Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3664

Appeal MA16-37

City of Brockville

October 3, 2018

Summary: The appellant seeks access to records identifying the expenses incurred from the negotiations, conciliation and arbitration that resulted in the 2009-2010 and 2011-2012 collective agreements between the city and the Brockville Professional Fire Fighters Association. The city denied the appellant access to the records, in their entirety, claiming the application of the exclusion in section 52(3) (labour relations) of the *Act*. The city also raised the application of the discretionary exemption in section 12 (solicitor-client privilege) to four of the records. In this order, the adjudicator finds the records are not excluded from the *Act* by virtue of section 52(3). The adjudicator orders the city to issue an access decision regarding three of the records. For the remaining records, the adjudicator upholds the city's exemption claim, in part, and orders it to disclose to the appellant the information not subject to the section 12 exemption.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 52(3)2 and 3.

Orders and Investigation Reports Considered: Orders MO-2024-I, MO-2810, MO-3253-I, MO-3455, PO-2484, PO-3572 and PO-3669.

Cases Considered: *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696; *Maranda v. Richer* [2003] 3 SCR 193; *Ministry of Attorney General and Toronto Star,* 2010 ONSC 991 (CanLII); *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.).

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) to the City of Brockville (the city) for access to certain records related to the 2009-2010 and 2011-2012 Collective Agreements (the collective agreements) between the city and the Brockville Professional Fire Fighters Association (the Association). Specifically, the appellant sought access to all documents that show the expenses incurred from the negotiations, conciliation and arbitration of the collective agreements, including all reports, legal invoices and related documents.

[2] The city located a number of records responsive to the request and issued an access decision to the appellant. The city denied the appellant access to the records in their entirety, claiming they are excluded from the application of the *Act* under section 52(3) (employment or labour relations).[1] The city subsequently issued a revised access decision stating that, in addition to the exclusion in section 52(3), it claimed the application of the discretionary exemption in section 12 (solicitor-client privilege) to some of the records.

[3] The appellant appealed the city's decision to this office.

[4] The parties attempted mediation but did not resolve the issues in the appeal. The appeal was then moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator originally assigned to the appeal began the inquiry by inviting the city to submit representations. The city submitted representations. The adjudicator then invited the appellant to submit representations in response to the city's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[5] In his representations, the appellant confirmed he would narrow the scope of his request to "only final dollar figures and a date for each record in their list. Alternatively, [the appellant] would also accept documents that have a final dollar figure for each set of years, 2009-2010 and 2011-2012." The appellant's narrowed request was presented to the city. The city maintained its position that this information is excluded from the scope of the *Act*. I note the IPC considers the application of an exclusion to records in their entirety.[2] As such, I will consider whether each record is excluded from the scope of the *Act* in its entirety, below.

[6] The appeal was then transferred to me to continue the adjudication of the appeal.

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[1] The city's decision letter states that it relies on section 53. However, the Index of Records identified section 52(3) as the basis for the city's denial of access.

[2] From Order PO-3572: "This office has consistently taken the position that the exclusions at [the provincial equivalent to section 52(3) of the Act] are record-specific and fact-specific. This means that in order to qualify for an exclusion, the record is examined as a whole." See also Orders M-797, P-1575, PO-2531, PO-2632, MO-1218 and PO-3456-I.

[7] Upon review of the records, I decided to notify four affected parties of the request and responsive records. One affected party (who I will identify as the affected party) submitted representations in response to a Supplementary Notice of Inquiry on the issues in this appeal.

[8] In the discussion that follows, I find section 52(3) does not apply to exclude the records from the scope of the *Act*. I order the city to issue an access decision to the appellant regarding Records 1, 2 and 7. Given the narrowed scope of the appellant's request, I consider only whether the dates and final dollar figures contained in Record 6 are exempt from disclosure. I uphold the city's section 12 claim to the dates in the invoices in Record 6, but find that section 12 does not apply to the final dollar figures. Finally, I find that section 12 does not apply to Records 3, 4 and 5. I order the city to disclose Records 3, 4, 5 and the final dollar figures in Record 6 to the appellant.

RECORDS:

[9] There are seven records at issue. The city described them in the index as follows:

1. Computer generated extract from the city's account records: Vendor Transaction Inquiry for "negotiation expenses" (2 pages)
2. Allocation Sheet Petty Cash or Mastercard – Human Resources Department (2 pages)
3. Correspondence from law firm for Arbitrator (5 pages)
4. Statement of Account from Arbitrator (1 page)
5. Invoices from Arbitrator (4 pages)
6. Invoices from law firm retained by city (26 pages)
7. Invoices from labour relations consultant (4 pages)

ISSUES

A. Are the records excluded from the *Act* under section 52(3)?

B. Does the discretionary exemption at section 12 apply to Records 3 to 6?

DISCUSSION:

Issue A: Are the records excluded from the *Act* under section 52(3)?

[10] The city claims that sections 52(3)2 and/or 52(3)3 apply to exclude the records

from the scope of the *Act*. Section 52(3) states, in part,

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution, bargaining agent or party to a proceeding or an anticipated proceeding.
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

If section 52(3) applies to the record and none of the exceptions in section 52(4) applies, the record is excluded from the scope of the *Act*.

[11] For the collection, preparation, maintenance or use of a record to be *in relation to* the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is *some connection* between them.

[12] The term *labour relations* refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation or to analogous relationships. The meaning of *labour relations* is not restricted to employer-employee relations.[3]

[13] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[14] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as a employer, and terms and conditions of employment or human resources questions are at issue.

Section 52(3)2

[15] For section 52(3)2 to apply, the city must establish the following:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

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[3] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] OJ No. 4123 (CA). See also Order PO-2157.

[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 OR (3d) 355 (CA), leave to appeal refused [2001] SCCA No. 507.

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.[5]

[16] The city submits the records were collected, prepared, maintained and/or used by it in accordance with part 1 of the test under section 52(3)2. The city states that it prepared, maintained and used Records 1 and 2, which it describes as *account records*. Similarly, the city states that it collected, maintained and used Records 3 to 7 which are correspondence from law firms and invoices from arbitrators, law firms and a labour relations consultant.

[17] With regard to the second part of the test, the city refers to M*inistry of Attorney General and Toronto Star*[6], in which the Ontario Divisional Court defined *relating to* in section 65(5.2) (ongoing prosecution) of the provincial *Act* as requiring *some connection* between the records and the subject matter of that exclusion. In that case, the Divisional Court overturned this office's finding that a *substantial* connection is required for the exclusion to apply. The city submits the IPC subsequently adopted this definition for the words *in relation to* in section 52(3)[7]. The city submits there is a connection between the records at issue and "negotiations… relating to labour relations." Specifically, the city submits the records relate to the negotiations and arbitration between the city and the Association about the collective agreements that took place between 2009 and 2012.

[18] The city refers to Order MO-2810, in which a requester sought access to the total legal fees paid to legal counsel in relation to the contract negotiations and arbitration between the Windsor Police Services Board and a named bargaining agent. The City of Windsor denied the requester access to the information claiming it was excluded under section 52(3)2 of the *Act*. The adjudicator found that section 52(3)2 applied to exclude the information at issue, finding as follows:

> … I am satisfied that the record was created as a result of the city retaining counsel to assist in labour relations negotiations. On this basis, and in view of the above-noted case law[8], I conclude that the record bears "some connection" to labour relations negotiations. Consequently, I find that the record meets the second requirement for the application of section 52(3)2 of the *Act*.

[5] Orders M-861 and PO-1648.
[6] 2010 ONSC 991 (CanLII) (Div. Ct.). (*Toronto Star*)
[7] See Order MO-2810.
[8] The adjudicator considered *Toronto Star*, *supra* note 6.

> I find that the third requirement for application of section [52(3)2] is met, as there is no dispute that the city and the appellant engaged in collective bargaining negotiations and subsequent arbitration.

Adopting this analysis, the city submits the records at issue are excluded under section 52(3)2 of the *Act*. The city submits the records were created as a result of the city retaining counsel and a labour relations consultant to assist in labour relations negotiations and arbitration.

[19] The appellant submits the records are not subject to the exclusion in section 52(3). The appellant claims the city adopted a far too broad interpretation of the term *in relation to* in part two of the test. The appellant refers to Order MO-2024-I, in which the adjudicator considered the application of the exclusion to the "total amount paid" to a law firm on a two page document containing the payments made to a former employee of the City of Toronto on a series of dates. The adjudicator found the information at issue was not subject to section 52(3)2 because it appeared to be extracts from the city's accounting records, which were created and maintained for accounting reasons unrelated to the labour relations or employment-related proceedings.[9] The adjudicator found that payments to a law firm, and particularly the total amounts paid, is too remote to qualify as being *in relation to* the negotiations.

[20] The affected party submits the records at issue are excluded from the scope of the *Act* pursuant to section 52(3)2. The affected party submits the records were collected, maintained and prepared by the city. The affected party also submits the records were collected, prepared, maintained and used directly as a result of the negotiations relating to the labour relations issues between the city and the Association. Referring to Order MO-2810, the affected party submits the records at issue have *some connection* to the negotiations between the city and the Association. Finally, the affected party submits there is "no dispute" the records relate to the fees associated with the collective bargaining negotiations that took place between the city and the Association.

Analysis and Findings

[21] As stated above, section 52(3)2 applies to records collected, prepared, maintained or used by the institution *in relation to* negotiations or anticipated negotiations relating to labour relations between the institution and bargaining agents.

[22] In this appeal, I find the records were collected, prepared, maintained or used by the city. Records 1 and 2 are financial records the city prepared, maintained and used. The remainder of the records, specifically correspondence and invoices from arbitrators, law firms and a labour relations consultant, were collected, maintained and used by the city. Therefore, I find the city established the first of the three requirements for the application of the section 52(3)2 exclusion.

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[9] Order MO-2024-I, page 4.

[23] I also find the third requirement for the application of section 52(3)2 is met. There is no dispute the city and the Association engaged in collective bargaining negotiations and arbitration.

[24] However, I am not satisfied the second of the three requirements for the application of the section 52(3)2 exclusion has been met. For the second requirement to be satisfied, I must find there is *some connection* between the collection, maintenance, preparation and use of the records and the negotiations or anticipated negotiations related to labour relations. The records at issue relate to the costs incurred by the city in preparation for and during the negotiations and arbitration with the Association. Based on the evidence before me, I do not accept the city established there is *some connection* between the collection, maintenance, preparation and use of the expense records at issue and the negotiations or anticipated negotiations.

[25] In making this finding, I rely on *Ontario (Ministry of Correctional Services) v. Goodis*[10] in which the Divisional Court considered the purpose and scope of the provincial equivalent to section 52(3). At paragraph 31, Swinton J. wrote,

> In *Reynolds v. Ontario (Information and Privacy Commissioner),* [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.)*,* this court applied [section 52(3)] to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was [page 468] an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Swinton J. also noted that whether or not a particular record is *employment*-related would depend on an examination of the particular record.[11]

[26] As described in the *Records* section above, the records at issue are expense reports, invoices or statements produced as a result of the negotiations between the city and the Association. In my view, the accounting records at issue do not relate to the *relations* between the city and its workforce. The expenses incurred by the city in relation to the negotiations and arbitration that took place between itself and the Association are only tangentially related to the negotiations and arbitration themselves. Based on my review of the records, I find the city created, maintained, prepared or used Records 1 and 2 to track its expenses. In fact, the city called Records 1 and 2

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[10] *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[11] *Ibid.* at para. 29.

account records in its representations. Similarly, Records 3 to 7 were collected, used or maintained by the city for accounting purposes as they consist of statements of accounts or invoices prepared by arbitrators or legal counsel to charge the city for services rendered. It does not appear that these records have *some connection* or relate to the negotiations or anticipated negotiations themselves, other than in a tangential way. In light of the purpose of the exclusion to protect "records relating to" an institution's relations with their own work force, I am not satisfied the collection, preparation, maintenance or use of the accounting or expense records at issue can be considered to have *some connection* to the labour relations negotiations between the city and the Association for the purpose of section 52(3)2 of the *Act*.

[27] As noted by the Divisional Court in *Reynolds*[12], the purpose of section 52(3)2 is to protect the interests of institutions by removing the public right of access to certain records relating to institutions' relations with their own workforces. In my view, the records at issue relate not to the city's relations with its workforce but to expenses arising out of those relations. I find that these are not the types of records that section 52(3)2 is intended to exclude from the *Act*.

[28] My interpretation is also in keeping with the objects of the *Act*. In my view, including the records at issue in the scope of the section 52(3)2 exclusion would stretch the ambit of that provision beyond what was intended by the legislature. In *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*[13], the Ontario Divisional Court considered the application of the research exclusion in section 65(8.1)(a) of the provincial *Act* and stated as follows:

> Section 1 of the *Act* provides that:
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> > The purpose of the Act is to provide a right of access to information under the control of institutions in accordance with the principles that (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of government information should be reviewed independently of government.
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> Exceptions to disclosure for research are therefore to be narrowly construed. The Legislature did not intend to create an exclusion from the *Act* whose reach would be broader than necessary to accomplish these objectives.[14]

The principles in *Carleton University* regarding the research exclusion are equally applicable to the exclusion in section 52(3)2. In a similar fashion, I find the reach of

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[12] *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.). (*Reynolds*)
[13] 2018 ONSC 3696. (*Carleton University*)
[14] *Ibid.*, at para 29.

section 52(3)2 should not be broader than necessary to accomplish the goals of protecting information relating to the relations between an institution and its workforce. Based on my review of the accounting records at issue as well as the purposes of the *Act* and section 52(3) in particular, I find that these records are not captured within the exclusion.

[29] Furthermore, the records at issue relate to the expenditure of public funds to negotiate collective agreements. In my view, this type of information has a strong connection to government accountability, which the Supreme Court of Canada has referred to as an overarching purpose of access legislation.[15] Accountability for expenditures of public funds requires that records of the type at issue in this appeal be subject to the *Act*.[16]

[30] I find further support for my analysis in Order PO-3572, in which the adjudicator considered the application of the provincial equivalent of section 52(3) to spreadsheets containing the full expense budgets for the University of Ottawa for the 2012/2013 and 2013/2014 budget years. In her analysis, the adjudicator considered whether the "collection, preparation, maintenance or use of the record *as a whole* is sufficiently connected to an excluded purpose."[17] The adjudicator also considered the application of *Toronto Star* and the *some connection* principle it articulated. The adjudicator found,

> This office has held that even where a record is collected, prepared, maintained or used for a non-excluded purpose, it may still qualify for exclusion where there exists the required degree of connection to an excluded purpose – as, for example, when a record originally created for a non-excluded purpose is later used or maintained for an excluded purpose.[18] This office has also recognized that where there are multiple purposes for a record's collection, preparation, maintenance or use, the question of whether the excluded purpose is a predominant or primary purpose is relevant.[19]
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> These orders do not assist the university, however, because in each of these cases, the question remains whether the collection, preparation, maintenance or use of the record as a whole is sufficiently connected to an excluded purpose. Where there are multiple purposes for the collection, preparation, maintenance or use of a record, this office has considered whether the record, as a whole, is collected, prepared, maintained or used primarily for an excluded purpose, or primarily for other, non-excluded purposes.

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[15] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61.
[16] See *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139 at para. 44.
[17] Order PO-3572 at para. 39.
[18] Orders PO-2105-F, M-1107, MO-1654-I, MO-2428 and others.
[19] Orders MO-1654-I, MO-2332, PO-3549 and others.

> … Before *Toronto Star*, this office applied a more stringent test of connection between a record's collection, preparation, maintenance or use and an excluded subject matter; the superseded test was still applied to the record as a whole. As is evident in the orders before and after *Toronto Star*, this office examines the degree of connection between an excluded subject matter and the collection, preparation, maintenance or use of the record as a whole. The exclusions do not apply where only part of a record is connected in this way. [emphasis in original]

The adjudicator reviewed the spreadsheets before her and considered whether the collection, preparation, maintenance or use of each record, as a whole, has some connection to labour relations negotiations. She found that it did not and concluded that the records were not excluded pursuant to the provincial equivalent to section 52(3)2.

[31] I adopt this analysis for the purposes of this order. The city submits there is a "real connection" between the records and the labour relations negotiations. The city also submits that the records were created "as a result of the city retaining counsel and a labour relations consultant to assist in labour relations negotiations and arbitration." However, based on my review of the records, I find that the city collected, prepared, maintained or used them to manage its accounts or expenses rather than in relation to labour relations negotiations. Given the nature of the records, I find that section 52(3)2 does not apply to exclude them from the scope of the *Act*.

[32] I recognize that the city and the affected party rely on Order MO-2810 to support their claim that the records are excluded from the scope of the *Act*. In Order MO-2810, the adjudicator found that the total cost of legal fees for assistance in labour relations negotiations is excluded under section 52(3)2. The adjudicator was satisfied the information was created as a "result of the city retaining counsel to assist in labour relations negotiations." On this basis, and in view of *Toronto Star*, the adjudicator concluded the record at issue bears *some connection* to labour relations negotiations. The city and the affected party submit I should apply the rationale in Order MO-2810 in this appeal due to the similarity in circumstances.

[33] The extent to which this office is bound to follow past orders was recently considered in Order PO-3669. In that order, the adjudicator considered Legal Aid Ontario's argument that she was required to follow IPC's precedent in her analysis. The adjudicator stated as follows:

> At its core, the decision to maintain the *status quo* is based on the notion that consistency in decision-making promotes predictability and supports the rule of law. Without doubt, such consistency is an important factor in building and maintaining public confidence in the integrity of the administrative justice system, of which this office is a part. It is also true that past decisions frequently offer useful guidance by illustrating legal principles that assist in achieving consistent and predictable results for administering and apply [the provincial *Act*]. The common law doctrine that decisions should be guided by precedent is known as *stare decisis*.

> However, as the appellant correctly points out, I am not bound by *stare decisis* and may depart from earlier interpretations of the same provision, particularly when doing so is required, for example, to clarify its meaning.[20]

The adjudicator in Order PO-3669 emphasized that *stare decisis* is not a "straightjacket" and interpreted the legislation before her and distinguished the orders relied upon by LAO.

[34] I adopt the principles in Order PO-3669 regarding *stare decisis* for the purpose of this analysis. Based on my review of the records at issue, I decline to follow the approach in Order MO-2810. The records before me relate to various expenses and fees that resulted from the negotiations. As discussed above, I find the city collected, prepared, maintained or used them for the purposes of tracking its expenses and accounts, rather than in relation to labour relations negotiations. Upon review of the records as a whole, the purposes of the *Act* and section 52(3), I find that section 52(3)2 has no application to the records.

[35] I note the appellant relies on the findings in Order MO-2024-I, in which the adjudicator interpreted the phrase *in relation to* as requiring a *substantive connection*. I decline to rely on Order MO-2024-I. As discussed above, the IPC follows the judicial interpretation in *Toronto Star* to analogous phrases (*in relation to*, *relates to*) appearing in section 52(3) of the *Act* and the equivalent sections in the provincial *Act*.[21] On this basis, the IPC has held that for the collection, preparation, maintenance or use of a record to be *in relation to* the subjections mentioned in the paragraphs listed under section 52(3), it must be reasonable to conclude that there is *some connection* between them. I confirm that the *substantial connection* test is not good law in light of *Toronto Star*. In this case, however, for the reasons set out above, I find that there is not *some connection* between the collection, use, preparation and maintenance of the records at issue and the labour relations negotiations.

[36] In conclusion, I find that section 52(3)2 has no application to the records.

Section 52(3)3

[37] For section 52(3)3 to apply, the city must establish:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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[20] Order PO-2976, citing *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 DLR (2nd) 482 (OCA); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 DLR (3d) 388 (Man. CA).
[21] See Orders MO-2537, MO-2589 and MO-3088, which apply the interpretation in *Toronto Star*.

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The phrase "in which the institution has an interest" means more than a *mere curiosity or concern*, and refers to matters involving the institution's own workforce.[22]

[38] The city submits it collected, prepared, maintained or used the records. The city refers to its arguments regarding *Toronto Star* in relation to section 52(3)2 and submits that there is *some connection* between the records and the meetings, consultations, discussions or communications about labour relations. The city submits the records arise from meetings, discussions and/or communications between the city, the Association and arbitrators about the collective agreements. Similarly, the city submits some of the records arise from meetings, consultations, discussions and/or communications with the city's lawyers and labour relations consultant. Finally, the city submits it has a direct interest in these meetings, consultations, discussions and communications about the negotiations and arbitration between the city and the Association.

[39] The appellant made one set of submissions to address the city's application of sections 52(3)2 and 3. I will not reproduce them again here.

[40] As stated above, I am satisfied the city collected, prepared, maintained or used the records. Accordingly, part one of the three part test for the application of section 52(3)3 is met.

[41] I am also satisfied the meetings, discussions, consultations and communications are about labour relations matters between the city and the Association and that the city has an interest in these labour relations matters. Therefore, part three of the three part test for the application of section 52(3)3 is met.

[42] However, I am not satisfied the second of the three requirements for the application of the section 52(3)3 exclusion is met. For the second requirement to be satisfied, I must find there is *some connection* between the collection, preparation, maintenance or usage of the records and the meetings, consultations, discussions or communications. For reasons similar to those in my discussion of section 52(3)2 above, I find the records were collected, maintained, prepared or used by the city for accounting purposes. I find the records, given the purpose of their use, maintenance, collection or preparation and in light of the purposes of the *Act* and the labour relations exclusion, do not have *some connection* to the labour relations meetings, discussions, consultations and communications themselves. As discussed above, I am not satisfied the records relate to the *relations* between the city and its workforce or the Association. The records were created, maintained, prepared or used for accounting purposes and are only tangentially connected to those meetings, discussions, consultations or communications. Therefore, I find the second part of the three part test for the application of section 52(3)3 is not satisfied and section 52(3)3 has no application to

[22] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra* note 4.

the records.

[43] In conclusion, I find the exclusion in section 52(3) does not apply to the records. As they are subject to the right of access in the *Act*, I will consider the city's exemption claims made for Records 3 to 6 below.

[44] It does not appear the city made an exemption claim in respect of Records 1, 2 and 7. Therefore, I will order the city to issue an access decision to the appellant regarding these records.

Issue B: Does the discretionary exemption at section 12 apply to Records 3 to 6?

[45] As an alternative to its section 52(3) claim, the city submits that Records 3, 4, 5 and 6 are exempt under section 12 of the *Act*. Section 12 states,

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

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. In this appeal, the city submits that Branch 1 applies to Records 3 to 6.

[46] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege. The city and the affected party claim the application of the solicitor-client communication privilege.

[47] 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 providing professional legal advice.[23] The rationale for this privilege is to ensure a client feels free to confide in his or her lawyer on a legal matter.[24] 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.[25] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[26]

[48] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate the communication was made in confidence, either

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[23] *Descôteaux v. Mierzwinski* [1982] 1 SCR 860, 1982 CanLII 22 (SCC).
[24] Orders PO-2441, MO-2166 and MO-1925.
[25] *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng. C.A.).
[26] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C. R. 27.

expressly or by implication.[27]

The Parties' Representations

[49] The city submits that Records 3 to 6 are subject to solicitor-client communication privilege and are exempt under section 12. The city refers to *Maranda v. Richer*[28] in which the Supreme Court of Canada held that legal billing information, including legal fees, is presumptively privileged unless it is neutral. The city submits the information in the legal correspondence and accounts is not neutral. Rather, the city submits that Records 3 to 6 are directly related to the seeking, formulating and providing of legal advice or assistance to the city by their legal counsel. Therefore, the city submits these records are protected by the privilege in Branch 1.

[50] The city also notes the appellant is familiar with the background labour relations referred to in the records. As such, the city submits the appellant is an assiduous requester and could deduce the privileged communications from the records.

[51] In his representations, the appellant disagrees with the city's position that Records 3 to 6 are exempt under section 12. The appellant also narrowed the scope of his request to "only final dollar figures and a date for each record in [the city's] list". In the alternative, the appellant stated the city could provide him with "documents that have a final dollar figure" for 2009-2010 and 2011-2012. The appellant states he seeks only the final dollar figures for the fees identified in each record. The appellant submits no privileged communications can be deduced from the final dollar figures for these negotiations.

[52] The appellant's proposal to narrow his request was shared with the city. However, the city maintained that the records are excluded from the scope of the *Act*.

[53] The affected party submits the records at issue "all relate to the invoicing of the City by legal counsel." The affected party submits these invoices relate to legal services provided by legal counsel in relation to the negotiation of the agreements. The affected party notes the records include "detailed docketing information about the advice sought, the type of advice given, whom at the City legal counsel spoke with or met with and who the City engaged with as legal counsel." The affected party submits the billing information is not *neutral* and includes detailed privileged information. Therefore, the affected party submits the billing information is privileged and exempt from disclosure under section 12 of the *Act*

Analysis and Findings

[54] I reviewed Records 3 to 6. I find none of these records appear to contain the information the appellant seeks, that is, the final dollar figures for the fees incurred during the collective agreement negotiations. Rather, the records consist of various

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[27] *General Accident Assurance Co. v. Chrusz* (1999) 45 OR (3d) 321 (CA); Order MO-2936.
[28] [2003] 3 SCR 193. (*Maranda*)

statements of accounts or extracts of various invoices. The records, on their own, do not provide the global dollar figure spent by the city on the collective agreement negotiations. While the appellant's request to narrow the scope was shared with the city, the city did not agree to provide him with the final dollar figures for the fees incurred from the collective agreement negotiations.

[55] In these circumstances, I will consider whether the exemption in section 12 applies to Records 3 to 5 as a whole. With regard to Record 6, because the appellant asked for the final dollar figures and the corresponding dates only, I find the information that does not pertain to the total dollar amounts or the dates is not responsive to his request. I therefore find that the invoice numbers, firm names, individual lawyers' names, descriptions of the services provided, file numbers and lawyers' hourly rates, are non-responsive. I also note there appear to be a number of entries unrelated to the collective agreement negotiations. I find these portions are also non-responsive to the appellant's request. In other words, I will only consider whether the city is entitled to withhold the dates, the "Amount for this Matter" or the "Total Amounts" in Record 6 from disclosure.

[56] The information that remains at issue, therefore, consists of the following:

- Correspondence from a law firm with an arbitrator's statements of accounts (Record 3)
- Statement of account from an arbitrator (Record 4)
- Invoices from an arbitrator (Record 5)
- The dates, "Total Amount" or the "Amount for this Matter" of Invoices from law firm retained by the city (Record 6)

[57] The information contained in Record 6 is clearly legal billing information. Record 6 consists of extracts from a number of legal invoices. These extracts relate to the negotiations between the city and the Association. Record 6 contains narrative entries that include the date, description of the services provided, the associated fees and disbursements and the total fee for each entry. Given the narrowed scope of the appellant's request, I will consider only whether the portions corresponding to the "Total Amount" or the "Amount for this Matter" and the dates are exempt from disclosure under section 12.

[58] In Order MO-3455, the adjudicator considered whether legal billing information is exempt under section 12 and stated,

> … [The] Supreme Court of Canada's decision in *Maranda v. Richer*,[29] specifically found that information in legal invoices is presumptively privileged and, therefore, qualifies for exemption unless it can be

[29] *Maranda*, *supra* note 30.

> 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 adopt this analysis for the purpose of this appeal. Based on my review, I find the total dollar amounts in Record 6 are not exempt under section 12 of the *Act*. In Order PO-2484, the adjudicator considered whether the total dollar figure in nine separate legal invoices, with all other information severed, qualified for exemption under the provincial equivalent to section 12 of the *Act*. Applying *Maranda*, the adjudicator found the total dollar figure in each of the invoices was *neutral information* that ought to be disclosed, but that the other information in the invoices, including the dates of the invoices was exempt under the solicitor-client privilege exemption in the provincial *Act*. The Divisional Court upheld the findings in Order PO-2484[30] and the analysis in Order PO-2484 has been adopted by the IPC in a number of subsequent decisions.[31]

[59] Applying the principles in *Maranda* and Order PO-2484, I find the presumption of privilege is rebutted with respect to the dollar amounts associated with "Total Amount" or "Amount for this Matter" in Record 6. From my examination of these amounts and in the absence of representations from the city on them, I find that disclosing them would not reveal any solicitor-client privileged information. In my view, it is not possible for an individual to glean what communications or advice was passed between the city and its legal counsel relating to the labour relations issues if these amounts are disclosed. The appellant confirmed during the inquiry he only seeks access to the final dollar figures for fees incurred during the 2009-2010 and 2011-2012 collective agreement negotiations. Based on my review of the total dollar amounts in Record 6, I find there is no reasonable possibility that privileged information could be revealed. Therefore, I find that these total dollar amounts in the negotiations are neutral.

[60] I agree the appellant is an *assiduous inquirer* whose involvement must be considered. However, I am not persuaded there is any reasonable possibility that privileged information would be revealed in the circumstances of this appeal by disclosing these dollar amounts. Accordingly, I find the "Total Amount" or "Amount for this Matter" contained in Record 6 do not qualify for exemption under section 12. I will order the city to disclose these portions of Record 6 to the appellant.

[61] However, I find the dates contained in the invoices in Record 6 are exempt from disclosure under section 12. In Interim Order MO-3253-I, the adjudicator found the dates on invoices convey privileged information "since, based on the timing of events, they may lead an observer to conclude, based on dates, that legal advice was sought related to a specific issue."[32] Adopting this analysis and due to the appellant's role in the negotiations, I find the dates contained in Record 6 are exempt from disclosure

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[30] *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] OJ No. 2769 (Div. Ct.).
[31] See Orders PO-3001, MO-3253-I, MO-2885 and others.
[32] Interim Order MO-3253-I, at para 44.

under section 12 of the *Act*.

[62] Based on my review of the city's representations regarding its application of section 12, I uphold its exercise of discretion to withhold the dates contained in Record 6 from disclosure. Having regard to the circumstances of this appeal, I am satisfied the city considered relevant factors, including the nature of the information at issue in Record 6, the importance of solicitor-client privilege and the purposes of the *Act*, including the appellant's right of access, in exercising its decision. Therefore, I am satisfied the city properly exercised its discretion to apply section 12 to withhold the dates contained in Record 6 from disclosure.

[63] I find Records 3, 4 and 5 are not protected by solicitor-client privilege. Record 3 consists of correspondence from the city's legal counsel to the city enclosing an arbitrator's statement of accounts. Based on my review of the record, it does not contain any information relating to seeking, formulating or providing legal advice. Rather, the city's lawyer merely forwarded the arbitrator's statement of accounts to the city. Therefore, I find that Record 3 does not qualify for exemption under Branch 1 of section 12.

[64] Records 4 and 5 are statements of account from arbitrators that the arbitrators sent to the city's legal counsel and the Association's representative. The city confirmed that one of the recipients of Records 4 and 5 was the Association's representative. Based on my review, I find that Records 4 and 5 are not subject to solicitor-client communication privilege because the records originate from an arbitrator who served as a neutral party to the negotiations. The records do not contain any communications or legal advice between a solicitor and client. It appears from the records that both the city and the Association hired the arbitrators. Furthermore, the arbitrators sent their accounts to the two opposing parties to the negotiations and arbitrations. Therefore, even if any privileged attached to the records, it appears to have been waived. Therefore, I find that Records 4 and 5 are not exempt from disclosure under section 12 of the *Act*.

[65] In conclusion, I find that Records 3, 4, 5 and the total dollar amounts in Record 6 do not qualify for exemption under section 12 of the *Act*. I will order the city to disclose this information to the appellant. I uphold the city's application of section 12 to the dates contained in the invoices in Record 6.

ORDER:

1. I find that section 52(3) has no application to the records at issue.

2. I order the city to issue an access decision to the appellant regarding Records 1, 2 and 7, treating the date of this order as the date of the request.

3. I order the city to disclose Records 3, 4, 5 and the "Total Amount" and "Amount for this Matter" portions of Record 6 to the appellant by **November 2, 2018.**

Original signed by | October 3, 2018

Justine Wai
Adjudicator