

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3001

Appeal PA10-1-2

Ministry of Community Safety and Correctional Services

October 5, 2011

**Summary:** In response to a request for access to information about payments made by the Ontario Provincial Police in relation to legal representation, the ministry created a record which summarized information taken from numerous legal invoices. The summary listed invoice numbers and corresponding invoice dates and amounts of payment. The ministry granted access to the invoice numbers and corresponding payment amounts, but denied access to the specific dates of each invoice under ss. 19 and 21(1). Section 19 is found to apply to the withheld specific invoice dates.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

**Orders and Investigation Reports Considered:** PO-2484, PO-2483.

**Cases Considered:** *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769 (Div. Ct.); *Dagg v. Canada (Minister of Finance)* [1997] S.C.R. 403.

### BACKGROUND:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for certain records pertaining to the payment of money by the Ontario Provincial Police (the OPP) to the Ontario Provincial Police Association (the OPPA). After

consulting with an affected party, the Ministry issued a decision letter which stated:

You have requested access to records pertaining to payments made by [the OPP] to [the OPPA] in relation to legal representation provided to OPPA members for the purpose of the Ipperwash Inquiry.

Please be advised that the OPP undertook a comprehensive records search. A total of 78 pages of records consisting of legal accounts and related documents were identified as containing information responsive to your request.

[2] The ministry then indicated that access to the responsive records was denied on the basis of the discretionary exemption in section 19 (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy).

[3] The appellant appealed this decision.

[4] During mediation, the ministry provided a further decision letter, confirming that the appellant had revised the scope of the request to include only the following:

1. A listing of the invoice dates, invoice numbers and invoice amounts as reflected in the responsive records of legal accounts and related documents concerning payments made to the OPPA by the OPP in relation to legal representation provided to the OPPA members for the purposes of the Ipperwash inquiry.
2. A copy of [an identified Memorandum of Understanding (MOU)].

[5] The ministry's decision granted access to the MOU. With respect to the requested invoice dates, numbers and amounts, the ministry confirmed that it had consulted with an organization whose interests may be affected by the request. The ministry advised that the consultations were complete, and then stated:

Please be advised that total access is granted to the invoice numbers and invoice amounts requested in part 1 of your revised request.

Access to the invoice dates requested in part 1 of your revised request is denied in accordance with sections 19 and section 21(1) [with reference to the presumption in 21(3)(d)] of the *Act*.

[6] In response to the clarified request, the ministry prepared a list identifying the invoice number, the invoice date, and the amounts paid. The ministry disclosed the list of the invoice numbers and corresponding amounts paid, but severed the invoice dates on the basis of the identified exemptions.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry and an affected party, initially. I received representations from the ministry only. I then sent the Notice of Inquiry, along with a copy of the representations of the ministry, to the appellant, who also provided representations to me.

## **RECORDS:**

[8] The information remaining at issue consists of the specific invoice dates for each of the identified legal invoices.

[9] The record at issue was created by the ministry and consists of a summary of information taken from numerous legal invoices. The summary lists the invoice numbers and the corresponding dates and payment amounts. The invoice numbers and corresponding amounts were disclosed, but the information relating to the specific dates of the listed invoices was severed.

## **ISSUES:**

- A. Does the solicitor-client privilege apply to the withheld information?
- B. Does the record contain personal information?
- C. If the record contains personal information, would disclosure constitute an unjustified invasion of privacy pursuant to section 21(1) of the *Act*?

## **DISCUSSION:**

### **A. Does the solicitor-client privilege in section 19 apply to the withheld information?**

[10] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[11] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

### **Branch 1: common law privilege**

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

#### ***Solicitor-client communication privilege***

[13] 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.)].

[14] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[15] 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.)].

[16] 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].

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

#### ***Litigation privilege***

[18] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated [Order MO-1337-I; *General Accident*

*Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above)].

[19] 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.

### ***Legal fees and billing information***

[20] 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 v. Richer*, [2003] 3 S.C.R. 193 (*Maranda*) which found this information to be presumptively privileged unless it can be characterized as "neutral."

[21] 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. [Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769 (Div. Ct.). See also *Ontario (Attorney General) v. Ontario (Information and*

*Privacy Commissioner*), [2005] O.J. No. 941 (C.A.); *Waterloo (City) v. Cropley* 2010 ONSC 6522]

[22] The parties were asked to address the question of whether the presumption of privilege in relation to legal billing information has been rebutted in this case.

### **Representations**

[23] The ministry takes the position that the release of the dates of the invoices would breach solicitor-client privilege. It states that the current law in Canada with respect to legal billing information is that it is "presumptively privileged" under branch 1 of section 19 unless the information is "neutral." The ministry then states:

The ministry position is that the invoice dates are not "neutral" information. The ministry submits that disclosing the dates of the invoices could allow inferences to be drawn about the nature of legal services the invoices paid for, as well as legal strategies employed by the OPPA during the inquiry. The Ipperwash inquiry is a publicly available record, which is posted on a Government of Ontario website. The dates of invoices could, for example, be matched up to dates posted on the website when witnesses are listed as having appeared to testify at the inquiry. In other words, given that the amounts for each invoice have already been released, the further release of dates could disclose information that would reveal the manner in which legal representation was provided to the OPPA at the inquiry ...

[24] The ministry also refers to the fact that the Ipperwash inquiry was held over a specific period, and that the requester already has a rough approximation of when legal services were rendered. It then states:

Given the amount of information that the requester has already been provided, the ministry submits that the requester is no longer interested in general information about fees paid, but seeks to, in the words of Senior Adjudicator John Higgins in Order MO-2211, "glean further information about the solicitor-client relationship." In that order, Senior Adjudicator Higgins upheld the City of London's decision not to release invoice information, and the ministry respectfully requests that the reasoning in Order MO-2211 be applied for the purposes of this appeal.

[25] The appellant provides representations in support of his position that the dates of the invoices ought to be disclosed. The bulk of his submissions are general in nature, and focus on the importance of open government and accountability in a democratic society. He also refers to recent decisions in which the amounts of legal fees paid for services by government institutions was ordered disclosed, and identifies

that these decisions have allowed the public to review government actions. He also refers to the Supreme Court of Canada's decision in *Dagg v. Canada (Minister of Finance)* [1997] S.C.R. 403, in which the Supreme Court stated:

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

[26] However, the appellant's representations are sparse regarding the issue of whether the information about the dates of the invoices is "neutral" information, or whether the presumption of privilege is rebutted. He states that access to the dates will allow citizens to review the actions of government in this case. He also states:

[The ministry] is absolutely correct, one can take the invoices, coupled with the dates associated to each one, and compare those invoices with the transcripts contained on the publicly-accessible Ipperwash Inquiry website. Does such a course of action by a citizen not meet the "meaningful" terminology reflected in the *Dagg* decision?

[27] The appellant also submits that this office ought to interpret the *Act* "more generously" in situations where the information "is monetary in nature and deals with access to public funds by private-sector law firms or other commercial entities." He also submits that the request for the invoice dates is simply the "next step in the process calling for accountability...."

### **Analysis and findings**

[28] I have carefully reviewed the record created by the ministry in this appeal, which consists of a list of invoice numbers, and their corresponding dates and amounts. I find that this information was taken directly from the legal invoices referred to above. As a result, I find that the information at issue (the dates of the invoices) is legal billing information.

[29] As noted above, 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*, which found this information to be presumptively privileged unless the information is "neutral."

[30] In Order PO-2484, senior adjudicator John Higgins had to determine whether the total dollar figure on nine separate legal invoices (with all other information, including the dates and number of hours, severed) qualified for exemption under section 19. Adjudicator Higgins examined in considerable detail the decision in *Maranda* as it

applied to lawyers' account and billing information. He confirmed that the principles established in that case regarding legal billing information applied in the civil law context, and found that they applied to the fees at issue in his appeal. As a result, he found that the total figure in each of the nine invoices was "neutral information" and ought to be disclosed, but that the other information on the invoices (including the dates of the invoices) was exempt under branch 1 of section 19.

[31] The ministry sought judicial review of Order PO-2484. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769, the Ontario Divisional Court reviewed both Order PO-2484 and another similar order, and upheld both decisions. In doing so, the Court stated:

The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicators clearly considered that the Requesters and counsel were "assiduous" and "knowledgeable" and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the [Ministry of the Attorney General] or any other type of information that may be subject to privilege. *Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation.* Thus, the only information that was ordered disclosed consists of amounts with no corresponding dates or descriptive information. [emphasis added]

[32] I adopt the approach taken by senior adjudicator Higgins in Order PO-2484 and upheld by the Divisional Court, and apply it to the information at issue in this appeal.

[33] As set out above, the invoice numbers and the corresponding total amounts of each of the legal invoices has been disclosed to the appellant. Access to the dates of each of the invoices has been withheld. On my review of this information and given the circumstances of this appeal, I find that the specific dates for each of the legal invoices is presumptively privileged information. Furthermore, I am not satisfied that the presumption of privilege which applies to the dates has been rebutted, either by the appellant or by my review of the record and the circumstances present in this appeal. Applying the approach taken in Order PO-2484 to the dates at issue in this appeal, I find that the dates of each of the legal invoices is solicitor-client privileged information and qualifies for exemption under branch 1 of section 19.

[34] I note that, as identified by senior adjudicator Higgins in Order PO-2484, each case must be determined on its own facts. There may well be situations or circumstances where the dates of legal invoices could be found to contain "neutral" information, and could be disclosed (see, for example, PO-2483). However, in light of the amount of information relating to the Ipperwash inquiry which both parties agree is



readily available to the public, and which both parties accept could be compared with the withheld dates, I find that the withheld dates qualify for exemption under section 19.

### **EXERCISE OF DISCRETION**

[35] As noted, section 19 is a discretionary exemption. When a discretionary exemption has been claimed, an institution must exercise its discretion in deciding whether or not to disclose the records. On appeal, this office may determine whether the institution failed to do so.

[36] A finding may be made that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

[37] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[38] In its representations the ministry refers to certain considerations it took into account in deciding to withhold the information relating to the dates of the invoices. These considerations include the fact that the Ipperwash inquiry was held during a specific period, that the appellant already has a rough approximation of when legal services were rendered, and that the appellant does not have any direct interest in the legal services that were provided. The ministry also refers to the fact that the appellant has been given the specific amounts of each of the invoices.

[39] As identified above, the appellant's representations focus primarily on the importance of access to government information, particularly monetary information and information relating to public expenditures.

[40] On my review of all of the circumstances surrounding this appeal, I am satisfied that the ministry has not erred in the exercise of its discretion to apply section 19 to the withheld information. In addition, the ministry has disclosed the amounts of the invoices, and many of the concerns identified by the appellant regarding accountability and public expenditures are addressed by disclosing the amounts. In the circumstances, I am satisfied that the ministry properly exercised its discretion to apply the section 19 exemption, and I uphold its exercise of discretion.

[41] In summary, I find that the information at issue qualifies for exemption under section 19. Having found that the information at issue is exempt under section 19 of the *Act*, it is not necessary for me to review issues B and C in this order.

**ORDER:**

I uphold the application of the exemption in section 19 to the information at issue, and dismiss this appeal.

Original signed by: \_\_\_\_\_ October 5, 2011  
Frank DeVries  
Adjudicator