was "in relation to" to meetings, consultations, discussions or communications about labour relations. For the same reasons outlined above under section 52(3)2, I find that this requirement has not been satisfied. The amount of fees charged in relation to collective bargaining is simply too remote to qualify as having been collected, prepared, maintained or used "in relation to" meetings, consultations, discussions or communications about labour relations or employment-related matters. For example, there is no evidence before me to suggest that the fee information at issue was used by the Town during any such meeting, consultation, discussion or communication in addressing the substance of any labour relations or employment-related matter. Because requirement 2 is not met, I find that section 52(3)3 also does not apply.

As I have found that sections 52(3)1, 52(3)2 and 52(3)3 do not apply in this appeal, the records are subject to the *Act* and I will go on to consider the remaining issues at dispute.

THIRD PARTY INFORMATION

The affected party claimed in its initial representations that section 10(1)(a) applies. Its supplementary representations also refer to section 10(1)(c). The Town's supplementary representations refer to section 10(1)(a).

Sections 10(1)(a) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For section 10(1)(a) or (c) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) or (c) of section 10(1) will occur.

Part 1: type of information

The affected party claims that the records at issue contain labour relations and financial information. The Town's position is that the records at issue contain financial and commercial information. Commercial, financial and labour relations information have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Having regard to the parties' representations and the records themselves, I am satisfied that the portions of the records at issue, namely amounts billed for legal services, consist of commercial and financial information, meeting part 1 of the test.

Though it is not required for the purposes of this order, and has no effect on my finding that part 1 of the test is met, I note in passing that, for similar reasons to those expressed under section 52(3), I am not satisfied that the information at issue qualifies as "labour relations information". Order P-653 described "labour relations information" as referring to "… information concerning the collective relationship between an employer and its employees." Only information having a substantial connection to the actual substance of labour relations negotiations, to a collective agreement, or to related matters of substance, could be considered to actually "concern" the collective relationship, and I find that the information at issue here has no such connection.

Part 2: supplied in confidence

The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The affected party submitted the following in its supplementary representations:

> Record #3 was explicitly provided in confidence to the respondent municipality by letter marked "Privileged and Confidential". The information originated from a third party and supplied directly to the institution. The information was not in the nature of a contract, but an invoice for services rendered.

The Town supports the affected party's position and states:

> The invoices containing invoice amounts are provided to the Town in confidence. These invoices were mailed to the Town in a sealed envelope marked "Private and Confidential", therefore, it was supplied by [the affected party] with a reasonable expectation of the invoices and invoice amounts remaining confidential. Further the amount of legal fees incurred for collective bargaining negotiations would not normally be disclosed by the Town to the public in any of the Town's mandatory financial disclosure requirements under the *Municipal Act*.

In my view, the notation "privileged and confidential" on a solicitor's invoice does not necessarily indicate that it could not be disclosed by the client, in this instance, the Town, if it chose to waive solicitor-client privilege and do so. It is axiomatic that privilege belongs to the client, not the lawyer. In the circumstances of this case, however, based on the representations of the Town and the affected party, I am satisfied that the information at issue is the result of invoices prepared and supplied in confidence by law firms retained by the Town. Accordingly, part 2 of the test for the application of section 10(1) has been met.

Part 3: harms

As noted previously, section 10(1)(a) and (c) have been raised in this case. The harms identified in these sections arise where disclosure could reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization" or "result in undue loss or gain to any person, group, committee or financial institution or agency".

Sections 10(1)(a) and (c) are designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, sections 10(1)(a) and (c) serve to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive or negotiating position

The affected party's position stated in its initial representations is that disclosure would prejudice significantly its competitive position as disclosure would reveal information about the billing rates of its lawyers which would jeopardize its relations with other clients. However, I have found, above, that this information is not at issue.

Moreover, as noted in the discussion of what portions of the record are responsive, above, only the dollar amounts paid to three law firms are responsive. This information is contained in

eleven discrete entries in records 1 and 2, and one entry in record 3. Nothing else in the records, including the firm name, lawyers' names, hourly rates, invoice dates or invoice numbers, is responsive and no matter what conclusions I reach in this order about the application of the *Act* itself, or the exemptions claimed, this information will not be disclosed.

In my view, the dollar figures alone are not attributable to any firm, even if the appellant should happen to be aware of the firms, or any of them, that are involved. Nor is it reasonably possible to draw accurate inferences about the hourly rates or other items charged by any of the law firms. For this same reason, I am also not satisfied that the possible uses of the information by the appellant, referred to by the Town and affected party in their representations, could reasonably be expected to prejudice the competitive position of any of the law firms.

The affected party also implicitly argues that the overall amount spent, which could not be attributed to a particular law firm, could damage the Town's position in future negotiations. The affected party asks that the details of these submissions remain confidential. I find this argument to be highly speculative and I am not satisfied that the evidence of this particular alleged harm that has been provided is "detailed and convincing". As well, I note that it relates to harm *to the Town*. The Town is an institution under the *Act*, not a third party. As mentioned above, sections 10(1)(a) and (c) are intended to protect the "informational assets" of businesses or other organizations that provide information to government institutions. In my view, this does not extend to protecting the future negotiating position of an institution. Section 11, which I will discuss in detail below, is the exemption designed to protect the interests of government institutions in relation to negotiations.

For these reasons, I find that a reasonable expectation of competitive harm and/or harm to negotiating position, within the meaning of this section, has not been established in relation to the responsive information in the records. I therefore find that, as regards section 10(1)(a), part 3 of the test is not established and, since all three parts of the test must be met, section 10(1)(a) does not apply.

Section 10(1)(c): undue loss or gain

The affected party's representations concerning this provision focus on the possible use of the information by the appellant. In representations that it has requested to remain confidential, the affected party elaborates on this submission and in effect, argues that disclosure could reasonably be expected to result in undue gain to the appellant. As I did under section 10(1)(a), I find this argument to be highly speculative and I am not satisfied that the evidence of this particular alleged harm is "detailed and convincing".

As well, given that the Town is the master of its own negotiating strategy, the Town is in a position to avoid this outcome. Moreover, in these circumstances, if the disclosure occurs and actually proves to have the result suggested by the affected party as the result of negotiations, I am not satisfied that any gain in this regard would be "undue" because it would be a negotiated outcome into which the Town has significant input.

I therefore find that a reasonable expectation of the harms in section 10(1)(c) has not been established, and again, part 3 of the test is not met. As all three parts of the test must be met, I find that section 10(1)(c) does not apply.

In summary, the responsive information in the records is not exempt under section 10(1)(a) or (c).

ECONOMIC AND OTHER INTERESTS

Section 11(c) of the *Act* states:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Turning to section 11(c) specifically, its purpose is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190]

The records at issue here have nothing to do with the Town earning money in the marketplace, nor do they engage any competition the Town might have with others in a marketplace setting.

Moreover, in my view, the Town has no "competitive position" in collective bargaining in the sense intended here. While collective bargaining could be construed as "competitive" as between employer and union, this does not create a "competitive position" as the term is used in section 11(c), which contemplates a situation in which two entities in the same or similar businesses compete for customers.

Similarly, although "economic interests" has a broader meaning than "competitive position", its interpretation must be consistent with the purpose of the exemption, and with the overall thrust of the provision. In my view, the "economic interests" in question again must relate to earning money in the marketplace. Here, they do not.

In any event, the evidence provided by the Town, which appears in representations that the Town largely seeks to withhold from the appellant as confidential, cannot be described as "detailed and convincing" in relation to economic prejudice. The Town's representations basically fall into two categories, both of which relate to speculation about what the appellant might do with the requested information if it were disclosed.

The representations in the first category speculate that comments the appellant might make about an important public issue, which is *not* a marketplace-related issue, could cause economic prejudice to the Town by impacting future negotiations for a collective agreement. Even if this were considered "prejudice to economic interests" within the meaning of this section, I would not find that the evidence presented is sufficient to demonstrate that this could reasonably be expected to result from disclosure. As noted above in the discussion of section 10(1)(c), the Town is the master of its own negotiating strategy and, in my view, the result suggested by the Town is a remote one over which the Town has significant control. I find that this argument does not provide a sufficient basis for applying section 11(c).

The thrust of the second category of representations provided by the Town on this exemption relates to the use of the information by the appellant in future negotiations. Essentially the same argument was made in relation to section 10(1)(a) and (c), and in that context, I found the argument to be highly speculative and not supported by "detailed and convincing" evidence. Also, as noted earlier, the Town is the master of its negotiating strategy and in my view, the result suggested by the Town is a remote one over which the Town has significant control. Therefore, even if I found this to be an economic interest protected by section 11(c) (which I did not, having reached the opposite conclusion on this issue, above), I would not be persuaded that the result suggested by the Town could reasonably be expected to result from disclosure. I therefore find that this submission does not provide a sufficient basis for applying section 11(c).

In conclusion, I find that the exemption in section 11(c) does not apply to the records at issue.

SOLICITOR-CLIENT PRIVILEGE

The Town submits that section 12 of the *Act* applies to exempt the legal fees contained in the records. The affected party provided representations in support of the Town's position. Section 12 reads:

> 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. The Town claims that Branch 1 applies to the records at issue and the affected party supports the Town's position.

Branch 1: common law privilege

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)]

The representations of the Town and the affected party relate to the solicitor-client communication privilege aspect of 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.

With respect to the decisions of the Divisional Court and Court of Appeal on the judicial review of Orders PO-1922 and PO-1952 in *Ontario (Attorney General)* (cited above), which applied *Maranda* in the context of an access-to-information request, I stated:

> These orders dealt with records created by the Ministry to reflect the requested information, including global fee and disbursement figures, which in some cases identify the law firms involved and the amounts they charged. Both the Divisional Court and the Court of Appeal upheld the determinations in these two orders that this information was not privileged. The Supreme Court had not articulated its *Maranda* criteria when Orders PO-1922 and PO-1952 were issued, but both the Divisional Court and the Court of Appeal applied these criteria, finding that the presumption of privilege was rebutted because the information was neutral.

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.

The Town's initial representations concede that in view of the Court of Appeal's decision in *Ontario (Attorney General)*, records 1 and 2 "may not by themselves be considered privileged." The thrust of these representations is that the amounts in these records do not represent the total strictly for collective bargaining, and that a review of the actual invoices would be required to achieve this, as noted in the discussion of "Responsiveness of Records", above. According to the Town, the invoices (which are not before me except for the responsive portion of record 3) are privileged. This submission does not assist the Town, because only the dollar amounts of fees and disbursements in records 1 and 2 are before me in this inquiry, as is the similar information in record 3. I must assess the application of privilege to the information that is actually before me, not to the detailed invoices mentioned by the Town in this part of its submissions. I will therefore not refer to these representations again in the analysis of section 12.

The affected party's initial representations focus on record 3, and relate to information I have found to be non-responsive. I will not refer to these representations again.

In its supplementary representations, the Town submits that the labour relations context is distinct from the criminal law context in *Maranda* and *Ontario (Attorney General)* (both cited above), and that this context should be carefully considered. The Town also submits that disclosing the total fees paid would allow the appellant to estimate the "amount of communication" the Town had with its lawyers. The Town does not explain how this reveals a privileged communication.

The Town also submits that given the appellant's knowledge of the negotiations, revealing the total fees would allow her to determine the subject matter of its discussions with counsel. In its response to this request, the Town has not denied that it retained counsel in relation to collective bargaining. In my view, if this fact was ever privileged, such privilege has been waived by virtue of the Town's communications to the appellant and the language it chose to use in responding to her request for information about legal fees in relation to this precise subject matter. The Town also suggests that disclosure could have a chilling effect on its consultations with legal counsel. Regarding the latter, I do not find it credible that the Town would willingly give up legal representation in relation to collective bargaining for the reason suggested in these submissions.

The affected party's supplementary representations again refer, in part, to information that I have found not to be responsive. They also take the position that the appellant is an "assiduous inquirer", and that this should be taken into account in assessing whether the presumption of privilege is rebutted. The affected party also asks that the substance of these representations remain confidential.

As noted earlier, the presumption of privilege will be rebutted if the information in question is "neutral". The affected party submits "… that the issue of "neutrality" may also be interpreted to make a determination of whether the information of itself has value as between the parties. … The information requested, in the context of labour relations, it is submitted, is neither neutral nor benign." I disagree. *Maranda* is quite clear that "neutral" information is information that does not violate the confidentiality of the solicitor-client relationship by revealing privileged information (see, for example, paragraphs 34-35 of the judgment). The question of the value of the information "as between the parties", if it is found not to be privileged, is irrelevant in this context. I therefore reject this argument.

In my view, the evidence before me, including the labour relations context of the relationship between the appellant and the Town, and the fact that the only responsive information is a series of dollar amounts and nothing else, with no dates, firm names or lawyers' names disclosed, indicates that there is no reasonable possibility that privileged information could be revealed. I therefore find the information to be neutral. I agree with the Town and the affected party that the appellant is an "assiduous inquirer" whose involvement must be considered, as well as the possibility of future requests. I have considered these factors in reaching my conclusion, but even bearing that in mind, I am still not persuaded that there is any reasonable possibility that privileged information would be revealed in the circumstances of this case by disclosing these dollar amounts.

Before leaving this issue, I note that I did not find it necessary to seek representations from the appellant in this case. This raises the question of whether the requester has rebutted the presumption. I considered this issue in Order PO-2483 and stated that:

> … while the Court of Appeal did indicate in [*Ontario (Attorney General)* (cited above] that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. … The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the requester. (In fact, in one of the orders under review in [*Ontario (Attorney General)*], the requester had not provided representations at all – see Order PO-1922.) This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner.

That is the approach I have taken here. Having regard to the above, I am satisfied that the information I found responsive to the request is "neutral" and the presumption of privilege is rebutted in relation to it. I therefore find that branch 1 solicitor-client privilege does not apply. I have not been provided with evidence or argument to support the application of common law

litigation privilege or branch 2 in this case. I find that the responsive information is not exempt under section 12.

PERSONAL PRIVACY

As noted above, the affected party claimed that disclosure of information which identified lawyers and legal assistants along with their hourly rates would constitute an unjustified invasion of personal privacy, taking into consideration the presumptions in section 14(3)(f) and the factors in section 14(2)(b) and 14(2)(h). This would result in the information being exempt under the mandatory exemption found in section 14(1). I have found this information to be non-responsive and it will not be ordered disclosed. It is therefore not necessary to address this particular submission.

With respect to the information I have found to be responsive, section 14(1) can only apply to "personal information". This term is defined in section 2(1) as recorded information about an identifiable individual…." followed by a non-exhaustive list of examples.

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)]. The information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The only responsive information in the records consists of twelve separate, non-attributed dollar amounts. These are amounts charged by law firms and are, in my view, not of a personal character even if it were possible to determine which amounts relate to each law firm or lawyer. Most importantly, the responsive information does not relate to any identifiable individual. I find that it is not personal information, and therefore it cannot be exempt under section 14(1).

CONCLUSION:

I have found that the *Act* applies to the records, and that none of the claimed exemptions apply to the responsive information. I will therefore order the responsive information disclosed.

In this order I have noted the Town's submissions to the effect that the information I have identified as responsive includes fees relating to matters not identified in the request. If the Town wishes to provide an explanation of what the actual dollar amount is that pertains to the items identified by the requester, it may do so when it discloses the responsive information.

As well, given the Town's explanation that it would have to resort to invoices that are not before me in order to arrive at this information, suggesting the existence of further responsive records, I reserve the appellant's right to launch a further appeal on the question of whether the Town's search for records was reasonable, to be initiated within thirty days after the appellant receives the information I have ordered disclosed.

ORDER:

1. I order the Ministry to disclose the portions of the record I have found are responsive to the request. For the sake of clarity, the responsive portions are highlighted on a copy of the records that I am sending to the Town with this order. Only the highlighted portions are ordered to be disclosed. Alternatively, the Town may disclose these amounts by putting them on a single piece of paper, if it so chooses. I order the Town to disclose this information by sending a copy to the appellant no later than **August 3, 2007** but not before **July 30, 2007**.

2. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Town pursuant to order provision 1.

3. The appellant may file an appeal on the issue of whether the Town's search for responsive records was reasonable, if she chooses to do so, by writing to this office within thirty days after she receives the records I have ordered disclosed.

Original signed by: June 29, 2007
John Higgins
Senior Adjudicator