ORDER MO-2600-F

Appeals MA08-112 and MA08-113

City of Waterloo

NATURE OF THE APPEALS:

This is my final order in connection with Appeals MA08-112 and MA08-113. I previously issued Interim Order MO-2573-I, in which I dealt with all of the records at issue except for one record that was responsive to part 5 of the request in both appeals. That record is addressed in this order. The background of Appeals MA08-112 and MA08-113 is extensively set out in Order MO-2573-I and I will not repeat it here, except as relevant to the issues remaining to be decided.

The record that remains outstanding after Order MO-2573-I (referred to in this order as "the record") is a one-page document created by the City, setting out the total amount billed to the City for legal fees in four lawsuits undertaken by the City. The figure represents aggregated legal expenses in connection with these lawsuits up to and including May 5, 2008.

The appeals were placed on hold at the City's request with respect to this record. The City asked that this be done pending the outcome of its application for judicial review in connection with Order MO-2294, in which Adjudicator Laurel Cropley ordered the City to disclose billing information about the same litigation that is the subject of the requests at issue here, up to the date of the requests dealt with in that order, which were submitted in 2004. The information ordered disclosed was the total dollar amount on each page of a total of 11 invoices for legal services, without any additional information.

Because the fees dealt with in Order MO-2294 were subsumed in the dollar amount of legal expenses set out in the record, I agreed to the City's request to place them on hold, as regards that record, pending the outcome of the City's application for judicial review. The application was recently dismissed in *City of Waterloo v. Cropley and Higgins* ("*Waterloo v. Cropley et al.*").[1] The information at issue in that case has now been disclosed by the City.

The request in Order MO-2294 was submitted by a journalist, while the requests under consideration in the appeals dealt with in Appeals MA08-112 and MA08-113 were submitted by counsel for a number of parties to the litigation to which the fees relate. The journalist subsequently submitted another request for legal billing information, which resulted in Appeal MA08-232. The same record that is being considered in this order is also at issue in that appeal, which is addressed in Order MO-2601, issued concurrently with this order.

In Appeals MA08-112 and MA08-113, the City denied access to the record under sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(c), (d) and (e) (economic and other interests), 12 (solicitor-client privilege), and 15 (information published or available) of the *Act*. The requester, who as noted is counsel for a number of parties to the litigation, appealed the denial of access.

During mediation of these appeals, the appellant clarified that his request for "legal expenses incurred to date" was a request for the total dollar amount of legal fees to date, and that he does not seek access to the actual legal bills. The City reiterated its claim that this record is exempt

[1] 2010 ONSC 6522 (Div. Ct.). This judgment also dismissed the City's application for judicial review of my previous Order MO-2481, which concerned a separate request for legal fees paid by the City in connection with the access-to-information request that ultimately led to Order MO-2294.

under section 12, and stated that access would continue to be denied pending the decision of the Divisional Court in the judicial review application relating to Order MO-2294.

Also during mediation, the appellant claimed that section 16 (compelling public interest) applied to the records remaining at issue. As a result, section 16 became an issue.

After the Divisional Court issued its ruling in *Waterloo v. Cropley et al.*[2], dismissing the City's application for judicial review of Order MO-2294, the City disclosed the information at issue in that case, and I reactivated these appeals with respect to the outstanding record. I sent a Notice of Inquiry to the City, outlining the background and issues pertaining to the outstanding record, and inviting it to provide representations. The City provided representations. In the circumstances of these appeals, I decided that it was not necessary to invite the appellant to provide representations.

The City's representations do not set out any issues or argument concerning the exemptions provided by sections 6(1)(b), 7(1), and 11(c), (d) and (e). With respect to each of those exemptions, which it claimed in the index of records mentioned above, 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 these are the outstanding issues before me. Because of my findings in this order, it is not necessary for me to consider either the public interest override or the City's exercise of discretion.

RECORD:

The record is a single page that identifies four separate court actions and names a single aggregated figure for legal expenses relating to all four of them, which it describes as "the total dollar amount … including ancillary items" as of May 5, 2008.

DISCUSSION:

BURDEN OF PROOF

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

[2] See citation at footnote 1.

> 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*")[3] "informs any consideration of burden of proof." As I will explore in more detail 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."

At the conclusion of its representations, the City states: "We look forward to the appellant's representations." As noted earlier, in the circumstances of these appeals, I did not consider it necessary to invite the appellant to provide representations.

I dealt with essentially the same argument submitted by the City concerning the burden of proof in Order MO-2481:

> 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.

In that same order, I went on to quote my earlier discussion of this issue in Order PO-2483, in which I had stated that:

> … while the Court of Appeal did indicate in [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, ("*Attorney General 2005*")[4]] 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

[3] 2003 SCC 67, [2003] 3 S.C.R. 193
[4] [2005] O.J. No. 941 (C.A.)

> 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*[5]], 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]

As already noted, the Divisional Court recently dismissed the City's application for judicial review of Orders MO-2294 and MO-2481 in *Waterloo v. Cropley at al.*[6], and in doing so, 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*[7]], the decision of the Ontario Court of Appeal in [*Attorney General 2005*[8]], and a decision of this Court in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commission)*[9] [*Attorney General 2007*].

Accordingly, as was done in *Attorney General 2005*, and in Orders MO-2481 and PO-2483, I will rely on the totality of the evidence in this case in assessing whether the presumption has been rebutted.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the *Act* states:

> 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.

[5] See citation at footnote 4.
[6] See citation at footnote 1.
[7] See citation at footnote 3.
[8] See citation at footnote 4.
[9] [2007] O.J. No. 2769 (Div. Ct.)

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 City argues 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.

The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege (*i.e.* the type of privilege that has been incorporated into branch 1 as common law solicitor-client communication privilege) has been the subject of many recent judicial decisions. The Supreme Court of Canada dealt with the issue in *Maranda*[10], which found this information to be presumptively privileged unless it 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.[11]

In its representations, the City says it is apprehensive about the release of lawyers' billings "… defeating the City's ability to achieve its goals in the litigation." The City goes on to argue that the following uses may be made of the information:

- tracking expenses through the litigant's accounting system and verifying that the commercial relationship between the litigant and its counsel is performed as it should be ("Accounting Billing Information"); and

- conducting a cost-benefit analysis and/or risk analysis, including managing risk when taking incremental steps in litigation ("Management Billing Information").

Significantly, the City then states:

> The gross amount billed is not information that is likely, in normal circumstances to disclose anything about the legal advice given to a client by a lawyer. If there is a reasonable possibility, however, that an assiduous inquirer could use the information requested to deduce communications protect[ed] by solicitor-client

[10] See citation at footnote 3.
[11] Order PO-2484, upheld on judicial review in *Attorney General 2007*, cited above at footnote 9. See also *Attorney General 2005*, cited above at footnote 4.

> privilege (the "Assiduous Inquirer Test"), then the information is protected and a litigant subject to the Act should not be ordered to disclose it.
>
> Where the record's usefulness is as Accounting Billing Information, it is essentially neutral and would be subject to disclosure under the Act.
>
> Gross amounts have limited use as Management Billing Information. By their nature, gross amounts are divorced from the risky events which – in the aggregate – gave rise to them. In this case, however, there has already been an amount disclosed (to November 4, 2004) in accordance with Order MO-2294. Sequential requests for information regarding legal expenses improve an assiduous inquirer's ability to infer privileged communications. The record requested by the appellant, if disclosed, would permit comparison of legal expense to November 4, 2004 to legal expense between November 4, 2004 and May 5, 2008.

The City further submits that the other parties to the litigation should be viewed as assiduous inquirers. In this instance, I note that the appellant represents several parties to the litigation, but the appellant is not the same person who requested the information ordered disclosed in Order MO-2294.

Nevertheless, as regards the possibility that the appellant and his clients could compare the amounts billed up to November 4, 2004 and the dollar figure in the record, which is a single aggregated figure for billing information in relation to four lawsuits, up to and including May 5, 2008, I conclude that, since the appellant in Order MO-2294 is a member of the media, it is quite possible that the information previously disclosed pursuant to Order MO-2294 will be widely publicized, permitting such a comparison.

The City does not, however, explain how the comparison of this billing information could permit anyone to deduce the privileged content of confidential solicitor-client communications, nor is this evident from the records.

The City submits that, in *Maranda*[12], the Court observed that, in addition to the privilege covering solicitor-client communications, the nature of the commercial relationship between counsel and his or her client is also protected by privilege. A fuller version of the passage quoted by the City reads as follows (at para. 22):

> … the parties are not questioning the principles set out in [*Descôteaux v. Mierzwinski*[13]], holding that lawyers' billings are protected by privilege when they contain information regarding the content of communications between the lawyer and his or her client, both about the legal advice given and about the terms

[12] See citation above at footnote 3.
[13] [1982], 1 S.C.R. 860 (S.C.C.)

> for payment of the lawyer's fees or the financial situation of the person who consults the lawyer…. In the Court's opinion, the scope of the privilege is broad.

The City observes that the nature of its commercial relationship with its counsel has not been disclosed. The City submits as a hypothetical that disclosing information about billings could have the effect of revealing whether the payment arrangements between a solicitor and his or her client are traditional or non-traditional. However, I note that the record at issue contains no information about this subject, nor does it reflect any communications or instructions given between the City as client and its counsel. Moreover, in my view, simply disclosing the gross aggregate amount of fees and disbursements covering a period of almost four years (and possibly longer) for representation in four separate lawsuits could not possibly have the effect suggested by the City, even if this is simply postulated as a hypothetical outcome. In my view, this submission does not assist the City.

Moreover, it is important to note the context of the Supreme Court's comments in paragraph 22 of *Maranda*[14] are a general statement about the manner in which privilege had previously been applied by the Court to information about various aspects of the solicitor-client relationship, including the narrative content of lawyers' bills, arrangements concerning the retainer and arrangements pertaining to how the lawyer's fees would be paid by a particular client. Later in the judgment, the Court goes on to enunciate the rule of presumptive privilege for "the fact consisting of the amount of fees." On that point, the Court states (at para. 33):

> In law, when authorization is sought for a search of a lawyer's office, *the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege.* While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. 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.

In Order MO-2573-I, I found that information about the City's retainer arrangements with its counsel, in connection with the same litigation that is under consideration here, was subject to solicitor-client privilege based on the Supreme Court's decision in *Descôteaux*[15]. At the conclusion of the analysis, I explained the distinction between the treatment of legal billing information (which is subject to the rebuttable presumption created by *Maranda*) and information about the retainer arrangements between solicitor and client (dealt with in *Descôteaux*) as follows:

[14] See citation at footnote 3.
[15] See citation at footnote 13.

> … it is important to note that the information about retaining and instructing counsel is distinct from information about the amounts of legal fees actually paid. … Legal billing information requires consideration of a completely different line of cases from the ones I am relying on here, commencing with the Supreme Court of Canada's decision in [*Maranda*[16]], which established a rebuttable presumption for information about the amount of fees charged for legal services. *Maranda* was applied by the Ontario Court of Appeal in [*Attorney General 2005*[17]] and subsequently by the Divisional Court in [*Attorney General 2007*[18]]. There is no rebuttable presumption with respect to information about retaining and instructing counsel; that type of information is privileged, as established in *Descôteaux*.

It is clear that the record at issue here sets out an aggregate amount of fees and disbursements that have been charged; it does not reveal anything about retainer arrangements or terms of payment. Therefore, the record must be considered under the rule enunciated in *Maranda, Attorney General 2005*, *Attorney General 2007*, and more recently, in *Waterloo v. Cropley et al.*[19] That line of cases requires consideration of the questions I set out above, which I repeat for convenience here:

> (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.[20]

With respect to the first question, I have noted, in particular, the City's submissions that I quoted above which are, again, repeated for convenience here:

> The gross amount billed is not information that is likely, in normal circumstances to disclose anything about the legal advice given to a client by a lawyer.

And further:

> Where the record's usefulness is as Accounting Billing Information, it is essentially neutral and would be subject to disclosure under the Act.

I agree with these submissions, and find that the disclosure of the gross billing amount, *per se*, would not disclose anything about confidential solicitor-client communications. In that regard, I

[16] See citation at footnote 3.
[17] See citation at footnote 4.
[18] See citation at footnote 9.
[19] See citation at footnote 1.
[20] See footnote 2, above.

consider it significant that this figure covers a period of almost four years (and possibly longer), given that it subsumes expenses disclosed under Order MO-2294 (which covered the period up to and including November 4, 2004) and includes those expenses, as well as any additional ones incurred up to May 5, 2008. As well, it is significant that the single dollar figure for legal expenses set out in the record, in addition to covering a substantial period of time, also aggregates expenses relating to four different lawsuits launched by the City. The possibility of deducing the privileged content of any confidential solicitor-client communication from this information is minimal.

This leads to consideration of the second question. In that regard, the City refers to the previous disclosure under Order MO-2294, and observes that disclosing the record at issue here would permit an assessment of the manner in which risk is apportioned between the City and its counsel, and could also be used by an opponent to decide whether taking procedural steps in the litigation might increase the financial pressure on the City.

With respect to this submission, I note that the record does not in any way address the question of risk apportionment; it simply lists the styles of cause in four actions and states an aggregated figure for legal expenses incurred in relation to all of those four actions during a particular period of time, which, as noted, is almost four years (and possibly longer).

It is also not clear how disclosure of this information could lead an opponent to decide that procedural steps, presumably adopted for the simple purpose of driving up costs and discouraging the City from continuing its actions, should be undertaken.

More importantly, this argument does not address how disclosure of the record could be used by an assiduous inquirer to deduce the privileged content of confidential solicitor-client communications, which is the question posed under *Maranda*[21] for deciding whether information is neutral. As I have already noted, the City does not explain how, in the circumstances of this case, comparing the fees charged before and after November 4, 2004 could possibly produce that outcome, and having reviewed the information, I am unable to see how it is possible, even if the appellant is considered an "assiduous inquirer."

Accordingly, based on the totality of the evidence before me, I find that the information in the record at issue is neutral and the presumption of privilege is rebutted. The record is not subject to solicitor-client communication privilege under branch 1 of section 12.

In my view this outcome is consistent with several previous court decisions. In *Attorney General 2007*[22], the Divisional Court upheld two different orders of this office relating to legal fees.

In one of these decisions (Order PO-2548), this office had ordered the Ministry of the Attorney General to disclose the total dollar figures for legal services rendered by that Ministry to the

[21] See citation at footnote 3.
[22] See footnote 9, above.

Ministry of Health and Long-Term Care ("MOHLTC") and the Ministry of Education ("MOE") in respect of legal services provided in two actions before the Superior Court of Justice regarding the province's provision of services to children with autism. The order required disclosure of the total dollar figures contained in individual invoices, either in redacted form or by creating a new record containing this information. The information was, if anything, even more specific than the aggregate figure at issue here because it appeared in a number of separate invoices.

In Order PO-2484, the other decision upheld in *Attorney General 2007*, I ordered the Ministry of the Attorney General to disclose the total dollar figures on nine invoices for legal services rendered by that Ministry to the MOHLTC in respect of an appeal to the Health Services Appeal and Review Board. Again, this information was, if anything, even more specific than that which is at issue here because, similar to Order PO-2548, it appeared in a number of separate invoices. In addition, it related to a single appeal rather than four separate actions, as here.

Finally, in *Waterloo v. Cropley at al.*,[23] the Divisional Court upheld two additional orders of this office pertaining to legal fees. In the first of these (Order MO-2294), Adjudicator Laurel Cropley had ordered disclosure of the total amounts shown on eleven invoices showing amounts billed to the City for legal services pertaining to the same litigation as the legal fees at issue in this case, for a shorter time period. The second decision upheld by the Court was Order MO-2481. In that case, I ordered the City to disclose a single sheet of paper setting out the total dollar amount, as of May 5, 2008, that had been billed to the City for legal costs in relation to FOI requests that had been made in 2004.

I note that in Order MO-2481, the record bore a striking resemblance to the one at issue here, since it was a single aggregate dollar figure relating to legal expenses billed over a period of approximately four years.

The question of whether the presumption of privilege pertaining to legal fees has been rebutted in a particular case turns on the facts of that case. In the analysis conducted in this order, I have specifically addressed the City's arguments, and have considered the particular record at issue here and the relationship between the fees it discloses and those previously disclosed under Order MO-2294. However, I also note that the conclusion that the presumption of privilege has been rebutted in the particular circumstances of this appeal is supported by the court decisions in *Attorney General 2007* and in *Waterloo v. Cropley at al.*, 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, and having examined the record, I find no basis for concluding that any of them would apply.

Accordingly, the record is not exempt under section 12 and must be disclosed.

[23] See footnote 1, above.

ORDER:

I order the City to disclose the record to the appellant on or before **March 15, 2011**.

Original signed by: February 22, 2011
John Higgins
Senior Adjudicator