

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 MO-2885

Appeal MA12-264

Regional Municipality of Durham

May 28, 2013

**Summary:** The appellant requested copies of certain invoices sent by a lawyer to his client (the region) relating to a small claims court matter in which the appellant was involved. The region disclosed the total amount of the invoices, but denied access to the other information in the invoices based on the discretionary exemption in section 12 (solicitor-client privilege). This order determines that the detailed invoices are presumptively privileged, and that the presumption has not been rebutted for the withheld information. It also determines that the records contain the appellant's personal information, but upholds the decision that the records qualify for exemption under section 38(a) (discretion to deny access to requester's own information) in conjunction with section 12 of the *Act*.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) definition of "personal information", 12 and 38(a).

**Orders and Investigation Reports Considered:** Orders PO-2483, PO-2484, MO-2222, M-352.

**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.

## **OVERVIEW:**

[1] The Regional Municipality of Durham (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the total amount spent defending a specific action in civil court. In particular, the request sought access to the following:

... copies of all the original billing copies from the [named law firm] for the small claims matter detailing dates and times that money was billed and time frames for which the billing occurred. ...

[2] The request also indicated that personal information such as names of witnesses was not being sought and that, if it existed, it could be redacted from the record.

[3] In response to the request, the region issued a decision in which it denied access to the requested records on the basis of the exemption in section 12 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the region's decision to deny access to the records.

[5] During mediation, the region issued a revised decision to the appellant. In that decision, the region identified for the appellant the total amount of legal fees paid in relation to the court action. After receiving the additional information from the region, the appellant confirmed that he continued to seek access to the dates, amounts and time periods for each invoice issued and paid. The region maintained that the invoices contain detailed information and that the exemption in section 12 applies to them.

[6] Mediation did not resolve this matter, and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the region, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the representations of the region, to the appellant, who also provided representations to me.

[7] In addition, I noted that the records may contain the personal information of the appellant, and invited the parties to also address the possible application of the discretionary exemption in section 38(a) of the *Act*.

## **RECORDS:**

[8] The records remaining at issue consist of legal invoices containing the details, dates, times and amounts billed for each time period. The total, combined amount of all of the invoices has been disclosed to the appellant.

## **ISSUES:**

- A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B: Does the discretionary exemption at section 38(a), in conjunction with section 12, apply to the information at issue?

## **DISCUSSION:**

### **Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[9] In order to determine which part of the *Act* applies, it is necessary to determine whether the record contains "personal information" and, if so, to whom it relates. That 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 if 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 where 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;

[10] 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.<sup>1</sup>

[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.<sup>2</sup>

[12] 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.<sup>3</sup>

[13] The records at issue consist of legal invoices which include the dates, times, details and amounts billed for each time period, and relate to a civil action involving the appellant. The appellant's name is included in the style of cause, and the notations in some of the records include references to actions taken by him in the course of the proceedings. In my view, the records contain the personal information of the appellant in accordance with paragraph (h) of the definition of the term "personal information" in section 2(1) of the *Act*,<sup>4</sup> because the records contain the appellant's name, along with other personal information about him.

[14] The records do not contain the personal information of other identifiable individuals.

[15] Because the records contain the personal information of the appellant, Part II of the *Act* applies. As a result, I will consider the application of the discretionary exemption in section 38(a), in conjunction with section 12, to the records at issue.

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Orders MO-1245, MO-1795.

**Issue B: Does the discretionary exemption at section 38(a), in conjunction with section 12, apply to the information at issue?**

[16] Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. That section reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

[17] The region has relied on section 12 to deny access to the records. Section 12 reads:

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.

[18] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

**Branch 1: common law privilege**

[19] 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.<sup>5</sup>

***Solicitor-client communication privilege***

[20] 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.<sup>6</sup>

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<sup>5</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>6</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[21] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.<sup>7</sup>

[22] 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.<sup>8</sup>

[23] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>9</sup>

[24] 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.<sup>10</sup>

### ***Litigation privilege***

[25] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.<sup>11</sup>

[26] In *Solicitor-Client Privilege in Canadian Law*,<sup>12</sup> 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.

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<sup>7</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>8</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>9</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>10</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>11</sup> 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).

<sup>12</sup> Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94.

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***

[27] 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*,<sup>13</sup> which found this information to be presumptively privileged unless it can be characterized as “neutral.”

[28] 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.<sup>14</sup>

[29] 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**

[30] The region confirms that it consented to the release of the total fee paid to legal counsel relating to the action involving it and the appellant. It then argues that the remainder of the information contain its billings communications with its legal counsel, and should remain confidential. It states that the detailed billings relating to the actions legal counsel performed for the region is covered by the solicitor-client privilege exemption in section 12.

[31] The region then reviews the cases (some of which are referred to above) that confirm that the billings that a lawyer sends to their client constitute communications between a solicitor and a client, and relate to the lawyer’s actions and the time required

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<sup>13</sup> [2003] 3 S.C.R. 193 (*Maranda*).

<sup>14</sup> 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. Copley* 2010 ONSC 6522.

to perform those actions. It then states that "the information contained in the billings is detailed enough to reveal litigation strategies, issues that require further research, and detailed actions performed to protect the clients legal interests." The region also states that the billings are part of the "continuum of communications," as 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. It states:

The [records] provide the Region with detailed information required to determine if litigation or actions taken by their solicitor is in its best interests. This information is passed from the solicitor to the Region aiming to keep the Region informed of the actions pursued on its behalf and the cost of such actions. This allows the Region to perform the required review function with its solicitor regarding the direction of litigation and the protection of the Region's interests.

[32] After referring to court cases that show why information of this nature ought not to be disclosed as it relates to litigation, the region also argues that the records are covered by the solicitor-client communication privilege. It states:

Billings are created regardless of what functions, duties or assignments are given to legal counsel by the Region. Therefore the fact that this file had a litigation component to it does not remove it from solicitor-client communication privilege. The Region was obtaining professional legal advice, and the fact that this had to be paid for does not remove the communications in the billings from the privilege.

[33] The region also states that it "clearly understood at all times" that any information passed between itself and its solicitor was privileged. It confirms that, in the circumstances of this appeal and during mediation, it "voluntarily waived" privilege only with respect to the entire amount paid to its solicitor on this file. However, it states that it has never waived its privilege over the remaining information in the billings.

[34] With respect to the fact that the appellant was the opposing party in the legal action, and was required to pay costs, it states:

These records have not been disclosed to any other party. There were no representations made as to costs in Court, as such there has been no communications with regards to billings to any opposing party in this litigation. ...



[35] Lastly, the region refers to the Supreme Court of Canada decision in *Maranda* (referenced above), which deemed legal billings and fees to be presumptively privileged. It then states:

... the information contained in the bills requested is not neutral .... The Region needs detailed information on the functions and duties performed in order to evaluate the direction of its files and the roles of its solicitor.

The Region has revealed the amount paid in full. *Prima facie*, the remainder of the information in the billings should be protected in full as either revealing in full privileged communications or it may be used to deduce privileged communications. The presumption to privilege has not been rebutted on what has not been revealed. ...

[36] The appellant provides extensive representations in support of his position that he ought to be granted full access to the requested records.

[37] He begins by identifying that the legal bills relate to the civil litigation he brought against the Durham Regional Police Service (DRPS), and that the case was concluded in 2012. He states that the judge ruled against him and, as a result, costs of the action were awarded against him. He then provides lengthy representations which can be divided in to the following broad categories:

- that the region has failed to establish the application of the exemption, and that disclosure of the records would not reveal solicitor-client privileged information;
- that he has direct links with the information because of his involvement in the legal action, and that he ought to have access to the information because he was required to pay costs;
- that the records do not contain the personal information of other individuals;
- that the region is a public body and ought to provide the records to ensure accountability; and
- his concerns about process issues relating to this appeal.

[38] The appellant also provides representations in support of his position that, even if the exemption applies to some of the information in the records, other portions of the records could be severed and disclosed to him.

[39] I review and address the appellant's arguments in more detail below.

### **Analysis and findings**

[40] The information at issue in this appeal is contained in the legal invoices submitted by the solicitor to his client, and is clearly legal billing information.

[41] 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.”

[42] 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 the provincial equivalent to section 12 of the *Act*.<sup>15</sup> Senior 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 the appeal before him. 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 12.

[43] The ministry sought judicial review of Order PO-2484. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*,<sup>16</sup> 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.

[44] 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.

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<sup>15</sup> Order PO-2484 dealt with section 19 of the *Freedom of Information and Protection of Privacy Act*, the relevant portions of which are similar to section 12 at issue in this appeal. For clarity, I will refer to section 12 of the *Act* in my discussion of PO-2484.

<sup>16</sup> *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769.

[45] I will address a number of the arguments made by the appellant.

[46] To begin, the appellant provides lengthy representations in support of his position that the region has failed to establish that the information in the records qualifies for exemption under section 12 of the *Act*. I note, however, that the Supreme Court of Canada decision in *Maranda* specifically found that information in legal invoices is presumptively privileged and, therefore, qualifies for exemption unless it can be established that the information is neutral. Accordingly, in these circumstances, the burden of proof does not rest with the region, and the information is exempt unless I find that the information (or any portions of the information) is "neutral."

[47] This also addresses the appellant's extensive representations in support of his view that the region has failed to establish the requirements of the section 12 solicitor-client privilege for the records. These records are presumptively privileged.

[48] With respect to the process issues raised by the appellant, and his concern that when he made an initial request for these records to the DRPS (who was not in possession of the records), he was not advised of the possibility that the solicitor-client exemption might apply, I find that this has no bearing on the application of the section 12 exemption in these circumstances.

[49] The appellant also makes the argument that no personal information was requested, nor is any contained in the records, and that this suggests that information in the records is "simply billing information and therefore neutral." I have found that the records only contain the appellant's personal information, and not that of other individuals; however, other than my discussion below regarding access to the appellant's own information, that finding does not have a bearing on the application of the section 12 exemption.

[50] The appellant argues that he ought to have access to the records because he was required to pay costs in the legal action, and that he is, therefore, entitled to review the opposing counsel's invoices to their client to ensure their accuracy and relevance to the proceeding. I note, however, that the costs paid by the appellant are a small fraction of the total invoiced amounts (which he received). I also note that the region addresses this issue when it states:

There were no representations made as to costs in Court, as such there has been no communications with regards to billings to any opposing party in this litigation. ...

[51] In the circumstances, although the appellant was responsible for repaying a set amount of costs in the legal action, I am not satisfied that this establishes his right to review the opposing counsel's detailed invoices. With respect to the appellant's

concerns regarding the amount of costs, he ought to have raised this in the context of his legal action, which has established procedures to address costs issues.

[52] The appellant submits that he ought to have access to the records because he was "directly involved with civil litigation." He states:

This legal involvement makes me acutely aware of the matter (i.e. strategies, tactics, outcomes, events etc.) and allows me entitlement to documents ...

[53] In considering this argument by the appellant, I note that it does not support his position that the presumptively privileged records in this appeal ought to be disclosed. In fact, I find that the appellant's "acute awareness" of all aspects of the litigation actually supports the region's position that the disclosure of detailed information relating to dates, times, and amounts billed for each time period would reveal privileged information. I accept that there may be circumstances where the dates of legal invoices would constitute "neutral" information, and could be disclosed (see, for example, PO-2483). In this appeal, however, the appellant's knowledge of this matter indicates that he is "assiduous" and "knowledgeable" about many aspects of this litigation, and I find that the disclosure of dates and times, in combination with his knowledge of the matter, could reveal privileged information.

[54] The appellant also argues that he and the public ought to have access to this information because the region is a public organization, and that taxpayers ought to be able to review records that relate to where their money was spent. Although I accept the appellant's general statement that the region is accountable to the public for monies spent, this does not mean that the presumptively privileged detailed lawyer's invoices, sent to its client (the region) ought to be made public. The region has disclosed the total amount invoiced by the lawyers to deal with the identified legal action (brought by the appellant). I find that disclosure of the records at issue would not assist further in accountability. I also note that the "public interest override" in section 16 of the *Act* does not apply to the section 12 exemption. In addition, previous orders have rejected the appellant's position that the taxpayers themselves are effectively the "client" for the purpose of the litigation.<sup>17</sup>

[55] I also reject the appellant's argument that the privilege was waived by the region because other "non-legal related individuals" (such as employees in the region's accounting department) have viewed the records. These employees of the region clearly represent the region, and the region has stated that the records were not disclosed to any outside party.

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<sup>17</sup> See MO-2222.

[56] Lastly, the appellant argues that even if some portions of the records qualify for exemption under section 12, other portions could be severed and disclosed to him. He attaches to his representations an example of a lawyer's bill, and reviews each part of it in detail. He identifies that the bill includes a header (with the firm's name, the date, the name of the party being billed, and the account number), the dates the professional services were rendered, a description of the types of service performed, a description of the hours it took to perform each task, an hourly rate, the costs of disbursements, the final total of the costs, and the footer (including the firm name and the due date).

[57] The appellant then argues that, except for the description of the types of services performed, none of the information in the bill contains solicitor-client privileged information. He also argues that these descriptions do not contain legal advice and that, because of his involvement with this matter, he is aware of the general information contained in the invoices and is entitled to it. He also states: "I know the firm that was dealing with this matter [and] the public has the right to know who represented them." In addition, he states that portions of the bills contain general information such as the names of the billing party (the lawyer's office) and the party being billed, and that this is not confidential in the circumstances.

[58] In considering whether the records at issue can be severed and portions provided to the appellant, I have taken notice of the appellant's own statement that he is "acutely aware" of the strategies, tactics, outcomes and events which occurred in this legal action. As a result, I am satisfied that the presumptive privilege that applies to the records has not been rebutted, particularly for information such as the dates, times, and amounts billed for each time period.

[59] With respect to the appellant's arguments that information such as the law firm's name and the identification of the region as the client ought to be disclosed, I note that the appellant's request was for the original billing copies from the named law firm for the identified small claims matter. He is aware of this information, and I find that no purpose would be served in severing this general information from the records. Doing so would only result in the appellant being provided with brief "snippets" of information of which he is already aware. Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets," or "worthless" or "meaningless" information.<sup>18</sup>

### *Summary*

[60] As set out above, the total amount of the invoices has been disclosed to the appellant. Access to the other information in invoices has been withheld on the basis

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<sup>18</sup> See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

that it is “presumptively privileged,” and that the presumption has not been rebutted. On my review of the information in the records, I find that the presumption of privilege has not been rebutted, either by the appellant or by my review of the records and the circumstances present in this appeal. Applying the approach taken in Order PO-2484 to the remaining information, I find that the information contained in the legal invoices is solicitor-client privileged information and qualifies for exemption under branch 1 of section 12, in conjunction with section 38(a), subject to my review of the exercise of discretion, below.

### **Exercise of discretion**

[61] Sections 12 and 38(a) are discretionary exemptions. 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.

[62] 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

[63] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>19</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>20</sup>

[64] The region identifies that, in considering the section 12 exemption during mediation, it decided to disclose the total amount of the bill to the appellant. It also indicates that it considered whether the presumption of privilege for the other information was rebutted in this case, and determined that it was not. In addition, its submissions refer to the fact that the appellant had not made representations in Court as to costs, and that this information was not shared as a result of the litigation involving the appellant.

[65] The appellant’s representations are set out in some detail above. Those portions that relate to the region’s exercise of discretion include the appellant’s argument that he was directly involved in the litigation, that he ought to have access to the information as he was ordered to pay costs, and that the public ought to have access to information of this nature.

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<sup>19</sup> Order MO-1573

<sup>20</sup> See section 43(2) of the *Act*.

### ***Analysis and findings***

[66] To begin, on my review of all of the circumstances surrounding this appeal, I am satisfied that the region has not erred in the exercise of its discretion to apply section 12 to the withheld information. In addition, as noted, the region has disclosed the total amount of the invoices, and many of the concerns identified by the appellant regarding accountability and public expenditures are addressed by disclosing this total amount. In the circumstances, I am satisfied that the region properly exercised its discretion to apply the section 12 exemption.

[67] I also note, however, that because of my finding that the records contain the personal information of the appellant, this request ought to have been considered under Part II of the *Act*, and in conjunction with the discretionary exemption in section 38(a).<sup>21</sup> The region has only addressed the possible application of section 12, and its exercise of discretion to apply that exemption. It has not provided representations on the exercise of discretion to apply the exemption in section 38(a).

[68] Ordinarily, where an institution fails to consider the application of the discretionary exemptions in Part II of the *Act*, this office requires the institution to specifically consider the application of those discretionary exemptions.<sup>22</sup> This is because, generally, requesters have a greater right to information when it relates to them in a personal capacity, and an institution must consider this factor in determining access.

[69] I considered whether to require the region to provide additional representations on its exercise of discretion in light of my finding that section 38(a) also applies. However, in the unique circumstances of this appeal, I have decided that it is not necessary to do so.

[70] I make this decision on the basis of my finding that the withheld records qualify for exemption under section 12 of the *Act* largely because of the fact that the appellant was directly involved in the litigation and that, as he himself stated, he is "acutely aware of the matter (i.e. strategies, tactics, outcomes, events etc.)." The appellant's direct involvement with the legal action, and the fact that he is named in the records, is a significant factor in support of my finding that the discretionary exemption in section 12 applies to the records.

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<sup>21</sup> See Order M-352, which requires an institution to take a record-by-record approach, and to consider each record either under Part I of the *Act* (for records that do not contain the requester's personal information) or under Part II of the *Act* (for those that do contain the requester's personal information).

<sup>22</sup> See, for example, Order MO-2046-I, where an institution which failed to consider a discretionary exemption in Part II of the *Act* was ordered to do so.

[71] In these circumstances, I am satisfied that the region's decision that the records qualified for exemption under section 12 would have been no different if it had also considered section 38(a). In the unique circumstances of this appeal, and because the appellant's knowledge of the matter supported my finding that section 12 applies, the additional consideration of the discretionary exemption in section 38(a) would make no difference in the region's decision.<sup>23</sup> If anything, it would bolster the region's decision to apply the solicitor-client privilege exemption in this case.

[72] Accordingly, in the circumstances of this appeal, I am satisfied that the region has not erred in the exercise of its discretion to deny access to the information at issue. In addition, the region disclosed the total amounts of the invoices, and many of the concerns identified by the appellant regarding accountability and public expenditures are addressed by disclosing the amounts. As a result, I am satisfied that the region properly exercised its discretion to apply the exemption, and I uphold its exercise of discretion.

[73] In summary, I find that the information at issue qualifies for exemption under section 38(a) in conjunction with section 12.

**ORDER:**

I uphold the decision of the region, and dismiss this appeal.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ May 28, 2013

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<sup>23</sup> See *Grant v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 749, 143 O.A.C. 131, Toronto Doc. 666/99 (Div. Ct.).