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

ORDER MO-2628

Appeal MA11-7

City of Waterloo

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NATURE OF THE APPEAL:

This order disposes of the issues raised as a result of a request made to the City of Waterloo (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> A total dollar figure for the City's legal fees in the RIM Park lawsuits from May 5, 2008 until the date of release of the requested information. No dates or other information is requested outside legal fees and related legal costs. May 5/08 is the date of a related request now before the IPC for adjudication.

The request was subsequently amended as a result of discussions between the City and the requester, as follows:

> A total dollar figure for the City's legal fees in the RIM Park lawsuits from May 5, 2008. No date or other information is requested outside legal fees and related legal costs. May 5/08 is the date of a related request before the IPC for adjudication. **This request shall continue to have effect for up to two years.**

The City denied access to the responsive information pursuant to sections 6(1)(b), 7(1), 11(c), 11(d), 11(e), and 12 of the *Act*.

The requester, now the appellant, appealed the City's decision.

During the course of mediation of this appeal, the City advised the mediator that it would not disclose any information and that it continues to rely on all of the exemptions claimed in the decision letter to withhold the responsive record. The appellant advised the mediator that he would like to pursue access to the requested information.

The appeal then moved to the adjudication stage of the process where an adjudicator conducts an inquiry. As the appellant's request is for continuing access, I have added section 17(e) as an issue in this appeal. I sought representations from the City and the appellant. The City provided representations, which were shared with the appellant in accordance with the IPC's *Practice Direction 7*. The appellant subsequently advised this office that he would not be submitting representations in this appeal.

The City's representations do not set out any issues or argument concerning the exemptions at sections 6(1)(b), 7(1), and 11(c), (d) and (e). With respect to each of those exemptions, which it claimed in its decision letter and during mediation, the City states that "[n]o representations are made in respect of this issue." The City did not formally withdraw its reliance on these exemptions, but in the absence of any argument concerning them, and having concluded that the record itself provides no evidentiary basis for finding that any of them applies, I find that they do not. I will not refer to these exemptions again in this order.

The City's representations focus on the burden of proof, the application of section 12, and its exercise of discretion with respect to section 12, and the application of section 17(3).

For the reasons that follow, I order the City to disclose the record to the appellant in its entirety.

RECORD:

The record at issue in this appeal consists of a single page that identifies the total dollar figure for the City's legal fees in the RIM Park lawsuits from May 5, 2008 to January 20, 2011.

DISCUSSION:

BURDEN OF PROOF

The burden of proof for claiming an exemption under the *Act* is addressed in section 42, which states:

> If a head refuses access to a record or part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

The City acknowledges that this is the burden of proof under the *Act*, but submits that the Supreme Court of Canada's decision in *Maranda v. Richer* ("*Maranda*")[1] "informs any consideration of burden of proof." As detailed below, *Maranda* indicates that, with respect to legal billing information, there is a rebuttable presumption of privilege. The City argues that "[t]his presumption places the onus on the appellant, w[h]ere the record in question – as here – is legal billing information."

Senior Adjudicator John Higgins dealt with essentially the same argument submitted by the City concerning the burden of proof in Orders MO-2481, MO-2600-F and MO-2601. In Order MO-2481, Senior Adjudicator Higgins stated:

> The City goes on to argue that the appellant must rebut the presumption of privilege:
>
> > This jurisprudence apparently informs the view of the IPC, as set out in Decision MO-2294, that billing information can be ordered released if it can be proven to be "neutral." At law the onus is on the requester to demonstrate this.
>
> The City submits that the appellant has not met the onus of demonstrating that the information contained in the record is "neutral." According to *Maranda*, if information is found to be neutral, the presumption of privilege is rebutted. In my view, this is a determination to be made on the facts. As several of the cases demonstrate, it is not necessary for the appellant to rebut the presumption through argument, which would be difficult when, in the context of an appeal under the *Act*, he is not aware of the exact content of the record.

[1] 2003 SCC 67, [2003] 3 S.C.R. 193.

In those same orders, Senior Adjudicator Higgins went on to quote his earlier discussion of this issue in Order PO-2483, in which he had stated that:

> … while the Court of Appeal did indicate in [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, ("*Attorney General 2005*")[2]] 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 2005*], 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]

Orders MO-2294 and MO-2481 were considered by the Divisional Court in *Waterloo v. Cropley at al.*[3] (*Waterloo*). The Court noted:

> … there is no suggestion that the adjudicators misstated the principles of law applicable to their decisions – in particular, references to the leading decisions of the Supreme Court in [*Maranda*], the decision of the Ontario Court of Appeal in [*Attorney General 2005*], and a decision of this Court in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commission)*[4] [*Attorney General 2007*].

I will adopt Senior Adjudicator Higgins' approach for the purposes of this appeal. Accordingly, as was done in Orders MO-2294, MO-2481, MO-2600-F and MO-2601, I will rely on the totality of the evidence in this case in assessing whether the presumption has been rebutted.

[2] [2005] O.J. No. 941 (C.A.).
[3] 2010 ONSC 6522 (Div. Ct.). Orders MO-2481 and MO-2294 both dealt with access-to-information requests for legal fees paid by the City and the Divisional Court dismissed the City's application for judicial review.
[4] [2007] O.J. No. 2769 (Div. Ct.).

SOLICITOR-CLIENT PRIVILEGE

General principles

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. 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. Branch 2 is a statutory privilege that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The institution must establish that one or the other (or both) branches apply.

The City submits that the record is subject to solicitor-client communication privilege during the litigation, and also states that all the actions referred to in the record are ongoing.

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.[5]

Legal Fees and Billing Information

The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege at common law has been the subject of many recent judicial decisions. The Supreme Court of Canada dealt with the issue in *Maranda* and found this information to be presumptively privileged unless the information is "neutral."

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.[6]

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

[6] Order PO-2484, upheld on judicial review in *Attorney General 2007*. See also *Maranda, Attorney General 2005* and Orders MO-2481 and MO-2294, upheld on judicial review in *Waterloo*.

The City notes that this is the third request related to the gross legal expense to the City arising from the RIM park litigation. The two previous requests resulted in this office issuing Order MO-2294, which required the disclosure of the legal costs for the period February 29, 2004 to September 30, 2004, and Orders MO-2601 and MO-2600-F, which required the disclosure of legal costs for the period February 29, 2004 to May 5, 2008. Consequently, the legal costs from February 20, 2004 to May 5, 2008 have been disclosed.

The City submits that the prevailing test for determination of whether "gross billing information" should be disclosed is to consider whether there is a reasonable possibility that an assiduous inquirer could use the requested information to deduce communications protected by solicitor-client privilege.

The City further submits that the assiduous inquirer need not be only the appellant. The City states:

> To properly protect solicitor-client privileged communications consideration should be given to what use might be made of the requested information by the most informed inquirer (particularly one informed with confidential information not subject to disclosure under the *Act*) – opposing counsel in cases such as this, where the requested information relates to ongoing litigation.
>
> In the City's submission, the information released pursuant to Orders MO-2294 and MO-2601, when taken together with the requested information, brings opposing counsel to a tipping point where he or she is able to deduce the nature of communications between the City and its solicitors in relation to the litigation.

I recognize that if I order disclosure of the legal fees for the period May 5, 2008 to January 20, 2011, other parties to the litigation could obtain this information, given that the appellant is a member of the media and likely to widely publicize the information. I also agree with the City that a comparison between the legal billing information for the time period set out in this request could be compared with that already disclosed pursuant to Orders MO-2294 and MO-2601. In other words, the total figure for billing information to January 20, 2011, in relation to the RIM park litigation could be determined by adding the figures disclosed in Orders MO-2294, MO-2601 and in this order.

As stated previously, the record contains a single dollar figure for legal expenses relating to the RIM park litigation; it does not reveal anything about retainer agreements or terms of payment. The question is whether there is any reasonable possibility that disclosure of this single dollar figure will directly or indirectly reveal any communication protected by the privilege, and whether an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged communications.

The City's argument is essentially that, if the information in the record is disclosed, opposing counsel in the litigation, armed with the information released in Orders MO-2294 and MO-2601, along with other "confidential information not subject to disclosure under the *Act*," will reach a "tipping point" where he/she will be able to deduce the nature of communications between the

City and its counsel in relation to the litigation. In effect, the City argues that disclosing the record would indirectly reveal privileged information.

The City's argument does not explain how comparing and/or totalling the legal fees charged during the course of the litigation could directly or indirectly reveal the privileged content of confidential solicitor-client communications, nor how it could possibly be used to deduce such information.

I have reviewed the record and I am unable to see how one could deduce or otherwise acquire the content of solicitor-client communications, even if the appellant or opposing counsel in the litigation is an "assiduous inquirer."

Consequently, based on the evidence, I find that the information in the record at issue is neutral, and the presumption of privilege established under *Maranda* is rebutted. The record is therefore not subject to solicitor-client communication privilege under branch 1 of section 12. My conclusion is supported by the court decisions in *Attorney General 2007* and in *Waterloo*, given the nature of the billing information at issue in those cases.

The City does not argue that branch 1 litigation privilege applies in this case, nor that either of the statutory privileges in branch 2 applies. Having reviewed the record, I find no basis for concluding that any of them would apply.

Accordingly, I find that the record is not exempt under section 12 and I will order the City to disclose it in its entirety to the appellant.

In view of my conclusion, it is not necessary for me to review the City's exercise of discretion.

REQUEST FOR CONTINUING ACCESS

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

> (3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.
>
> (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
>
> (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
>
> (b) a statement that the applicant may ask the Commissioner to review the schedule.

> (5) This Act applies as if a new request were being made on each of the dates shown in the schedule.

The right to request continuing access should be interpreted broadly, and is not restricted to records produced "in series."[7]

A possible exception to the application of section 17(3) arises in the case of a request where it is impossible or highly unlikely that further responsive records would come into existence during the continuing access period. In that case, the institution would have the option of refusing the continuing access request, or issuing a schedule with very few dates on it.[8]

A second exception arises from the inclusion of the words, "if granted" in section 17(3); if access is fully denied in response to the initial request, these words indicate that section 17(3) does not apply.[9]

The City argues that continuing access should not be granted in this appeal, given the nature of the information contained in the record. The City submits that even if section 12 does not apply in this appeal, it may apply to future gross legal expense information. If disclosure is ordered in this appeal, more information is available, and the City would have no way of knowing what future communications an assiduous inquirer would be able to deduce from future legal expense information. The City concludes that disclosure of legal fees should be on a case-by-case basis.

The appellant did not provide representations on this issue.

As previously stated, Order PO-2730 sets out an exception to continuing access from the inclusion of the words, "if granted" in section 17(3); if access is fully denied in response to the initial request, these words indicate that section 17(3) does not apply. In this case, the City did not grant access at first instance, although I am now ordering it to do so. Moreover, in the circumstances of this case, I conclude that each request for legal billing information must be considered in its own context, applying the criteria referred to earlier in this order, in view of the importance of protecting information that is subject to solicitor-client privilege.

This approach respects the Supreme Court of Canada's finding, set out in *Maranda*, that legal billing information is presumptively subject to solicitor-client privilege unless the information is neutral. In order to determine whether the presumption has been rebutted, a decision maker must look at the totality of the evidence on a case by case basis.

Therefore, I conclude that, in these circumstances, the appellant is not entitled to continuing access to this type of information. However, my finding does not preclude the appellant from making future requests for a finite period.

[7] Order PO-2730.
[8] See footnote 7.
[9] See footnote 7.

ORDER:

1. I order the City to disclose the record to the appellant on or before **July 8, 2011**.

2. I uphold the City's decision with respect to continuing access.

Original signed by: June 8, 2011
Brian Beamish
Assistant Commissioner