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

ORDER MO-2294

Appeals MA-040339-1 and MA-040386-1

City of Waterloo

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NATURE OF THE APPEALS:

The City of Waterloo (the City) received two related requests from the same requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The first request was for access to copies of "all invoices or bills for legal services related to the lawsuit against [a named individual]." In response to the request, the City issued a decision denying access to the responsive records on the basis of the exemption in section 12 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed that decision, and appeal MA-040339-1 was opened.

The second request, submitted approximately two months after the first request, was for "costs of legal services related to RIM Park lawsuits, including actions against [a number of named businesses], and [two named individuals] etc., plus any other RIM Park lawsuits subsequently launched by the City." In response to this request, the City also issued a decision denying access to the responsive records on the basis of the exemption in section 12 of the *Act*. The appellant appealed that decision, and appeal MA-040386-1 was opened.

After receipt of these appeals, the Registrar of this office notified the parties that, due to a court case which may have an impact on these appeals, these matters would be placed "on hold". The letter from the Registrar read:

> The Ontario Court of Appeal has granted the Ministry of the Attorney General's motion for leave to appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4215. This case deals with legal fees and may have an impact on the outcome of your appeal.
>
> As a result, I have decided to put [these appeals] on hold pending the Court of Appeal decision.

On March 14, 2005 the Court of Appeal issued the decision in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.) (hereafter *Attorney General*), and these two appeal files were reactivated.

The City subsequently issued a revised decision letter dealing with both requests and claiming that the records were excluded from the application of the *Act* pursuant to section 52(3). The City also relied, in the alternative, on sections 7(1) (advice or recommendations) and 11(c) and (d) (economic and other interests) as well as section 12 in denying access to the records. Furthermore, the City's decision letter stated that it had requested this office to consolidate and deal simultaneously with the two requests. The decision then stated:

> Both requests are for the cost of legal services related to several civil actions commenced by the City against a number of parties …, which are further complicated by counter-claims and third party claims. The same solicitors are acting as counsel for the City on all the lawsuits and it would be difficult, if not impossible, to separate the specific costs of legal services related to the individual lawsuits.

The decision-maker initially assigned to these appeals consolidated them, and commenced his

inquiry by sending a Notice of Inquiry to the City and affected parties. Upon receiving representations in response from all parties notified, he sent a second Notice of Inquiry to the appellant, together with a redacted copy of the City's and the affected parties' representations. The appellant also submitted representations.

In his representations, the appellant clarified that during the mediation stage of the process he agreed to seek only the total dollar figures in relation to the lawsuits. Although not specifically referring to the "public interest override" in section 16 of the *Act*, the appellant claimed that there was a public interest in disclosure of the requested information. The previous decision-maker then invited the City and the affected parties to provide reply representations in response to the appellant's representations. The City and one affected party provided representations in response.

The file was subsequently transferred to me to complete the adjudication process.

Further to the previous Notices that had been sent, I decided to seek supplementary representations from the City and affected parties regarding new developments relating to legal fees that emerged over the time period that these files were in the adjudication stage. As these developments in the IPC jurisprudence appeared to be relevant to the issues in this appeal, I decided to provide these parties with the opportunity to comment on them. The City and one affected party submitted supplementary representations in response.

RECORDS:

The City identified nine records that were responsive to Appeal MA-040339-1 and 11 records for Appeal MA-040386-1 (nine of which are duplicates of the records in Appeal MA-040339-1). All of the records comprise solicitors' bills of account for legal services. In the indices prepared by the City and provided to the appellant, these records are simply identified as "Account for Legal Fees & Disbursements" for identified dates.

The only portions of these records which remain at issue are the total dollar figures contained in each of these accounts.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

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)1, 2 or 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 "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

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.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

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].

The City relies on the application of section 52(3)1 to deny access to the records.

Section 52(3)1: proceedings or anticipated proceedings

For section 52(3)1 to apply, the institution must establish that:

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.

The City states that the solicitors' accounts contain summaries of the time, effort and resources spent on specific tasks in relation to a legal service and were used by the City to inform itself of the steps already taken, to plan future action and to know the expenses incurred. The City notes further that it is involved in civil actions, including allegations made against the former employee for actions taken during his tenure with the City.

I am satisfied that the records were used by the City, meeting requirement 1. I am also satisfied that the court action instituted by the City against its former employee, among others, constitutes "proceedings" before a court.

However, all three requirements must be met for section 52(3)1 to apply. Turning to requirement 2, the City submits that:

> The information contained within the requested accounts creates a narrative of actions taken and opinions generated in relation to a variety of legal actions which are currently before the courts. In accordance with Order P-1223, it is the City's position that the requested information was created "for the purpose of" or "as a result of" the legal actions in question…
>
> …
>
> The test for "proceedings before a court or tribunal," established by Orders P-1223, and PO-2105-F, clearly and obviously must refer to a civil action in the Ontario Superior Court. In Order P-1223, the Commission to determine the meaning to be attributed to the phrase "proceedings before a court or tribunal" chooses to rely upon the definition of the sixth edition of Black's Law Dictionary which defines proceeding to include "Regular and orderly progress in form of law, including all steps in an action from its commencement to the execution of judgment."

In Order MO-2024-I, Senior Adjudicator John Higgins addressed similar types of records in an analogous situation. He stated:

> The question I must decide under requirement 2 is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".

The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.

Another relevant factor to consider in assessing the meaning of "in relation to" is the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act*, which added section 52(3) to the *Act*. The long title of this Bill identified this goal as to "restore balance and stability to labour relations and to promote economic prosperity".

As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition 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.

> I therefore find that requirement 2 is not met, and section 52(3)1 does not apply. Accordingly, the records are subject to the *Act*.

In the current appeals, the records are the actual solicitors' bills of account submitted to the City, although as I indicated above, only the total amounts are at issue. I agree with the rationale for the Senior Adjudicator's decision in Order MO-2024-I, and find that it is equally applicable to the information at issue in the current appeals.

I note that the records at issue pertain to lawsuits involving multiple parties, some of whom are not employees or former employees of the City. In this case the records, in their entirety and as reflected in the total amounts of the bills, contain billing details that extend well beyond the involvement of the former employee. The City has not distinguished which aspects of the billings pertain solely to this individual. However, even if the City could identify discrete portions of the records to pertain directly to the former employee, applying the reasoning in Order MO-2024-I, I find that there is no obvious relationship between the total amount of the billings and the actual conduct of the proceedings, nor do the City's representations explain such a relationship.

Accordingly, I find that requirement 2 has not been met, and section 52(3)1 does not apply. As a result, the records are subject to the *Act*.

PERSONAL INFORMATION

One affected party submitted representations in which he claimed that disclosure of some of the information in the records would disclose the income of any member of his law firm that worked on the file and/or would create the mistaken impression that he received all of the funds. In claiming this, the affected party has raised personal privacy issues as set out in the mandatory exemption at section 14(1). The City did not raise this exemption claim, and has made no submissions with respect to it.

In order for section 14(1) to apply, the information must qualify as "personal information". This term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, 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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Other than the statement referred to above, the affected party's representations do not indicate how or why the total amount of billings issued in the name of his law firm would qualify as "personal information".

In the absence of cogent evidence that disclosure of the total amount of a legal bill issued in the name of a law firm would reveal anything of a personal nature about the affected party or any other member of his law firm, I find that the information relates to this individual in a professional capacity and, therefore, does not qualify as personal information. Accordingly, the mandatory exemption at section 14(1) cannot apply in the circumstances.

SOLICITOR-CLIENT PRIVILEGE

Section 12 states as follows:

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

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

The City claims that the records at issue are exempt in their entirety under section 12 of the *Act*. These records consist of invoices for legal services that were sent to the City. The City's initial representations indicate that it relies on the common-law solicitor-client privilege in branch 1, and also that the records were "prepared by or for counsel … retained by an institution" under branch 2. I will begin by considering branch 1.

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)].

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].

Litigation privilege

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

> In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:
>
> The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
> >
> > It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
> >
> > . . . . .
> >
> > [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Representations

In its initial representations in response to the Notice of Inquiry, the City took the position that the solicitors' bills of account are direct communications of a confidential nature, made for the purpose of obtaining and giving professional legal advice, and are *prima facie* covered by common law solicitor-client privilege. The City also argued that the requested information was created as a direct result of ongoing litigation, for the purpose of furthering the clients' interest, and that the records "undoubtedly satisfy the common-law litigation privilege as well." The City relies on *Stevens v. Canada (Prime Minister)(C.A.)*, [1998] 4 F.C. 89, Order M-1408, Order PO-1714, and *Attorney General* in support of its position that the disclosure of the amounts of legal

fees paid to lawyers in the circumstances of this case "is entirely improper and contrary to the ruling in [*Attorney General*]."

The City also takes the position that the decision of *Attorney General* requires the requester to rebut the presumption that solicitor-client privilege would apply to the amounts paid in legal services, and claims that the appellant has failed to do so. In addition, the City stated:

> There were several factors relied upon in [*Attorney General*], to determine whether a decision to release such information, would violate solicitor-client privilege.
>
> 1) **The "context" in which the request arose.** [*Attorney General*] was decided in the context of a criminal matter which had been concluded. The current matter arises from ongoing civil actions. The criminal context is not driven by financial considerations to the same degree as civil matters. The aforementioned damages that could result through unilateral disclosure of financial matters described under the s.11 (c), (d) submissions were not present, in the [*Attorney General*] matter.
>
> 2) **Timing of the release.** The fact is that the matter was concluded in [*Attorney General*]. The current request deals with matters which are on-going before the Courts. The documents released in [*Attorney General*] did not deal with the identity of the solicitor but merely the total amounts and the dates upon which the amounts were released. To release such information in the present request would allow the assiduous inquirer to be able to determine information which would reveal the contents of communication between solicitor and client. *The Legal Services Society v. Information and Privacy Commissioner of British Columbia*, 2003 BCCA 278 (CanLll), (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.) case upon which the rebuttable presumption test in [*Attorney General*] was based dealt expressly with the effect timing would have on the determination of whether or not violation of solicitor-client privilege would result.… The City notes that in [*Attorney General*] the Ontario Court of Appeal states:
>
> > The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications.
>
> The City states that the law is clear, the previous rulings of the Privacy Commission, such as the aforementioned Order M-1408, and Order PO-1714, establish that the financial data contained in the Solicitors' bills of account is privileged. [*Attorney General*] creates no new law. Its effect is strictly limited to the application of a rebuttable presumption, which requires the requester to show that disclosure of the specific information concerning the total fees paid may not attract such privilege when it is completely divorced from the remainder of the

> communication. To force such information to be released in the specific context would have immediate and ruinous effects on the City by revealing the content of discussions and strategies determined by the City in consultation with its lawyers.

One of the affected parties also argued that the information in the records was prepared in contemplation of litigation, and for the purpose of communicating legal advice between a solicitor and client. He states that, based on the request itself, it is clear that the requested information is privileged, and refers generally to "a long line of authority" which establishes that solicitors' bills of account are privileged in their entirety.

The appellant provided brief representations in support of the position that the solicitor-client privilege should not apply to the requested information, and stated:

> I have no background information that would allow me to ascertain anything other than the approximate number of hours billed from the City's total legal costs in [the lawsuits]. On that point, the [*Attorney General*] decision from the Ontario Court of Appeal seems directly relevant. Divulging the total costs would not reveal any communication or advice between the City and its lawyers.

In reply, the City took issue with the appellant's statement that, "he personally has 'no background information' that could be used to determine more than the approximate number of hours billed." The City notes that the appellant is employed by a newspaper, and that the request and representations were made to assist his work. The City submits that even if the appellant does not have the required skills or information, he has access to newspaper staff of competent and passionate investigators and reporters, in essence, "assiduous inquirers", to assist him with the interpretation of these materials.

Moreover, the City submits that, "the test is not whether or not the requester has this information, but rather if the release of the information to a hypothetical assiduous inquirer who using other public information could determine solicitor-client communications." The City notes that the appellant has indicated an intention to make the information public and submits that the public includes the individuals who are representing the entities opposed to the City's interests in these lawsuits. The City takes the position that there are members of the public who have the skills to take other publically available information and deduce the content of the communications.

The City also argues that there is a fundamental difference between the present situation and *Attorney General*, noting that the latter case dealt with a long concluded legal proceeding, whereas the present lawsuits are on-going. The City submits that total billing information for a concluded legal action would only reflect the total time spent, whereas providing billing totals in an on-going legal matter would provide "snap-shots" of the matters and would therefore reveal privileged information.

Reiterating the test to rebut the solicitor-client privilege concerning billing totals in *Attorney General*, the City submits that the appellant has failed to satisfy his onus in establishing that the billing totals could be released.

Supplementary Issues Arising During the Adjudication Stage: Background and Representations

While these appeals were in the adjudication stage of the process, Senior Adjudicator John Higgins issued Orders PO-2483 and PO-2484. Both orders deal with legal billing information, and both contain a detailed analysis of the state of the law in relation to common law solicitor-client communication privilege under branch 1 in relation to legal billing information. In particular, they address the presumption of privilege applied to legal billing information in *Maranda v. Richer*, [2003] 3 S.C.R. 193. *Maranda* held that legal billing information is subject to a rebuttable presumption of solicitor-client communication privilege. This presumption is rebutted where it can be shown that the legal billing information in question is "neutral", *i.e.*, it does not disclose confidential solicitor-client communications or other privileged information.

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.

The City was invited to provide representations on the relevance of Orders PO-2483 and PO-2484 in the context of this appeal. Similar to the representations provided earlier, the City's supplementary representations focus on two arguments regarding why the information contained in the records ought not to be disclosed. First, the City argues that, based on Orders PO-2483 and PO-2484 and the decision in *Maranda*, the burden of proof is on the appellant to show that the presumption of privilege does not apply in the circumstances. The City states that, as the appellant has not provided sufficient evidence to rebut the presumption, the presumption applies and the records ought not to be disclosed. Secondly, the City takes the position that the disclosure of the records would disclose or reveal communications protected by the solicitor-client privilege. I will address each of these issues separately.

Analysis

Burden of proof – rebuttable presumption

The City takes the position that, because the information requested consists of legal billing information, the presumption that it is privileged applies, and the onus is on the appellant to show that this presumption has been rebutted. The City states:

> As recognized by … Orders PO-2483 and PO-2484 the amount of solicitors' accounts is presumptively privileged. While it is true that this presumption of privilege is rebuttable, specific conditions have been imposed on the party attempting to pierce the privilege. Order PO-2483, explicitly recognizes on page 14 that it is the instruction of the Supreme Court of Canada that solicitor-client privilege must remain as absolute as possible. It is only when it can be successfully shown that the release of the requested information will not reveal or

> allow solicitor-client communications to be deduced that the information could be considered to be "neutral" and the privilege will not apply.
>
> The burden of proof concerning whether or not such information is covered by solicitor-client privilege should lie on the party seeking the information. The presumption operates to require [the appellant] to at least raise an arguable case that the presumption is rebutted, prior to requiring the party seeking to withhold information to argue in support of the presumption. To require parties seeking to rely upon solicitor-client privilege to prove such information is not "neutral" effectively reverses the rebuttable presumption, and creates the very real possibility that privileged information will need to be shared to prove that privilege applies to the information. This result is not only absurd, but explicitly contrary to the ruling in *Maranda v. Richer*, [2003] 3 S.C.R. 193.
>
> In the present case, the full extent of [the appellant's] submissions concerning solicitor-client privilege (at least as received by the City) are contained within one paragraph … [The appellant] does not address the danger that releasing this information would allow an assiduous inquirer to deduce privileged information.

Throughout the City's representations the City continues to refer to the lack of information provided by the appellant in support of its position that the information is privileged.

I have carefully considered the City's position that, based on the fact that the request is for legal billing information, and based on the decision in *Maranda* and Orders PO-2483 and PO-2484, the appellant must provide me with sufficient evidence to rebut the presumption. For the reasons set out below, I do not accept the City's position.

In Order PO-2483 (a portion of which is set out above) Senior Adjudicator Higgins examined the Supreme Court Canada's decision in *Maranda* in considerable detail. He also reviewed a number of other Court decisions and Orders which relate directly to the issues in this appeal. The Senior Adjudicator also directly addressed the issues of how the rebuttable presumption set out in *Maranda* operates, as well as whether a requester must tender evidence to rebut the presumption.

In Order PO-2483 the record at issue consisted of a summary record, created during mediation, which set out the global, total figure for "legal costs" billed by several identified law firms in a given fiscal year, and the same information regarding the same three firms plus an additional identified firm, in a second fiscal year. The requester in that appeal did not submit any representations, and the institution argued that the appellant, in failing to submit representations, therefore failed to rebut the presumption.

Senior Adjudicator Higgins stated as follows regarding this argument:

> … while the Court of Appeal did indicate in [*Attorney General*] 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 entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. 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 [*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*. [emphasis added]

Senior Adjudicator Higgins adopted this same approach in Order PO-2484. He referred to the excerpt from PO-2483 set out above, and then stated:

> In my view, similar considerations apply where the appellant has provided representations on the issue, but the records themselves are a source of important information. Even if the appellant participates in the appeal, as in this case, his or her ability to provide the necessary evidence and argument to rebut the presumption is hampered by not having seen the records. In this situation, in my view, the Commissioner must review the records and consider the evidence they provide on this point, just as the Court of Appeal did in [*Attorney General*]. Any other approach would be unfair to the appellant.

As identified above, Order PO-2484 was upheld by the Divisional Court.

I accept the approach to the rebuttable presumption taken by Senior Adjudicator Higgins in PO-2483 and PO-2484 and adopt it for the purpose of this appeal. I will, therefore, review the nature of the information and the circumstances of this case to determine whether the presumption has been rebutted.

Disclosure would reveal privileged information

In response to the invitation to provide supplementary representations, the City indicated that it continued to rely on its earlier representations, and then stated:

> Solicitor-client privilege and the statutory privilege provided in s.12 of the [*Act*] are designed to allow a party to converse with his lawyers without fear that such information will be shared with others. In particular, the privileges are designed to allow a party to litigation to discuss matters with counsel without fear such information would be able to be obtained by opponents in such litigation. To

> release any of the requested information, including the total amounts spent in the lawsuits, would directly allow the City's opponents a backdoor into privileged discussions between a solicitor and client.

In the confidential portion of its representations the City then provides an example of the type of information that it argues could be obtained. The City goes on to state:

> It was decided in Order PO-2484 that information produced "in contemplation of or for use in" litigation would be excluded from disclosure on the basis of the statutory privilege provided in s.12 of the [*Act*]. In the present case, any and all of the various information requested by the Requestor is created either in contemplation of or for use in the various litigation. Accounts provide useful information to clients, informing them of steps taken, proposed developments and the costs of various activities. A solicitors' bill of account, and the information contained within, are created to not only allow the solicitors to receive payment, but to inform clients and allow them to make informed decisions as which further instructions to provide to their solicitors. The information requested in the present case, relates to a complex "family" of legal activities … It is manifestly obvious that the solicitors' bills of account, and the information included within them, are produced for use in the litigation.

The City then posits that an assiduous inquirer would be able to use the information in the records to "pierce the privilege", and in its confidential representations provides a general statement regarding how this may be done.

The City's representations then focus on the decisions made by this office and the courts. The City states:

> Furthermore, it has been mandated by the Supreme Court of Canada that it is to be assumed *prima facie* that the revelation of even the amount of a solicitors' account would violate privilege, and it is only where it can be shown that the release of the requested information would be "neutral" that release is to be granted. To be considered "neutral" it must be shown that the release of the requested information could not disclose, or allow to be deduced, any privileged information. …
>
> Orders PO-2483, and PO-2484 realize that simple mechanical application of rulings in other cases is not appropriate in determining whether or not information in this context should be considered privileged. Comparison between cases should be based on the principled application of the principles and rules established therein and not simply "matching" of released information. The [appellant] … stated that the result in the present case should be mandated by the result in the *Attorney General* decision …

> Even in the *Attorney General* decision …, it was noted that simply revealing the total number of hours spent could reveal solicitor-client communications. The context in which the information is revealed has been noted as crucial to the determination of whether privilege applies. Unlike the *Attorney General* case, the requested information, even if limited to total accounts to date, would reveal information protected by solicitor client privilege. The release of the total account information in *Attorney General*, is premised on the basis that in the case of concluded legal matters, the total number of hours spent, is of little import.

The City then provides examples of how information disclosed in the course of litigation that has not yet been concluded could result in the disclosure of privileged information. The City states:

> A party observing the entirety of a completed legal activity (or reviewing the total materials filed) can often conclude approximate total hours spent, without turning to the solicitors' bills of account. Also, at the conclusion of the hearing, the general communications between client and solicitors are revealed through their actions. As a practical example after a conclusion of a matter, an assiduous inquirer could look at the court file and see that the client had instructed their solicitor to bring a motion for relief, by simply looking at the motion record filed with the court. If the assiduous inquirer had access to a person with a general familiarity with legal matters, he could estimate the time which was spent in preparing the motion. As such, revealing the total account, does not assist in determining what instructions were given between the party and the solicitor.
>
> However, this cannot be said to be true in the case of an "incomplete" legal activity. Prior to a matter reaching its conclusion, the observable actions do not reveal the communications between parties and their solicitors. If a party to litigation was able to know that the opponent had spent ten times (or one-tenth) as much time as they had on a matter, they would then be aware of the solicitor-client communication between the parties.

The City also provides a hypothetical example of the type of information which may be disclosed in a given instance, if a matter is "ongoing". The City then states:

> This would obviously reveal solicitor-client communication. Through piercing solicitor-client privilege, the opposing party would then be forewarned of the actions its opponent was planning to take and could pre-emptively respond.

The City identifies the nature of the matter that gave rise to the lawsuits for which the account totals are requested. It identifies that legal fees for previous litigation involving this matter were publicly disclosed after the litigation and other proceedings were completed. The City then contrasts that situation with the current litigation, and states that "the present litigation involves several additional court actions, many parties and very complex issues," and that the litigation is in the early stages. The City states:

> The City's concern is that disclosure of legal accounts or even the disclosure of the amounts spent on legal fees and disbursements could negatively impact on the City and create an adversarial result that would be harmful to the City's case. Such information would not be neutral because it could cause the opposing parties to the litigation to form conclusions on the City's litigation strategy which is communication at the heart of solicitor-client privilege. The ability for parties directly opposed in interest to the City to deduce communications between the City and its solicitors would affect negotiations and possible settlement of the Court actions, as well as create a negative atmosphere during the course of the litigation.
>
> For example, a small expenditure could indicate that the City is not committed to go to trial and wishes to settle or abandon all or some of the litigation rather than incur the risk and expense of protracted litigation. A disclosure of a large expenditure at this stage of the litigation could lead to a conclusion that the City is committed to go to trial and that there is no sense for the opposition to mediate or enter into settlement discussions.
>
> This form of disclosure could lead to an assiduous inquirer, based on the various publically available documents to conclude which of the various strengths and weaknesses in their litigating position the City had discussed with its Solicitors…. By releasing any of the requested information, parties opposed to the City in litigation, would be able to form a "snap-shot" or the City's mind state as communicated to its solicitors in relation to the litigation….
>
> If [the appellant's] arguments are sufficient in the present case to cause the City to reveal the total amount spent on its solicitors, the face of litigation for Cities (and other public bodies) will be forever altered. Any party who is in opposition to such a body can simply send a Freedom of Information request asking for the running accounts of the Cities' solicitors, perhaps even before a legal action has been commenced. The City will then be forced to either, as happened in the present case, expend further resources in justifying long-standing fundamental principles of the judicial system of Canada or allow its opponents to have no less than a running total of the steps taken to date, thereby limiting its ability to have disputes fairly adjudicated. The final option would be that all public bodies would simply forgo any bills of account and therefore their opponents would be unable to review the actions taken by their solicitors. All of the forgoing are clearly unacceptable solutions, especially in light of the clear mandate to treat such information as subject to a rebuttable presumption of privilege.

Findings

I have carefully reviewed the representations of the parties. The City has made a number of arguments which are directly addressed in Orders PO-2483 or PO-2484, as well as in the Divisional Court's decision upholding Order PO-2484.

To begin with, the City argues that different considerations apply in this appeal because this matter is ongoing, and not completed. Senior Adjudicator Higgins directly addressed a similar argument in Order PO-2484. In Order PO-2484 the matter which the records at issue related to was initially ongoing, but had concluded by the time the decision was rendered. The institution in that case argued that the records ought to be privileged, and pointed out that in the Supreme Court of Canada decision in *Maranda*, the presumption of privilege was not rebutted even though the proceedings were concluded. Senior Adjudicator Higgins did not find that this distinction was particularly relevant. He stated:

> … the Ministry argues that in *Maranda*, the presumption of privilege was not rebutted even though the proceedings were concluded. I note, however, that the Supreme Court describes the appeal in *Maranda* as "moot", even by the time it had reached the Quebec Court of Appeal. The Supreme Court explains that "[g]iven the serious consequences of the Superior Court's judgment, however, the [Court of Appeal] thought it necessary to hear the appeal and examine the legal issues that had been raised at trial." In my view, therefore, the termination of the litigation was irrelevant to the analysis of the issues in *Maranda*, which was undertaken, in effect, as if the proceedings were ongoing, in order to address the serious issues raised.
>
> Also, while comparisons to other cases may be instructive, and even persuasive, they are not ultimately determinative. The question is whether disclosure would reveal privileged information, and in particular, whether the presumption of privilege is rebutted. The answer to that depends on the circumstances of each unique situation, and cannot be based on mechanical comparisons with another case. …

I adopt the approach taken to this issue by Senior Adjudicator Higgins. As I noted above, in its representations the City provides a number of hypothetical scenarios in which the disclosure of solicitors' accounts (particularly "running accounts") may reveal information covered by solicitor-client privilege. I agree that in a given circumstance, the disclosure of solicitor's accounts for an ongoing matter may be privileged. However, as identified by Senior Adjudicator Higgins in PO-2484, each case must be determined on its own facts. I will accordingly review this case on its own facts, and not on hypothetical scenarios.

In addition, the City has provided significant representations regarding whether or not the appellant could be regarded as an "assiduous inquirer". Recognizing that disclosure to the appellant is essentially disclosure to the world, the approach I have taken in analyzing this issue is to determine whether an assiduous inquirer, including the appellant, aware of background information, could use the information requested to deduce or otherwise acquire privileged communications in the circumstances of this case.

Based on the circumstances of these appeals, and the representations of the parties, I find that there is no reasonable possibility that the disclosure of the records remaining at issue (the total

dollar figures contained in each of these accounts) will directly or indirectly reveal any communication protected by the privilege. I am also not satisfied that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged communications. I make these findings for a number of reasons.

First, the records remaining at issue are only the total dollar figures contained in each of these accounts. Any other information, including the date the invoice was received, the identity of the particular law firm involved, and the breakdown of this information into fees or disbursements, is no longer at issue. Accordingly, the sole information is the total dollar figure.

Second, most of the accounts for which the total dollar figures are requested are responsive to both of the requests made by the appellant. The appellant's first request was for the costs for legal services related to a lawsuit against a named individual, and his second request was for the costs for legal services for a number of lawsuits. The City identified that the requested records were identical (but for the two additional records responsive to the second request, which were created after the first request was received). Accordingly, the total dollar figures in the accounts relate to more that one lawsuit, and indeed appear to relate to many legal actions. The City's own revised decision letter points to the difficulty of separating the specific legal costs for these various matters even with the full account information available to it. It stated:

> Both requests are for the cost of legal services related to several civil actions commenced by the City against a number of parties …, which are further complicated by counter-claims and third party claims. The same solicitors are acting as counsel for the City on all the lawsuits and *it would be difficult, if not impossible, to separate the specific costs of legal services related to the individual lawsuits.* [emphasis added]

Therefore, anyone viewing the information at issue would be unable to determine the instructions or any other privileged communication even if they were "assiduous".

Third, the records requested in this appeal are a one-time request for the information. In that regard they are not a request for "running totals" or a series of requests from which additional information may be gleaned. The requests are for the costs of legal services for the lawsuits as of the dates of the requests. Moreover, the records remaining at issue consist of only the total dollar figures in relation to the lawsuits, contained in a number of invoices. The request is not for the dates of the invoices, nor the amounts in any sequence. The information remaining at issue consists solely of the total amount set out on the bottom of each of these invoices.

Accordingly, based on the nature of the information before me, and all of the evidence, I find that the disclosure of the total dollar figures contained in each of the accounts does not give rise to any reasonable possibility that privileged information such as the nature or content of any solicitor-client communication could be revealed or deduced. Accordingly, I find that this information is neutral information, and that the presumption of privilege is rebutted. As a result, the records remaining at issue are not exempt under branch 1.

Branch 2 – statutory privileges

Branch 2 arises from the latter part of section 12, and in particular, the reference to a record "…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." It 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.

In its representations the City takes the position that, as the solicitors were retained by the City, the requested information also attracted statutory solicitor-client privilege.

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

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.
>
> This conclusion is reinforced by my decision in Order MO-2024-I. In that case, I had to determine whether similar information was excluded from the scope of the *Act* under section 52(3)1 of that statute, on the basis that the records were collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution. The record at issue was a two-page document containing payments made to a law firm on a series of dates, including a total amount, with respect to an action against the City by a former employee. Based on the nature of the request, however, only the total figure was at issue. I stated:
>
> > The question I must decide … is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".
> >
> > …
> >
> > In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to

> proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

> Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared to be used in actual or contemplated litigation. In my view, they were not.
>
> I find that branch 2 does not apply to any part of the records.
>
> In my view, precisely the same analysis applies to the invoices in this case. They were not prepared "for use in" giving legal advice, or in litigation. I find that branch 2 does not apply to the category 2 invoices.

I adopt the approach taken by the Senior Adjudicator for the purposes of the present appeal and conclude that the invoices (for which only the total dollar amounts are at issue) are not subject to branch 2 of section 12. As was the case with the records at issue in Order PO-2484, I find that there isn't any obvious relationship between the records at issue and the actual conduct of the litigation. In answer to the question posed by Senior Adjudicator Higgins in Order PO-2484, specifically, whether the records were prepared for use in or, as he stated the question, "to be used in" actual or contemplated litigation, I conclude that they were not. Accordingly, I conclude that the records at issue in this appeal are not subject to exemption under branch 2 of section 12.

Accordingly, I find that the records do not qualify for exemption under section 12 of the *Act*.

ADVICE OR RECOMMENDATIONS

The City claims that the records are also exempt under section 7(1) of the *Act*.

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

These decisions also confirm that advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

In its representations concerning this exemption, the City states:

> The City refuses to reveal the specific advice or course of action contained within the requested information. The city's sole representation in this respect is that the information contained within the requested Solicitor's bills of account establishes the advice, legal strategy, and course of action in the specific lawsuits named in the request for information. Additionally, the City submits that the advice was given by a solicitor retained by the City.
>
> Any information in the Solicitors' bills of account, including the requested financial information, where it does not directly reveal the advice or recommendations it will accurately infer such information. A solicitor's bill of account establishes the time expended and expenses incurred in a specific period of time. The named lawsuits are currently ongoing, and a large amount of dated documents relating to the various files is currently available to the public. An

> assiduous inquirer, could easily take the financial or other data provided in the solicitors' bill of account and by combining such information with the publicly available information deduce the extent and complexity of various actions or conversations. Furthermore, the publically (*sic*) available documents combined with the solicitors' bill of account shall allow an assiduous inquirer to determine the nature of the discussions based on the progress of the matter through the courts. Civil actions are regulated and orderly procedures. An assiduous inquirer will be able to take the information contained in the requested solicitors' bill of account and through simple deduction as to time, deduce significant portions of previously confidential information.
>
> The City is of the position that the disclosure of the requested information shall have a devastating effect on the free flow of advice or recommendations to the government. The specific nature of the solicitor and client relationships result in confidentiality being crucial to its proper operation. No solicitor would be able to operate if the materials provided under this umbrella of privilege, and thereby the free flow of advice or recommendations to the government, would be reduced to next to nothing in regards to legal services.

The only information remaining at issue is the bottom line amounts for each legal bill. There is no indication from this amount of the particular activity undertaken by the City's legal counsel. As the City notes, these lawsuits have been on-going over an extended period of time. In my view, the total amount of the interim billings could not possibly disclose or reveal the advice or recommendations (if any) that might have been given during the period captured in each invoice. Accordingly, I find that the remaining information is not exempt under section 7(1).

ECONOMIC AND OTHER INTERESTS

Sections 11(c) and (d) state:

> 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;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests 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.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 City's Representations

The City submits that the grounds articulated in sections 11(c) and (d) are virtually identical in the circumstances of these appeals. The City relies on the findings in Order MO-1184, stating that it dealt with the damage arising from the release of financial information concerning the City of Hamilton's civil settlement of an employee related action. The City submits that there is no appreciable difference between that situation and the situation in the current appeal.

The City submits further:

> Disclosure of the funds spent on the actions as to date will reveal the City's financial investment in the various civil actions. Civil actions are often resolved through negotiated resolutions or "settlements." Crucial to any settlement is the investment in time, effort and expense of the parties to the lawsuit. The ability to resolve civil actions through compromise is directly related to the level of risk involved in determining the matter through an adjudicative process. The negotiations of civil actions are premised on several factors, one of which is minimizing the expense incurred in defending or pursuing a claim. As expense is a crucial element of any negotiation, to force the City to disclose its financial investment unilaterally, will cause immediate, direct and irreversible damage to the City's financial and economic interests.
>
> The "strength" of a party's position is directly and inversely related to the strength of an opposing party's position. The release of the requested Solicitor's bills of account shall expose the steps taken in ongoing civil actions. The opposing parties in these actions, shall have the extent of the legal actions taken by their opponent laid bare, without a corresponding duty to disclose their expenses, or level of preparedness.
>
> The City is in direct and real competition with the other parties to the various actions, and to release publically the specific information shall irrevocably harm

> the City's economic and financial position. It is the City's position that sufficient "detailed and convincing" evidence exists to establish a "reasonable expectations of harm" could result from the disclosure of any of the requested information, from the mere fact that the requested information is the subject matter of resolution negotiations. To force the City to reveal any or all of the requested information would result in an uneven access to information crucial to the resolution of the civil actions. The City would have to negotiate a resolution, or prepare a trial with no knowledge of the expense, effort or time allocated by its opponents, while the other parties to the lawsuit would possess an itemized itinerary of all aspects of the City's case. It is patently obvious that an injury to the City's financial and economic interests would result.

Section 11(c) - prejudice to economic interests

The purpose of section 11(c) 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].

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

Section 11(d): injury to financial interests

As noted above, for 11(d) to apply, the City must demonstrate that disclosure of the records "could reasonably be expected to be injurious" to its financial interests. As with section 11(c) above, to meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

Although it is arguable that section 11(d) is broader in scope than section 11(c), the City has made joint submissions on its application under both headings. Even taking a more expansive view of the interests at stake, I find, for the reasons enumerated below, that the City has failed to provide the kind of "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated under section 11(c) or (d).

Analysis

At the outset, it is important to remember that the only information at issue in these appeals is the bottom line amounts of the Solicitor's invoices and not "an itemized itinerary of all aspects of the City's case" as the City claims in its submissions.

The City's reliance on the findings in Order MO-1184 does not support its argument. In that order, former Assistant Commissioner Tom Mitchinson rejected the City of Hamilton's submissions that sections 11(c) and (d) applied to the minutes of settlement between the City and other individuals. He stated:

> In Order P-1190, I stated:
>
> > In my view, the purpose of section 18(1)(c) [the provincial equivalent of section 11(c)] is to protect the ability of institutions to earn money in the market-place. 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.
>
> Although I acknowledge that there is a difference in wording between "prejudice the economic interests" and "be injurious to the financial interests" in sections 11(c) and (d), in my view, any difference is irrelevant to the consideration of these two exemptions in the circumstances of this particular appeal.
>
> In the present case, I am not persuaded that disclosure of the record could reasonably be expected to result in either of the types of harm outlined in section 11(c), or the harm envisioned by section 11(d). A confidentiality clause is common to agreements of this nature which settle civil lawsuits, and indicates the sensitivity of arrangements regarding the termination or separation of employment relationships between an institution such as the City and its employees. However, in my view, the presence of a confidentiality clause in and of itself is not sufficient to bring the record within the scope of sections 11(c) or (d); this or any other term of a settlement agreement, such as the one at issue in this appeal, cannot take precedence over the statutory right of access provided in the *Act*. Any increased costs to the City which would result from disclosure are speculative at best, and the evidence provided by the City is insufficient to establish a reasonable expectation of prejudice to the City's economic interest or injury to its financial interest.
>
> Similarly, I am not persuaded that disclosure could reasonably be expected to prejudice the City's competitive position. It is widely recognized that government institutions are held to a high standard of accountability for the use of public funds, and that records in the custody or control of these organizations are governed by legislation which is based on a public right of access. I do not accept the City's position that disclosure of a record through this statutory scheme could reasonably be expected to impact on the level of trust that current and future employees would have in the City's ability to negotiate future agreements. Agreements of this nature are negotiated on the basis of individual circumstances,

> and in an atmosphere where all parties have an interest in settlement. In my view, the potential harm envisioned by the City is simply too remote to satisfy the requirements of a reasonable expectation of prejudice to the City's competitive position.
>
> Finally, it is also important to state that the circumstances of this appeal bear little or no relationship to the purpose of the sections 11(c) and (d) exemption claims described earlier in this order.
>
> In summary, I find that the record does not qualify for exemption under either section 11(c) or section 11(d) of the *Act*.

In my view, the information at issue and the circumstances of the current appeal similarly bear little or no relationship to the purpose of the exemption claims in sections 11(c) or (d). I am not persuaded that disclosure of the bottom line amounts of interim billings has any connection to the City's ability to earn money in the marketplace or to compete for business with other public or private sector entities as required under section 11(c).

In its reply submissions (which I have not cited), the City has provided a variety of possible contradictory scenarios describing how the information at issue could be interpreted, while refusing to confirm which scenario might be correct. I find its submissions to be entirely speculative, leading to the conclusion that it would not be possible to determine how disclosure could possibly result in the harms contemplated by these two sections of the *Act*.

Moreover, as noted in my discussion under section 12, the City is involved in several civil actions. By the City's own admission, "[t]he same solicitors are acting as counsel for the City on all the lawsuits and it would be difficult, if not impossible, to separate the specific costs of legal services related to the individual lawsuits." In my view, this admission undermines the City's argument that the opposing parties would have access to information that reveals the extent of the legal actions taken by the City relating to a particular lawsuit. I am not persuaded that disclosure of the bottom line figures that do not distinguish between the various lawsuits the City is involved in could reasonably be expected to compromise the City's position in any possible settlement or negotiation discussions.

Recognizing that government institutions are held to a high standard of accountability for the use of public funds, and that records in the custody or control of these organizations are governed by legislation which is based on a public right of access, I am not persuaded that the mere disclosure of bottom line figures could reasonably be expected to be injurious to the City's financial interests as contemplated by the exemption in section 11(d).

Accordingly, I find that the City has failed to establish the application of the discretionary exemptions in sections 11(c) or (d) of the *Act*.

Because of the findings I have made above, it is not necessary to address the possible application of the public interest override in section 16 of the *Act*.

ORDER:

1. I order the City to disclose the records at issue (that is - the total dollar amounts on each page of the records only with no reference to any other information on the record including the record number) to the appellant by sending him a copy by **May 23, 2008** but not before **May 20, 2008**.

2. In order to verify compliance with provision 1, I reserve the right to require the City to provide me with a copy of the records which were disclosed to the appellant.

Original signed by: April 17, 2008
Laurel Cropley
Adjudicator