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

ORDER PO-2673

Appeal PA-040159-1

Ministry of Government Services

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BACKGROUND AND NATURE OF THE APPEAL:

The requester submitted a request to the Ontario Realty Corporation (the ORC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- the [ORC's] total expenses from each entity it used in a specified civil action; and
- a copy of the final [named chartered accountant firm] audit report prepared for the government relating to that action.

The ORC issued a decision letter, granting the requester access to the individual and total amounts for three invoices from the named chartered accountant firm dating from the year 2000. These figures had previously been disclosed. The ORC explained that the total figure represents a portion of the total costs relating to the services of the named chartered accountant firm reflected in the accounting record. With respect to the remaining information, the ORC stated that it had located two records responsive to the request and denied access to them pursuant to the exemptions found under sections 14(1)(f) (right to a fair trial), 17(1)(a) and (c) (third party information), 18 (economic and other interests) and 19 (solicitor client privilege) of the *Act*. The ORC subsequently clarified that with respect to the section 18 exemption, it is relying on sections 18(1)(c), (d) and (e).

The ORC transferred to Management Board of Cabinet (MBC), now the Ministry of Government Services (MGS), a portion of the above request regarding legal costs relating to the civil action and the forensic review.

MBC located one record responsive to the request and issued a decision letter stating that in addition to the outside legal consultants hired, MBC had also hired an external accountant in relation to the relevant matter and that costs relating to that service had also been calculated to form part of the record. MBC denied access to the information pursuant to the exemptions found under sections 17(1)(a) and (c) (third party information) and 19 (solicitor client privilege) of the *Act*.

The appellant appealed both decisions. Appeal PA-040158-1 was opened to address the issues pertaining to the decision made by ORC and PA-040159-1 was opened to deal with the MBC decision. During the processing of these two appeals, discussions and correspondence at times dealt with each one separately and at times dealt with both appeals. This order will address only the issues raised in Appeal PA-040159-1 while the issues raised in Appeal PA-040158-1 were addressed in Order PO-2672.

PROCESS DURING THE MEDIATION AND ADJUDICATION STAGES

Mediation did not resolve the issues on appeal, and the file was transferred to the inquiry stage of the appeals process.

This office sent a Notice of Inquiry to MBC, initially, seeking its representations. A copy of the Notice was also sent to three parties that might have an interest in the disclosure of the records

[the affected parties]. MBC made submissions in response to the Notice. Only one of the affected parties submitted representations. This office sent the Notice to the appellant, inviting representations and enclosed copies of the entire representations submitted by MBC and a copy of the non-confidential portions of the representations submitted by the one affected party that responded to the Notice.

After this office sent out the second party Notice, the ORC and MBC submitted joint supplementary representations. These were also sent to the appellant, in their entirety. The appellant also provided submissions jointly referencing the two appeals and attached a number of court decisions to support his arguments.

This office then sought representations by way of reply from MBC and one affected party and attached the non-confidential portions of the appellant's representations to the Notice. The ORC provided additional submissions by way of reply, which were then shared with the appellant, who submitted further representations by way of sur-reply to this office.

Following the rendering of a significant decision by the Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.), the parties to the appeal were again invited to provide this office with additional submissions regarding the impact the decision might have on the outcome of the present appeal. The ORC and MBC submitted joint representations in response to this invitation.

This office later issued Orders PO-2483 and PO-2484 which applied the approach from the *Attorney General* case to records containing information relating to legal accounts. The parties were invited to make submissions on the relevance of these orders. The ORC, MBC and one of the affected parties provided this office with additional representations.

RECORDS:

The record at issue is a one-page document entitled, "Summary of Costs – Ontario Realty Corporation Forensic Review and Civil Litigation, Expenditures to March 9, 2004." This document contains total costs for legal services provided by two law firms and the total cost for accounting services provided by one accounting firm.

DISCUSSION:

SOLICITOR CLIENT PRIVILEGE

MBC has claimed the application of the discretionary exemption at section 19 for both of the records at issue in this appeal. At the time of the request, section 19 read as follows:

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

General principles

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).]

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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

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

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

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

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

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

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

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

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.

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Application of section 19 to the record

As indicated above, the record consists of a list of payments made to two law firms and one accounting firm. I note that one of the three amounts listed in the record pertain to payments made by MBC to an accounting firm, who is clearly not legal counsel. Obviously, solicitor client privilege cannot apply to information that relates to payments made to organizations that are not law firms as the privilege only extends to the solicitor-client relationship and not to those involving accountants and their clients. As a result, the only amounts listed on the record that could be subject to section 19 are those relating to payments made to the two law firms.

Representations of the parties

MBC provided representations to this office jointly with the ORC on several occasions when invited to do so. Its position remains the same, arguing that the dollar amount paid by it to the law firms is subject to exemption under section 19. In its original submissions, MBC and the ORC acknowledge that "there is jurisprudence which provides that solicitor-client privilege does not apply to legal costs records in relation to completed litigation matters."

However, MBC and the ORC then go on to argue that in situations where litigation is ongoing, "individuals can make repeated access requests under [the *Act*] for an institution's ongoing legal costs and discover information subject to solicitor-client privilege." In support of these arguments, the ORC and MBC rely on the decision of the British Columbia Supreme Court in *Municipal Insurance Association of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996) 143 D.L.R. (4d) 134 and the decision of the Supreme Court of Canada in *Maranda v. Richer* [2003] S.C.R. 193, arguing that the requester bears the onus of satisfying this office that the disclosure of the information in the record would not disclose privileged information.

MBC and the ORC also argue that the information in the record is subject to exemption by reason of the application of the litigation privilege aspect of Branches 1 and 2 of section 19. They state that the record "has been provided to counsel for the purpose of providing legal advice relating to the litigation. Accordingly, it forms part of the working papers of counsel in the litigation…"

Findings

In Order MO-2294, Adjudicator Laurel Cropley recently reviewed the current jurisprudence respecting the application of the equivalent provision to section 19 in the *Municipal Freedom of Information and Protection of Privacy Act* to the dollar amounts paid for legal fees by institutions. She reviewed first whether this type of information qualifies for exemption under Branch 1 of the exemption, which covers information that is subject to solicitor-client privilege at common law, finding that:

> At the time I sought supplementary representations from the City and affected parties regarding these two decisions, Order PO-2484 was the subject of a pending application for judicial review (Tor. Doc. 394/06 (Div. Ct.)). Order PO-2483 has not been subject to such an application. On July 16, 2007, the Divisional Court dismissed the Ministry of the Attorney General's application to set aside Order PO-2484 (*Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.)). The Divisional Court upheld the Senior Adjudicator's decision that the bottom line legal fee amounts appearing on legal accounts were not exempt under the solicitor-client privilege exemption at section 19 (the provincial *Act* equivalent to section 12 of the *Act*).

Although they differ in their particulars, Orders PO-2483 and PO-2484 both conclude by requiring disclosure of aggregated fees and disbursements.

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

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

> *The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements*.
>
> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.… [emphases added]

The decision goes on to find that the approach set forth in *Maranda* applies in both the criminal and the civil context, in accordance with the approach taken by the Court of Appeal in *Attorney General*. In that decision, the Court of Appeal set out the test for rebuttal of the presumption of privilege as follows:

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

In Order PO-2483, Senior Adjudicator Higgins summarized the above-noted approach as follows:

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

I agree with this analysis. Applying this approach to my consideration of the application of the solicitor-client communication privilege aspect of Branch 1 of section 19 to the dollar figures for legal fees contained in the record, I come to a similar conclusion. While each case must be determined on its own merits, I conclude that the present facts support a finding that the presumption against disclosure has been rebutted. In my view, the dollar figures for legal fees must be characterized as "neutral" information, thereby rebutting the presumption that the information is subject to solicitor-client communication privilege either at common law or in the context of communication privilege in Branch 1 of section 19. I find that the disclosure of this information cannot reasonably lead to the revealing of any solicitor-client communication, nor would it reveal any "strategic" information that falls within the ambit of a privileged communication to anyone, even the most assiduous requester.

In its final supplementary representations filed in response to the solicitation of submissions on the application of Orders PO-2483 and PO-2484, the affected party applies the criteria set out in Order PO-2484 and agrees that "the total amounts of our legal fees may be rebutted as constituting neutral information". In my view, the affected party has acknowledged that Branch 1 of section 19 cannot apply to the total legal fees listed in the record, as the disclosure of this information alone would not reveal or permit solicitor-client communications to be deduced.

With respect to Branch 2, the affected party again appears to have concerns about the disclosure of "our statements of account and background accounting records". It argues that there exists a connection between them and the "actual conduct of the litigation" because "these records constitute important communication of legal strategy conducted in relation to our retainers in the present case." I note, however, that the actual record at issue in this appeal is not the statements of account or the background accounting records of the law firm relating to its retainer. Rather, the record only lists two dollar amounts and the names of two law firms. I find that the disclosure of this information would not reveal a "legal strategy" regarding any litigation. In addition, I conclude that the information in the records was not prepared in contemplation of or to be used in litigation, as is required under Branch 2 of section 19.

THIRD PARTY INFORMATION

MBC submits that the information in the record is subject to the mandatory third party information exemptions in sections 17(1)(a) and (c). These sections 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, where 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;

General principles

Section 17(1) is 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.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves 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].

For section 17(1) 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), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

MBC submits that the record contains information that qualifies as financial and commercial information belonging to the accounting and law firms. It argues that the information relates directly to the value of the services performed by these entities for the MBC.

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].

Based on my review of the information contained in Record 1, I am satisfied that it relates directly to the supply of legal and accounting services to MBC arising from the commercial relationship that existed between these parties. Accordingly, I find that part one of the test under section 17(1) has been satisfied.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(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].

Based on the context in which these figures appear in the record, I am satisfied that the information in this document was supplied by the accounting and law firms to MBC as it relates directly to the fees charged by these firms to MBC for their services.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure, in this case, MBC, 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]. I note that none of the affected parties, including the law firm that provided representations in response to the Notice of Inquiry, included any submissions respecting the application of section 17(1) to the information in the record.

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]

MBC submits that there exists an expectation of confidentiality as the amounts listed therein are derived from billings for the supply of litigation support services to it. MBC has not, however, provided me with any indication of the terms surrounding the retainer of each of these firms upon which an expectation of confidentiality could be based. In my view, MBC has not provided sufficient evidence to support a finding that the information in the record was provided to it with a reasonably-held expectation that it would be treated confidentially. In the absence of evidence from the accounting and law firms, and owing to the dearth of evidence on this point tendered by MBC, I find that this part of the three-part test under section 17(1) has not been satisfied.

As all three parts of the test must be met in order for the information to be found to be exempt under section 17(1), I find that this exemption does not apply to the record. As no other exemptions have been claimed and none which are mandatory apply, I will order that the record be disclosed to the appellant.

ORDER:

1. I order MBC to disclose the record to the appellant by providing him with a copy by **June 20, 2008** but not before **June 16, 2008**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require MBC to provide me with a copy of the record which is disclosed to the appellant.

Original Signed by: May 15, 2008
Donald Hale
Adjudicator