

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3445

Appeal MA16-274

Town of South Bruce Peninsula

May 24, 2017

Summary: The appellant requested access to two invoices sent by a lawyer to his client (the Town of South Bruce Peninsula). Relying on sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act* the town denied access to the responsive records. The appellant appealed the decision and alleged that the Town Clerk was in a conflict of interest, and should not have been permitted to make the access decision on behalf of the town. This order finds that the Town Clerk was not in a conflict of interest, that the detailed invoices that were located by the town are presumptively privileged and that the presumption has not been rebutted for the withheld invoices.

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 Considered: MO-1285, MO-2227, MO-2900, MO-3204 and MO-3256.

Cases Considered: *Maranda v. Richer* [2003] 3 S.C.R. 193, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] The Town of South Bruce Peninsula (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information arising from the town's response to a previous three-part request by the requester, which is the subject of Appeal File number MA16-98-2. In response to the previous request, the town had advised that there were no records that were

responsive to the appellant's request for access to "[a]ll invoices making up the amount for the item called 'prosecution' in clerk report [number] Legal Update". In that regard, the town had advised in its decision letter in Appeal MA16-98-2 that:

We submit that the report in question [identified in item 2 of the previous request] was discussed with Council in Closed Session. Without breaching the confidentiality afforded under the *Municipal Act, 2001*¹, we assert that the word "prosecution" does not occur anywhere within the body of [the specified report] and as such there are no responsive records to that portion of the request.

[2] The requester then recalled that the records that he sought were not "classified as prosecution" but rather as "removal and trespass" or "something related to removal or trespass or both". Accordingly, the appellant submitted the request at issue in this appeal for:

...all invoices making up the amount for the item called "removal and trespass" or anything similar to or related to "removal and trespass" or "removal" or "trespass" or "prosecution" in clerk report "[number] Legal Update".

[3] The town identified four invoices and issued an access decision accompanied by an index of records. The town relied on sections 4(1)(b) (frivolous or vexatious request), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act* to deny access to the records, in full.

[4] The requester, now the appellant, appealed the town's access decision.

[5] During the course of mediation, the appellant advised the mediator that because two of the responsive invoices are also at issue in Appeal MA16-98-2, he is not pursuing access to them in this appeal. Accordingly, records numbered 2 and 3 in the index of records and the possible application of section 4(1)(b) of the *Act* are no longer at issue in this appeal. The appellant also alleged that the Town Clerk was in a conflict of interest, and should not have been permitted to make the access decision on behalf of the town.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process.

[7] During the inquiry into the appeal, I sought and received representations from the town and from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

¹ *Municipal Act, 2001*, SO 2001, c 25.

[8] Although I was not provided with copies of the records at issue, I was provided with sufficient evidence and argument to make my determinations in this appeal in the absence of the records. Accordingly, it is not necessary for me to determine whether copies of the invoices should have been provided to this office. As a result, it is not necessary for me to address the parties arguments surrounding the production to this office of records over which solicitor-client privilege is claimed as discussed in the decisions of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*² (*Blood Tribe*) and *Alberta (Information and Privacy Commissioner) v. University of Calgary*³.

[9] In this order I find that the Town Clerk was not in a conflict of interest, that the detailed invoices that were located by the town are presumptively privileged and that the presumption has not been rebutted for the withheld invoices.

RECORDS:

[10] The records at issue in this appeal consist of legal invoices and are itemized as records 1 and 4 in the town's index of records.

ISSUES:

- A. Is the Town Clerk in a conflict of interest with respect to the access decision?
- B. Do the invoices at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(a) in conjunction with the section 12 exemption apply to the information in the invoices at issue?

DISCUSSION:

Issue A: Is the Town Clerk in a conflict of interest with respect to the access decision?

[11] At mediation the appellant alleged that the Town Clerk was in a conflict of interest, and should not have been permitted to make the access decision on behalf of the town.

² 2008 SCC 44, [2008] 2 S.C.R. 574.

³ [2016] 2 SCR 555, 2016 SCC 53.

The town's representations

[12] The town's representations set out the history of litigation involving the appellant and, referring to Order MO-3204, asserts that the appellant has failed to provide sufficient grounds to establish a conflict of interest. The town submits that:

[The appellant] has provided no evidence that [the Town Clerk] had any personal or special interest in the records or that a well-informed person considering all of the circumstances could perceive a conflict of interest on [the Town Clerk's] part. [The Town Clerk] had no personal or special interest in the documents being requested and had no improper motive in refusing to produce them. In fact, as evidence of her lack of improper motive, the town notes that [The Town Clerk], in her letter to [the appellant] dated April 19, 2016, waived the fees for searching which the town was entitled to charge.

[13] In responding to a request for documentation from this office during the initial processing of this appeal, the town provided an affidavit of the Town Clerk. In it she set out the circumstances surrounding the request, the steps she took to respond to it and the content of the two invoices at issue in this appeal. In the course of adjudication, a non-confidential version of the affidavit was provided to the appellant⁴.

[14] The town submits that the Town Clerk complied with her procedural fairness obligations and considered the request in good faith and that she considered the relevant factors and was aware of previous decisions of the IPC.

[15] The town submits that the Town Clerk responded to the request in accordance with the level of transparency found appropriate by previous orders of the IPC and considered:

1. the municipality's reasonable desire to protect documents and information subject to solicitor-client or litigation privilege;
2. the fact that the municipality must be accountable to the public regarding its expenditures;
3. the need to protect the personal information of individuals involved in the legal matters, especially considering the appellant's history as a blogger and the possibility that he was going to broadcast any personal information which he received;

⁴ Although I have considered the confidential portion of the affidavit in making my determinations in this appeal I cannot set out those portions in this order because it would reveal the information that is claimed to qualify for exemption.

4. the circumstances of the appellant's request;
5. the age of the information;
6. the purposes of the *Act*;
7. the lack of a compelling need for the appellant to receive the information; and,
8. the historic practice of the town in relation to similar requests.

[16] The town further submits that the Town Clerk considered previous Orders of the IPC, "which have consistently held that releasing the overall legal service cost creates a proper balance between competing interests". The town provides as an example Order MO-2900 where Commissioner Brian Beamish stated that:

The Board has disclosed the amounts of the invoices and the total 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.⁵

[17] The town submits that the Town Clerk considered the relevant factors in good faith and made a decision in line with previous IPC and Ontario court decisions, had no personal or special interest in the documents being requested and had no improper motive in refusing to produce them.

The appellant's representations

[18] The appellant asserts that the Town Clerk is in a conflict of interest because she had a "personal interest" in the access decision and "should have recused herself", because of:

- her alleged role in the creation of counsel minutes referring to matters involving the appellant,
- a witness statement she provided in proceedings involving the appellant,
- her alleged release of his personal information which resulted in a complaint to this office,
- her alleged public accusation against him of certain conduct,

⁵ Paragraph 81.

- his suspicion that the Town Clerk is using taxpayer funds to bring harm to him, which he asserts is a “personal and improper use”, and
- his belief that some of the requested records “implicate the Clerk” because he believes they will show “that the clerk used public funds (payments to legal firms) for something that was not a legitimate town matter, especially anything related to ‘prosecution’, ‘IPC legal’ or ‘trespass/removal’”.

[19] He submits that he asked for “records which will verify or dispose of my suspicions about [the Town Clerk], and [the Town Clerk] is making the decision of whether I get those records”. He submits that this is a clear conflict of interest⁶.

[20] The appellant submits that he has satisfied the onus in MO-3204 arguing that:

I have satisfied that onus. I cannot see how she could not have a bias. I have seen the bias. Many others have too.

[21] The appellant also attempts to distinguish order MO-2227 by asserting that the Town Clerk was personally in a direct adversarial relationship with him whereas in MO-2227 the adversarial relationship was between the requestor and the town, not between the requestor and the decision maker. The appellant further challenges the factors that the town states the Town Clerk considered and asserts that his history as a blogger is irrelevant.

The town’s reply representations

[22] Relying on Orders MO-1285 and MO-3204 the town submits that the appellant has provided no evidence that the Town Clerk had any personal or special interest in the records or that a well-informed person considering all of the circumstances could perceive a conflict of interest on the Town Clerk’s part.

[23] With respect to the appellant’s allegations, the town replies:

- there was no inaccuracy with the minutes and the appellant’s complaints in relation to those minutes should be directed to the town’s Council, as Council, following the Town Clerk’s preparation of the minutes, reviews and approves them. The Town Clerk does not have unilateral control over the minutes nor does she approve them.
- the appellant’s complaint arose from a request for the amount of legal fees incurred by the town in relation to legal actions commenced by the appellant and the town released the total amounts in accordance with the relevant case law. The appellant in that complaint states that personal information was revealed

⁶ In support of his submissions he relies on Orders MO-1285, MO-2227 and MO-3204.

about him and that the amounts should not have been released. In this appeal the appellant requests not only the amounts incurred in legal fees being released, but also communications from the town solicitor (being the legal invoices) in relation to the fees.

- the appellant's disagreement with a previous decision made by the Town Clerk as the Head does not indicate that the Town Clerk has a conflict of interest in any decision regarding the appellant and the town's release of the amount of legal fees that is the subject of the appellant's complaint, as well as the amount of the legal fees in the present matter, is evidence of the town's consistent approach to requests for information. It is not indicative of any conflict of interest on the Town Clerk's part.
- there is no evidentiary foundation for the appellant's allegations that the Town Clerk is using taxpayer money to fund her personal litigation or is intentionally trying to make the appellant suffer.

[24] Relying on Orders MO-2227 and MO-3204, the town submits that this office has previously held that a Head is not required to be impartial in the way that would be expected of an independent adjudicator but rather they are required to comply with procedural fairness and exercise their discretion in good faith, taking into account relevant considerations and disregarding irrelevant ones.

[25] The town submits that the Town Clerk considered relevant factors in good faith and made a decision in line with previous IPC and Ontario court decisions, that she had no personal or special interest in the documents being requested and had no improper motive in refusing to produce them.

The appellant's sur-reply representations

[26] In sur-reply, the appellant asserts that the town mischaracterizes his conduct and his concerns about the town clerk and provides various examples in support of his position. He asserts that by virtue of a position he holds he has a right to see the invoices and had been advised by the town's chief financial officer that he could, but that he was subsequently told he could not.

Analysis and finding

[27] In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether

the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[28] There is no evidence before me that the Town Clerk had a special or personal interest in the records at issue in this appeal. In my view, there is nothing before me to substantiate a finding that the Town Clerk was in a conflict of interest or exercised bias with respect to the processing of the appellant's request under the *Act*.

[29] I now turn to the other issues in the appeal.

Issue B: Do the invoices at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[30] In order to determine which sections of the *Act* may apply, it is necessary to decide 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 if 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;

[31] 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.⁷

[32] The town submits that the responsive records contain personal information of the appellant as well as other identifiable individuals. The appellant takes the position that information in the responsive records relates to him and contains his personal information. The appellant further argues that if the invoices contain the personal information of other identifiable individuals, that information can be severed and the remaining information can be disclosed to him.

[33] I accept the town's evidence that the records contain information that qualifies as the personal information of the appellant as defined in section 2(1) of the *Act*. Because the invoice contains the personal information of the appellant, Part II of the *Act* applies. Accordingly, I will address the application of section 38(a) (discretion to refuse requester's own information) in conjunction with section 12.

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

[34] 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.

[35] Section 38(a) 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.

[36] Section 38(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to

⁷ Order 11.

grant requesters access to their personal information.⁸

[37] The town has relied on section 12 to deny access to information on the invoices. 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.

[38] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[39] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[40] 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.⁹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁰ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹¹

[41] 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.¹² The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹³

Litigation privilege

[42] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that

⁸ Order M-352.

⁹ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁰ Orders MO-1925, MO-2166 and PO-2441.

¹¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹³ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.¹⁴ Litigation privilege protects a lawyer’s work product and covers material going beyond solicitor-client communications.¹⁵ It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁶ The litigation must be ongoing or reasonably contemplated.¹⁷

Loss of privilege

Waiver

[43] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹⁸

[44] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹⁹

[45] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²⁰ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²¹

Termination of litigation

[46] Common law litigation privilege generally comes to an end with the termination of litigation.²²

¹⁴ *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).

¹⁵ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹⁶ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁷ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁹ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII).

²⁰ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²¹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

²² *Blank v. Canada (Minister of Justice)*, cited above.

Legal billing information

[47] Legal billing information is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.²³

[48] In determining whether or not the presumption has been rebutted, the following questions may 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?²⁴

The town’s representations

[49] The town submits that disclosing the requested information would directly or indirectly reveal communication protected by privilege to an “assiduous inquirer” or otherwise. The town explains:

... the invoices contain dockets, which include, *inter alia*, information as to what issues the town was consulting with legal counsel about, including litigation matters; the timeline of the same; options which the town was considering; and, counsel's recommendations - all of which is privileged information.

[50] The town submits that privilege has not been waived and that:

The privilege belongs to the Council of the Town of South Bruce Peninsula and can only be waived by an explicit resolution of that Council. Such a resolution has not been made.

[51] The town submits that it is prepared to disclose the total amounts of the invoices however, the appellant already knows the amounts as they were set out in his access request.

The appellant’s representations

[52] The appellant submits that the fact of a bill being presented does not automatically make it legal billing information as lawyers give other kinds of advice “including strategy, financial planning, marriage, political, policy, and personal”. The

²³ *Maranda v. Richer*, [2003] 3 S.C.R. 193; 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.).

²⁴ See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

appellant asserts that:

... the bills are at least in parts for services other than legal. The bills or parts that are for other than "legal" are not protected or privileged.

So there is a claim that privilege is presumed, but that presumption has not been established.

... All four originally identified MA16-274 records (two of which are being addressed in case MA16-98-2) include reference to "removal/trespass" as in clerk's report [identified report]. I cannot imagine any way that the removal/trespass issue could be a legal matter for the town.

I assume the removal/trespass items are related to [certain matters involving the appellant] ... The town is not a participant, nor are any town staff,

For requests about "removal and trespass" invoices, there is no legitimate legal matter involving the town. I believe the invoices will show that strategic advice or work, or personal advice, or some other non-legal advice, was sought and delivered rather than legal advice. I believe the question to the lawyer was something like "how can some individual persons (not the town) help ensure that [the appellant] suffers as much as possible as a result of [certain matters]?"

If there is privileged information in records 1 to 4 not related to trespass/removal it can be redacted.

[53] The appellant asserts that the town has not provided sufficient evidence to demonstrate that the records are not neutral.

[54] The appellant further relies on what he asserts is a dictionary definition of docket²⁵ to assert that the information in the legal invoices is not privileged.

[55] He further submits that the invoices do not qualify as communications made for the purpose of obtaining or giving legal advice alleging that "[t]hey can be for the purposes of recording the general nature of services provided, but they are not for the purpose of providing that service".

[56] The appellant submits that because, in his view, there is no privileged information in the invoices, he could not be an "assiduous inquirer".

[57] The appellant further takes the position that there are no facts or litigation that

²⁵ Being in his view a calendar or list of cases for trial or people having cases pending.

are sufficient to establish the application of litigation privilege such as that discussed in *Blood Tribe*.

[58] The appellant further submits that the legal invoices were not confidential because anyone on town staff could have seen them by opening the bills and that he, by virtue of a position he holds, should have access to all invoices. He doubts that any of the invoices were marked to indicate he could not access them.

[59] He states:

... In fact [the CFO at the time] agreed to give me the invoices, then for some reason changed his mind. They may be confidential for members of the public. But they are hardly confidential for me. They became confidential for me only after I was almost given them.

The town's reply representations

[60] Relying on my Order MO-3256²⁶, the town submits that the appellant appears to have blended solicitor-client privilege with litigation privilege, and erroneously concluded that there must be litigation in order for solicitor-client privilege to apply. The town submits that there does not need to be litigation for solicitor-client privilege to be claimed, as the appellant asserts. The town submits that, in any event, the legal invoices include references to litigation matters involving the town, including litigation matters commenced by the appellant.

The appellant's sur-reply representations

[61] The appellant submits that there is no confusion on his part and submits that his point was simply that solicitor-client privilege is only applicable where there is at least potentially a proceeding or case that the client is involved in as a party or a defendant or as a plaintiff and whether advice given by the lawyer is actually legal advice.

[62] He states that there is no litigation or legal proceeding that is being contemplated or in existence and that:

My point was then, and remains now, that just because it is advice from a lawyer, does not make it legal advice, and if it is not legitimate legal advice about a case or proceeding or potential case or proceeding in which the town is a party, there is no legitimate privilege.

[63] The appellant agrees with the analysis in my Order MO-3256 but asserts that this case is distinguishable.

²⁶ The town references paragraphs 45 to 49 of Order MO-3256.

[64] He asserts that the non-confidential version of the Town Clerk's affidavit "does not verify anything" nor qualify as "proof" that all parts of the requested records relate to legal matters in which privilege applies. He submits that the dockets could easily include matters that the town was not a party in and that he does not want the "dockets" that reveal what the lawyer did on cases that the client is involved in as a participant, and which are likely privileged.

Analysis and findings

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

[66] The appellant asserts that the town has failed to establish that the information in the invoice qualifies for exemption under section 12 of the *Act*. I note, however, that the Supreme Court of Canada's decision in *Maranda v. Richer*²⁷, 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 town, and the information is exempt unless I find that the information (or any portions of the information) is "neutral." I find that the appellant's interest in the particulars of the fees charged by the town's legal counsel as well as his knowledge of the underlying matters indicates to me that he would qualify as an "assiduous inquirer" as contemplated in the *Maranda* decision. I find that, in all the circumstances, the presumption of privilege has not been rebutted by the appellant, and that the information in the invoices is solicitor-client privileged information under Branch 1 of section 12.²⁸

[67] I am also satisfied that the town has not waived any privilege in the invoices for the purposes of the *Act*. As the request for access at issue in this appeal is governed by the *Act*, I make no comment regarding the appellant's assertion that he can obtain the invoices by other means.

[68] Lastly, the appellant argues that the town could sever the invoice. In considering whether the records at issue can be severed and portions provided to the appellant, in light of the appellant's familiarity with underlying matters in the invoices, I am satisfied that the presumptive privilege that applies to the invoices has not been rebutted. 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,"

²⁷ [2003] 3 S.C.R. 193. See also 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.); and *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

²⁸ As set out above, the town submitted that it is prepared to disclose the total amounts of the invoices however, the appellant already knows the amounts as they were set out in his access request. The appellant did not take issue with this submission and seeks access to the detailed information in the invoices. Accordingly, the total dollar invoice amount is not at issue in the appeal.

or "worthless" or "meaningless" information.²⁹

[69] Therefore, I find that the information contained in the invoice is solicitor-client privileged information and qualifies for exemption under Branch 1 of section 12, in conjunction with section 38(a).

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

Issue F: Did the institution exercise its discretion under section 38(a)? If so, should this office uphold the exercise of discretion?

[71] The section 38(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[72] In addition, the Commissioner may find 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.

[73] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁰ This office may not, however, substitute its own discretion for that of the institution.³¹

Relevant considerations

[74] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³²

- the purposes of the *Act*, including the principles that
 - information should be available to the public

²⁹ See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

³⁰ Order MO-1573.

³¹ Section 43(2).

³² Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The town's representations

[75] The town submits that it exercised its discretion based on proper considerations. It submits that when a municipality is faced with an access to information request surrounding legal issues about which the town has been involved and the cost of legal services thereof, there are a number of competing factors, which the municipality must consider including:

1. the municipality's reasonable desire to protect documents and information subject to solicitor-client or litigation privilege;
2. the fact that the municipality must be accountable to the public regarding its expenditures; and,
3. the need to protect the personal information of individuals involved in the legal matters.

[76] The town submits that in exercising its discretion the factors it considered included: the age of the information, the purposes of the *Act*, the lack of a compelling need for the appellant to receive the information, the appellant's history as a blogger

and the historic practice of the town in relation to similar requests. It further submits that it also considered previous orders of this office which, it asserts, have consistently held that releasing the overall legal service cost creates a proper balance between these competing interests.

The appellant's representations

[77] The appellant disagrees. He submits that:

- not all parts of the invoices are privileged. Alternatively, if some parts are privileged, there is no damage that could be done. Also because of a position he holds, those providing the legal advice should have had an expectation that he would be allowed to see the records.
- the fact that the municipality must be accountable to the public regarding its expenditures was either not considered or given "far too little weight".
- in his view at least some of the information is not personal information and the town erred in categorizing the invoices as legal matters and erred in presuming the invoices were or contained personal information.
- based on his reading of *MFIPPA*, the age of the information is irrelevant to the decision.
- the purposes of the *Act* are to be considered especially that set out at section 1(a) (iii) which provides that decisions on the disclosure of information should be reviewed independently of the institution controlling the information.
- that he has a compelling need for the information which is to protect the public.
- that his history as a blogger is irrelevant to the exercise of discretion and considering his history as a blogger is an improper consideration.
- his doubt that there have been similar requests to provide a foundation for the historic practice of the town which, in any event, would not be a binding precedent.
- with respect to the reference to previous orders of this office, the town has not established that that any or all records are for "legal services".

[78] The appellant submits that the denial of access was for an improper purpose namely to "hide improper use of funds". He also submits that the following relevant considerations were missed:

- by virtue of a position he holds he should have access to the information when members of the public would not.

- the request is to determine whether public funds have been used for private purpose. He adds:

... If so this may be the tip of the iceberg. If the public trust is being systematically abused, there is a duty on my part to stop it. That is a very compelling need on my part. A relevant overriding factor which has not even been considered at all.

[79] The appellant further submits that the irrelevant considerations taken into account were his history as a blogger as well as his involvement on past legal proceedings.

The town's reply representations

[80] The town submits that in considering the request it examined the circumstances, various policy considerations, and previous decisions of this office. It submits that it determined that the appropriate level of transparency, as found by previous decisions of this office was to disclose the total amount of the invoices. As the appellant's request indicated that he was already aware of the total amounts, the town determined that no further disclosure was necessary.

Analysis and finding

[81] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.³³ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.³⁴

[82] I have some concern that the town considered the appellant's blogging practices in its exercise of discretion as many requesters are media outlets who serve a broad constituency, some of whom are now bloggers. That said, I am satisfied overall that the town was well aware of the wording and purpose of sections 1, 12 and 38(a) of the *Act* and that it properly exercised its discretion under section 38(a) in conjunction with section 12 of the *Act*. It should be noted that the Supreme Court of Canada has stressed the categorical nature of the privilege when discussing the exercise of discretion in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*³⁵.

[83] I find that there is insufficient evidence before me to establish that the town exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations or that the town was withholding the information for a

³³ Order MO-1287-I.

³⁴ Order P-58.

³⁵ 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 75.

collateral or improper purpose. Nor am I satisfied that it was biased or that it fettered its discretion in any way.

[84] With respect to other relevant considerations, I am satisfied that the town was aware of the reason for the request, why the appellant wished to obtain the information, and the appellant's arguments as to why it should disclose the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the town considered why the appellant sought access to the information, whether the appellant had a sympathetic or compelling need to receive the information, the relationship between the appellant and the town as well as the nature of the information and the extent to which it is significant and/or sensitive to the institution and the appellant. In addition, the town considered whether the appellant was an individual or an organization. The information was relatively recent, so, in my view, the age of the information was not a relevant factor. In all the circumstances and for the reasons set out above, I uphold the town's exercise of discretion.

ORDER:

I uphold the decision of the town and dismiss this appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ May 24, 2017