

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2900

Appeal MA11-406

Thames Valley District School Board

June 20, 2013

Summary: The board received a request for the amount it spent on a matter that resulted in the former head of an athletic association being charged with fraud. The board created and disclosed a record listing the amount of money it spent dealing with the matter. The board also advised the requester that there were no identifiable internal costs relating to the matter and that the legal and accounting invoices responsive to the request were exempt from disclosure under sections 7 (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*. The requester (now the appellant) appealed the board's decision. This order finds that the further breakdowns sought by the appellant during mediation are outside the scope of his original request. In addition, the board's decision to withhold the legal invoices and attached Index of Records in their entirety under section 12 of the *Act* is upheld. The board is ordered to issue a decision to the appellant with regard to records relating to certain internal costs identified during the inquiry process.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1), 12 and 17.

Orders and Investigation Reports Considered: PO-2484

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 appellant submitted the following request to the Thames Valley District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like to know how much money the [board] has spent on the [Thames Valley Regional Athletic Association (TVRAA)] situation for the last two years. Documents sought but not limited to would be bills, invoices for legal assistance, accounting assistance, identifiable internal costs, etc.

[2] By way of background, the TVRAA is a partnership of the City of London's two English school boards, two French-language school boards and the private London Christian School. In October 2010, the former head of the TVRAA pleaded guilty to fraud on a charge involving the disappearance of \$800,000 over a period of a decade.

[3] In response to the appellant's request, the board issued a decision granting access to a one-page record. The board's decision specifically state:

- i) Thames Valley District School Board agrees to provide the attached one page record which lists the total amount of money spent dealing with the TVRAA situation. The amount includes the amount spent for legal costs and the costs for accounting advice as the accountants were retained by the Board's solicitors.
- ii) There were no identifiable internal costs or other costs incurred and therefore there are no records relating to this request.
- iii) Your request for production of documents being legal bills and invoices is denied pursuant to section 12 of the [*Act*] on the basis that the records requested are subject to solicitor and client privilege and the records were prepared by counsel and retained by the Board for use in giving legal advice. Your request for production of said records is also denied pursuant to section 7 of the *Act* on the basis that the disclosure would reveal advice or recommendations of a consultant retained by the Board.
- iv) Your request for bills and invoices and for accounting assistance is denied on the basis that the accounting consultant was retained by the Board's solicitors and therefore the record is not subject to production for the same reason as set out in iii) above, with respect for bills and invoices for legal assistance. In the event that it is subsequently determined that the accounts were retained by the Board, then your request for the production of the record is denied pursuant to section 7 of the [*Act*] on

the basis that disclosure would reveal advice or recommendations of a consultant retained by the Board.

[4] The document which the board provided to the requester contained the total for the legal fees, accounting costs and disbursements, inclusive of tax, paid by the board regarding the TVRAA matter for the period of September 2009 to July 2011. In addition, the board provided the requester with a Schedule of TVRAA-Related Invoices, covering the period 2009-2011.

[5] The appellant appealed the board's decision to this office.

[6] During mediation, the appellant advised the mediator that although the board had provided a total dollar figure for the amount spent on the TVRAA fraud situation, he was seeking a detailed breakdown of how the money was spent. Specifically, he sought the following information:

1. How much money was paid to [an identified accounting firm] to provide accounting advice to the lawyers and how much did they charge for their report and recommendations?
2. How much money was spent on outside legal fees to address his [the appellant's] FOI requests and send him correspondence?
3. How much did the law firm charge to provide legal advice related to FOI requests, provide advice, and respond to appeals?

[7] The board advised that the information requested in points two and three above is outside the scope of the appellant's original request. The board suggested that the appellant make a new request for the information sought in points two and three. However, the board advised the appellant that even if this information is found to be within the scope of the request, it is unlikely that it would be disclosed.

[8] The appellant disputes the board's position on the scope of the request. He states that his request clearly included a detailed breakdown as to how the legal fees were allocated, which he asserts includes the information sought in points 2 and 3.

[9] Accordingly, the scope of the request in relation to points 2 and 3 was added as an issue in this appeal.

[10] The board also advised that it does not have records relating to how much money was paid to external accounting firms, as the records that would provide this information are in the "custody or control" of the board's external solicitor within the meaning of section 4(1) of the *Act*.

[11] The appellant disputes the board's position on custody or control. He believes the board should have access to this information and that it should be provided to him. As such, custody or control of records relating to money paid to external accounting firms was added as an issue in this appeal.

[12] In addition, the appellant challenges the board's decision to withhold the monthly legal invoices pursuant to sections 7 and 12 of the *Act*.

[13] The appellant accepts that there were no identifiable internal costs related to this matter.

[14] The parties were unable to resolve the appeal through mediation and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. During the inquiry, the board and the appellant were invited to make submissions on the issues in this appeal. Both the board and the appellant provided representations. The board also made submissions by way of reply to those of the appellant.

[15] In the discussion that follows, I find that points 2 and 3 raised by the appellant during mediation are not within the scope of his original request. In addition, during the inquiry process, the board identified additional records which may be responsive to one aspect of the appellant's request. In this order, I find that these additional records are responsive to the appellant's request and order the board to issue an access decision to the appellant respecting them. Finally, I uphold the board's application of section 12 of the *Act* to exempt records from disclosure.

RECORDS:

[16] The records are comprised of 22 invoices issued to the board between 2009 and 2011 and an attached Index of Records (the index). The index itemizes the 22 invoices by invoice number, invoice date, invoice amount and the exemption claimed. The total amount is provided at the bottom of the index.

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Does the discretionary exemption at section 12 apply to the 22 withheld invoices and the index?
- C. Did the board exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

- D. Are records showing the amounts paid to external accounting firms with respect to the TVRAA matter “in the custody” or “under the control” of the board under section 4(1) of the *Act*?

DISCUSSION:

A. What is the scope of the request? What records are responsive to the request?

[17] It is the appellant’s position that the records documenting how much the board spent on outside legal fees to address his FOI requests and to correspond with him in response to his requests, including amounts charged by law firms to provide legal advice related to those requests and appeals to this office, is within the scope of his request. The board disagrees.

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

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[19] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester’s favour.¹

[20] To be considered responsive to the request, records must “reasonably relate” to the request.²

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

[21] The board takes the position that the appellant's request was for the amount of money spent by the board in a two year period with regard to the TVRAA matter. The board submits that the appellant requested access to bills and invoices related to legal assistance, accounting assistance and internal costs pertaining to that matter only.

[22] In response to the appellant's request, the board states that it provided the appellant with a total dollar figure for legal and accounting costs related to the TVRAA matter. The board submits that the appellant sought a breakdown of each of the legal and accounting costs and was again advised that only the total dollar figure would be provided. Subsequently, the board states that it provided the appellant with a list of invoice amounts and dates for the legal and accounting costs incurred.

[23] The board submits that during the mediation of this appeal, the appellant redefined his request to include a specific breakdown of (1) monies paid for accounting advice, (2) moneys paid in legal fees to respond to him regarding his FOI requests, and (3) monies paid in legal fees to provide advice and to respond to his appeals.

[24] The board submits that it understood at all times that the appellant sought production of the details of the costs incurred for legal fees in this matter, including production of the legal invoices detailing legal and accounting advice. The board submits that, throughout the request and appeal stages, it advised the appellant that the invoices would not be produced and that the appellant was only entitled to receive a total dollar amount for the legal and accounting fees incurred by the board, which was then supplemented with a breakdown per invoice of those costs. With this understanding, the board submits that the information sought in the appellant's redefined request is outside the scope of his initial request and ought to be the subject of a further request.

[25] In response, the appellant maintains that the scope of his request was never changed and that he never redefined his request.

[26] Upon review of the parties' representations and the records, I find that the additional information requested by the appellant during mediation is outside the scope of the current appeal and ought to be the subject of a new request.

[27] The appellant's original request stated as follows:

I would like to know how much money the [board] has spent on the [Thames Valley Regional Athletic Association (TVRAA)] situation for the last two years. Documents sought but not limited to would be bills, invoices for legal assistance, accounting assistance, identifiable internal costs, etc.

[28] The board identified 22 invoices responsive to this request and issued a decision to the appellant.

[29] During mediation, the appellant advised the mediator that he sought a detailed breakdown of how the money was spent and specifically:

1. How much money was paid to [an identified accounting firm] to provide accounting advice to the lawyers and how much did they charge for their report and recommendations?
2. How much money was spent on outside legal fees to address his [the appellant's] FOI requests and send him correspondence?
3. How much did the law firm charge to provide legal advice related to FOI requests, provide advice, and respond to appeals?

[30] The appellant's original request expressly asks for the total amount spent by the board in relation to the TVRAA matter. The appellant did not originally seek or request a detailed breakdown of the amount spent. As such, the board simply collated the responsive invoices and provided the appellant with the document which describes the total amounts spent.

[31] However, during mediation, the appellant requested a detailed breakdown that identifies the amount paid to an external accounting firm for accounting advice, amount spent on legal fees to address the appellant's FOI requests and amount spent on legal advice related to FOI requests and appeals. In my view, a request for how much money was spent "on the TVRAA situation" is significantly different from a request for how much was expended by the board in dealing with the appellant's access to information requests and appeals. If the appellant wanted the latter, he should have specifically requested this information in his original request. I note that the appellant has significant experience in the access to information process and could be expected to formulate his request clearly and with some precision.

[32] In addition, in order to respond to the redefined request, the board would be required to review all of the invoices and search for the amounts spent on accounting advice, legal fees to address the appellant's FOI requests and legal advice related to FOI requests. Although the information requested during mediation is likely contained in the 22 invoices that are the responsive records in this appeal, the board would have to perform a new search within the records and identify the new amounts that the appellant identified during mediation. I find that this work amounts to a new search to be completed by the board, and should therefore be the subject of a new request.

[33] I note that during mediation, the appellant did not simply narrow his request, but asked the board to produce different types of information that would require additional work on the part of the board. If the appellant simply narrowed the scope of the request from a two year period to a one year period, for example, the information would be found to be within the scope of this appeal. However, in this case, the appellant seeks additional information from the board that would need to be generated in response to a new request. The detailed breakdown and detailed amounts requested during mediation would, therefore, constitute new responsive information.

[34] Accordingly, I find the information responsive to the appellant's redefined request to be outside the scope of the appeal. Should the appellant seek access to the fee breakdowns and details requested during mediation, he must file a new request with the board.

Internal Costs of the Board

[35] In his original request, the appellant stated that he sought access to "identifiable internal costs". The board's decision letter advised the appellant that "there were no identifiable internal costs or other costs incurred and therefore there are no records relating to this request."

[36] It appears that during mediation, the appellant accepted that there were no identifiable internal costs related to the TVRAA matter.

[37] However, in his representations in response to the Notice of Inquiry, the appellant raised the issue of whether the hiring of a named individual to run the TVRAA was an internal cost to the board. The appellant states that he seeks production of this information and any relevant records.

[38] In response, the board confirmed that the named individual was hired as a casual employee of the board and was paid for the assignment. The board identified the following records as relating to the hiring of the named individual: electronic pay register forms; electronic time sheets and an acknowledgement letter and email communications to the named individual.

[39] The board submits that because it paid the named individual for the assignment following the departure of the former head of the TVRAA, and was no longer paying a salary to the former head, the monies paid to the named individual are not an internal cost to the board related to TVRAA as contemplated by the appellant's request. I do not agree.

[40] The departure of the former head of the TVRAA and the hiring of the named individual are directly related to the TVRAA matter. If not for the discovery of the fraud, the named individual would not have been hired by the board to run the TVRAA.

Accordingly, I find that the hiring of the named individual is properly considered to be an “identifiable internal cost” of the board relating to the TVRAA matter. Records relating to the hiring of the named individual are therefore within the scope of the appellant’s request and I order the board to issue a new decision letter to the appellant with respect to any records relating to this aspect of the request.

B. Does the discretionary exemption at section 12 apply to the 22 withheld invoices?

[41] The board relies on section 12 of the *Act* to deny access to the 22 withheld invoices. The board submits that, by producing the total dollar amount and the invoice amounts to date, it has taken a reasonable approach to the appellant’s request in keeping with IPC and court decision on this issue.

[42] Section 12 of the *Act* 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.

[43] 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

[44] 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.³

Solicitor-client communication privilege

[45] 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.⁴

³ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

⁴ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[46] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁵

[47] 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.⁶

[48] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.⁷

[49] 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.⁸

Litigation privilege

[50] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.⁹

[51] In *Solicitor-Client Privilege in Canadian Law*¹⁰, 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.

⁵ Orders PO-2441, MO-2166 and MO-1925.

⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁷ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁸ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁹ 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).

¹⁰ 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

[52] 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*¹¹, which found this information to be presumptively privileged unless it can be characterized as "neutral".

[53] 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.¹²

[54] The board confirms that it has released the total dollar amount and the invoice amounts to date to the appellant and has, therefore, taken a reasonable approach to the appellant's request. The board cites a number of cases (including the *Maranda* decision) that confirm that solicitor-client accounts and information about lawyer's fees are presumptively privileged and are, therefore, subject to common law solicitor-client communication privilege.

[55] The board confirms that it has not waived the privilege that attaches to the invoices at issue, with the exception of the information previously released to the appellant.

[56] The board states that the 22 invoices were created for use in giving legal advice or in contemplation of or for use in litigation. The board states that the records were collected, maintained, prepared or used in relation to the TVRAA proceeding, which included the board's investigation into the TVRAA matter and the board's involvement in

¹¹ [2003] 3 S.C.R. 193. ("*Maranda*")

¹² 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.

the Crown prosecution. As these invoices were created in the context of those proceedings, the board submits that there is a clear relationship between the invoices and the actual conduct of the proceedings and that the records are exempt under section 12 of the *Act*.

[57] The board refers to the Supreme Court of Canada's decision in *Maranda* and Orders PO-2727 and MO-2211, and states that the presumption of privilege will not be rebutted if there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege. In this case, the board submits that the appellant has been provided with a total dollar figure for legal fees and disbursements, and, subsequently, a breakdown, per invoice, of the legal fees incurred. Notwithstanding, the board states that the appellant seeks production of the invoices themselves, thereby asserting the total amounts provided are insufficient for his purposes. It is the board's submission that the appellant is not merely interested in obtaining general information about fees paid, but wishes to subject the invoices to further scrutiny.

[58] The board notes that the appellant has been privy to additional board documentation obtained through other FOI requests and information already made public about the TVRAA matter. In the circumstances of this appeal, the board submits that an inference can be drawn that the appellant is an "assiduous inquirer" as contemplated in the *Maranda* decision and seeks additional content of the invoices and the invoices themselves in order to glean further information about the solicitor-client relationship. It submits that, if these records are disclosed, there is a reasonable possibility that privileged information will be disclosed.

[59] The appellant confirms his position that he should have access to the invoices. He states that the board is spending public money raised from taxes and that the TVRAA matter resulted from the board's mismanagement of funds. As such, the appellant submits that all costs related to the TVRAA matter should be disclosed to the public.

[60] In Order PO-2484, this office considered 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 of section 12 of the *Act*. Reviewing the *Maranda* decision as it applied to lawyers' accounts and billing information, former Senior Adjudicator John Higgins confirmed the principles established in that case regarding legal billing information in the civil law context and found that the total figure in each of the nine invoices was "neutral information" and ought to be disclosed. However, Senior Adjudicator Higgins found that the other information on the invoices (including the dates of the invoices) was exempt under branch 1 of section 12.

[61] The ministry sought judicial review of Order PO-2484. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*¹³, the Ontario Divisional Court reviewed Order PO-2484 and another similar order, and upheld both decisions. 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.

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

[63] The board has provided representations that demonstrate the appellant is the “assiduous inquirer” as contemplated in the *Maranda* decision. The board has provided the appellant with a total dollar figure for legal fees and disbursements, as well as a breakdown per invoice, of the legal fees incurred. Nonetheless, the appellant seeks a further detailed breakdown of the costs associated with specific activities undertaken by legal counsel (costs incurred in communication with him and costs incurred responding to FOI requests and appeals) and production of the invoices themselves. In light of these circumstances, the board submits that the appellant is not merely interested in obtaining general information about the fees paid, but wishes to subject the invoices to further scrutiny which will impact upon its relationship with counsel.

[64] I agree with the board’s position. As the appellant has confirmed, he has made many other FOI requests in relation to the TVRAA matter. I find that the appellant’s interest in the particulars of the fees charged by the board’s legal counsel and dissatisfaction with the totals already provided suggests that the appellant is, in fact, the “assiduous inquirer” as contemplated in the *Maranda* decision. Further, I agree that the appellant seeks additional details regarding the fees charged and the invoices themselves in order to glean further information about the solicitor-client relationship between the board and its legal counsel.

¹³ [2007] O.J. No. 2769, at para. 25.

[65] As set out above, the total amount of the invoices and the total amounts per invoice by year were disclosed to the appellant. Access to the other information in the invoices has been withheld on the basis that it is "presumptively privileged," and that the presumption has not been rebutted. I agree that the presumption of privilege has not been rebutted, either by the appellant or as a result of my review of the invoices and the circumstances present in this appeal. Applying the approach taken in Order PO-2484 and endorsed by the Divisional Court to the 22 invoices, 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, subject to my review of the exercise of discretion, below.

[66] While the appellant submits that the costs related to the TVRAA matter should be disclosed to the public, thereby raising the public interest, I note that the public interest override in section 16 cannot be used when section 12 is claimed. Further, I note that the board has disclosed the total dollar amount of the legal costs it incurred, as well as a breakdown of these costs by invoice, satisfying to a great extent any public interest that may exist in the content of the records.

Index of Records

[67] I have carefully reviewed the index created by the board, which appears to have been prepared to assist this office with processing this appeal. As such, I am of the view that it is not a record that is responsive to the appellant's request. However, since reference to the index was made in the Notice of Inquiry sent to the parties, I will consider whether it is also subject to the exemption found at section 12 of the *Act*.

[68] The index consists of a list of invoice numbers and related dates, amounts and the exemptions claimed. I find that this information, with the exception of the exemptions claimed, was taken directly from the legal invoices at issue. As a result, I find that the information at issue (the invoice numbers and the invoice dates) is legal billing information.

[69] I have already found that the details contained in the 22 invoices are exempt from disclosure under section 12 of the *Act*. Similarly, I find that the invoice numbers and invoice dates contained in the index are also exempt under section 12 of the *Act*.

[70] Since the board has disclosed the remaining information (i.e. invoice amounts, total amount, exemptions claimed) to the appellant, I find that the remainder of the Index of Records qualifies for exemption under branch 1 of section 12, subject to my review of the exercise of discretion, below.

[71] As I have found that the withheld invoices are exempt in full under section 12 of the *Act*, I do not need to consider whether section 7(1) also applies to the invoices.

C. Did the board exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?

[72] Section 12 of the *Act* is a discretionary exemption. When a discretionary exemption is 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.

[73] 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

[74] In such a case this office may send the matter back to the institution for an exercise of discretion based on proper considerations¹⁴. This office may not, however, substitute its own discretion for that of the institution¹⁵.

[75] The board submits that it properly exercised its discretion under section 12 in denying access to the records at issue. The board submits that it did not exercise bad faith nor did it act for an improper purpose. It also submits that it did not consider irrelevant factors in exercising its decision.

[76] The board identifies that, in exercising its discretion, it considered such relevant factors as:

- The purpose of the *Act*, including the public's right to information, as well as the fact that exemptions should be limited and specific. The board notes that it reconsidered its position with regards to its initial exercise of discretion and subsequent revised decision, thereby demonstrating its recognition of these principles.
- The language of the section 12 exemption and the interests it seeks to protect. The board notes that it considered the exemption in section 12 in conjunction with the sensitivity and significance of the information to the board and the historic practice of the board with respect to similar information. The board states that it has maintained a consistent position with regard to this exemption.

¹⁴ Order MO-1573.

¹⁵ See section 43(2) of the *Act*.

- The appellant's request, as a member of the public. The board states that it considered the fact that this is not the appellant's personal information and weighed the appellant's need for the information against the solicitor-client privilege exemption.
- The desire to maintain and promote public confidence in the board as weighed against its need to maintain its privileged relationship with legal counsel and prevent the disclosure of sensitive information.

[77] In response, the appellant submits that the board acted improperly and demonstrated a "pattern" of misconduct. The appellant suggests that the board has failed to properly respond to any of his FOI requests relating to the TVRAA matter. The appellant submits that the board provided him with three different amounts representing the fees charged by its legal counsel and that these amounts were not properly clarified.

[78] The board disputes the appellant's submissions. The board provided the IPC with copies of email communications sent to the appellant that noted an error in the total fees originally sent to the appellant and subsequently confirming the final correct dollar figure to him.

[79] I have reviewed the email correspondence referenced by the board regarding the total amount invoiced for legal fees and do not find any evidence of bad faith on the part of the board.

[80] Furthermore, I find that the board's error with regard to the total amount invoiced is not a relevant factor in the consideration of whether the board properly exercised its discretion in withholding the records under section 12 of the *Act*. The exercise of discretion analysis relates to whether the board properly exercised its discretion in deciding whether or not to disclose the records to the appellant.

[81] On my review of all the circumstances surrounding this appeal, I am satisfied that the board has not erred in the exercise of its discretion to apply section 12 to the records. Of particular relevance is the fact that the board has disclosed the amounts of the invoices and the total of legal fees charged. I find that by doing so, the board has facilitated an appropriate level of transparency to the appellant, while still protecting information subject to solicitor-client privilege. As noted above, this approach is consistent with previous orders of this office and relevant judicial decisions. In the circumstances, I am satisfied that the board properly exercised its discretion to apply the section 12 exemption, and I uphold its exercise of discretion.

D. Are records showing the amounts paid to external accounting firms with respect to the TVRAA matter “in the custody” or “under the control” of the board under section 4(1) of the *Act*?

[82] In his original request, the appellant sought access to the amount of money spent by the board on the TVRAA matter. The appellant indicated that he sought access to records including “bills, invoices for legal assistance, accounting assistance, identifiable internal costs, etc.”

[83] During mediation, the appellant indicated that he sought access to the amount of money paid to an external accounting firm to provide accounting advice to the lawyers and what they charged for their report and recommendations.

[84] It is the board’s position that the invoices that show the amount of fees paid to the external accounting firm retained by its legal counsel in the TVRAA matter are in the possession of legal counsel who retained, instructed and received the advice and recommendations of the accounting firm. The board submits that the fees for the accounting work were paid by its legal counsel and not directly by the board. It also submits that the accounting firm’s invoices were sent directly to legal counsel for payment and not to the board.

[85] In addition, the board submits that the accounts rendered to the board by counsel (i.e. the records at issue) contain non-specific disbursement items which include, among other items, the costs incurred by its counsel regarding the accounting work product and advice.

[86] Based on these submissions, it appears that the amounts paid to external accounting firms with respect to the TVRAA matter are contained in the invoices at issue in this appeal. As I have already found that the 22 invoices are exempt in full under section 12, the amounts that the appellant is seeking are also exempt.

[87] Furthermore, it is probable that the information that is contained in the invoices submitted by the external accounting firm, particularly that which relates to the TVRAA matter and is, therefore, responsive to this request, is reflected in the invoices at issue in this appeal. While there may be an argument that the board does have custody or control over the invoices provided by the external accounting firm to the board’s legal counsel, the amounts charged by the accounting firm are contained within the body of the invoices. I have already found that the information contained in the invoices is exempt under section 12 of the *Act*. Accordingly, the amounts charged by the accounting firm would also be exempt under section 12 of the *Act*.

[88] Therefore, as the information the appellant seeks is contained in the records and the records have been found to be exempt under section 12 of the *Act*, I need not consider whether the records showing the amounts paid to external accounting firms by

the board's legal counsel are in the custody or under the control of the board under section 4(1) of the *Act*.

ORDER:

1. I order the board to make access decisions with regard the records relating to the hiring of a named individual following the departure of the former head of the TVRAA, treating the date of this order as the date of the request.
2. I uphold the board's decision to withhold the 22 invoices and Index of Records in their entirety.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ June 20, 2013