

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3778

Appeal MA16-571

North Bay Hydro Holdings Limited

May 31, 2019

Summary: The appellant is seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the total dollar amounts in three separate invoices that a law firm submitted to North Bay Hydro Holdings Limited (NBHHL) relating to the amendment of a shareholder agreement. NBHHL denied access to this information under the mandatory exemption in section 10(1) (third party information) and the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*. In this order, the adjudicator finds that this information is not exempt from disclosure under those provisions and orders NBHHL to disclose it to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 10(1)(a) and (c) and 12.

Orders Considered: Orders PO-2484 and MO-2294.

Cases Considered: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 65615 (ON SCDC) and *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (CanLII).

OVERVIEW:

[1] The issues to be resolved in this appeal are whether the total dollar amounts in three separate invoices that a law firm submitted to North Bay Hydro Holdings Limited (NBHHL) for professional services rendered are exempt from disclosure under the mandatory exemption in section 10(1) (third party information) and/or the discretionary exemption in section 12 (solicitor-client privilege) of the *Municipal Freedom of*

Information and Protection of Privacy Act (the Act).

[2] The appellant had submitted an access request under the *Act* to North Bay Hydro Distribution Limited (NBHDL) for the following records:

. . . invoices pertaining to any legal or other costs incurred by the [NBHHL] regarding the amendment of its Shareholder agreement.

[3] NBHDL forwarded the appellant's access request to NBHHL, which located a number of records, including cover letters and invoices from the law firm.

[4] NBHHL notified the law firm about the access request under section 21(1) of the *Act* and invited it to provide its views as to whether the records should be disclosed to the appellant. The law firm submitted representations to NBHHL which stated that it did not consent to the records being disclosed to the appellant.

[5] NBHHL then sent a decision letter to the appellant that stated it was denying him access to the records because the law firm did not consent to their disclosure on the basis that some records (the cover letters to the legal invoices) are not responsive to his access request and the other records (the legal invoices) are exempt from disclosure under sections 10(1) and 12 of the *Act*.

[6] The appellant appealed NBHHL's decision to deny him access to these records to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[7] During mediation, the appellant stated that he was not pursuing access to the records deemed not responsive by NBHHL (the cover letters). Accordingly, these records are no longer at issue in the appeal. In addition, he narrowed his access request to only the total dollar amounts in each of the three legal invoices. As a result, the remainder of the information within these invoices is no longer at issue in the appeal.

[8] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The assigned adjudicator solicited and received representations from the parties. This appeal was then transferred to me to complete the inquiry.

[9] In this order, I find that the total dollar amounts in each of the three legal invoices are not exempt from disclosure under sections 10(1) or 12 of the *Act*. Consequently, I order NBHHL to disclose this information to the appellant.

RECORDS:

[10] The only information at issue in this appeal is the total dollar amounts in each of the three legal invoices.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the information at issue?
- B. Does the discretionary exemption at section 12 apply to the information at issue?

DISCUSSION:

THIRD PARTY INFORMATION

A. Does the mandatory exemption at section 10(1) apply to the information at issue?

[11] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[12] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

parties that could be exploited by a competitor in the marketplace.²

[13] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[14] For the reasons that follow, I find that the total dollar amounts in each of the three legal invoices are not exempt from disclosure under section 10(1) of the *Act*.

[15] In this appeal, the law firm is the third party that is resisting disclosure of the information at issue.³ In its representations, the law firm focuses largely on part 3 of the section 10(1) test. Before proceeding to that part of the test, I will briefly address whether the first two parts are met.

[16] With respect to part 1 of the section 10(1) test, “financial information” refers to information relating to money and its use or distribution and must contain or refer to specific data.⁴ Based on that definition, I am satisfied that the total dollar amounts in each of the three legal invoices constitute “financial information.” As result, part 1 of section 10(1) test is met.

[17] For part 2 of the test, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.⁵ Given that confidentiality is an essential component of the relationship between solicitor and client, I am satisfied that the law firm had a reasonable expectation of confidentiality that was implicit when it supplied the information in the invoices to NBHHL. As result, part 2 of section 10(1) test is met.

[18] With respect to part 3 of the test, the parties resisting disclosure must establish a

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ NBHHL did not provide any representations on whether section 10(1) applies to the information at issue.

⁴ Order PO-2010.

⁵ Order PO-2020.

risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.⁶ Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁷

[19] The law firm appears to be relying on sections 10(1)(a) and (c) of the *Act*, which would require NBHHL to refuse to disclose the total dollar amounts in each invoice to the appellant if doing so could reasonably be expected to prejudice significantly the law firm's competitive position or result in an undue loss to the firm or an undue gain to others. In particular, it submits that "disclosure of invoices for our legal services would prejudice our competitive position, result in undue loss to [us] and in many cases our clients, and result in undue gain to our competitors and other third parties through the suggestion that [we do] not assiduously protect solicitor-client privilege despite its importance, recognized in the presumption of privilege in regard to legal fees established by the Supreme Court in *Maranda*."

[20] The appellant submits that the law firm has not met the burden of showing that disclosing the total dollar amounts in each invoice to him could reasonably be expected to lead to a risk of harm under section 10(1) that is well beyond the merely speculative or possible and that overrides the need for accountability in the expenditure of public funds.

[21] I have considered the evidence provided by the parties and do not find the law firm's submissions to be persuasive for two reasons. First, the law firm's representations refer to the "disclosure of invoices for our legal services," which appears to be a reference to the entirety of the information in these records. However, the only information at issue from each of the three legal invoices is the total dollar amounts. None of the other information in these invoices, such as the breakdown of the professional services rendered or the dates of the invoices, is subject to disclosure.

[22] Second, the law firm appears to be arguing that the harms in sections 10(1)(a) and (c) could reasonably be expected to occur because disclosing the information in the legal invoices would suggest to others that the firm does not "assiduously protect solicitor-client privilege," particularly with respect to legal fees. However, under Issue B below, I find that the narrow and specific information at issue in this appeal is not subject to solicitor-client privilege under section 12 of the *Act* because it does not directly or indirectly reveal privileged communications between NBHHL and the law

⁶ *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

firm.

[23] In these circumstances, I find that it is simply not credible that disclosing the total dollar amounts in each of the three legal invoices could reasonably be expected to prejudice significantly the law firm's competitive position under section 10(1)(a) or result in an undue loss to the firm or an undue gain to others under section 10(1)(c). I find, therefore, that the law firm has failed to meet the requirements of part 3 of the section 10(1) test.

[24] For section 10(1) to apply, the party resisting disclosure must satisfy each part of the three-part test. Given that the law firm has failed to satisfy part 3 of this test, I find that the total dollar amounts in each of the three legal invoices are not exempt from disclosure under section 10(1) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

B. Does the discretionary exemption at section 12 apply to the information at issue?

[25] Section 12 states as follows:

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.

[26] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law and encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Branch 2 ("prepared by or for counsel employed or retained by an institution . . . ") is a statutory privilege that is similar but not identical to the common-law privilege in branch 1. The institution must establish that at least one of these branches applies to the information at issue.

[27] Both NBHHL and the law firm appear to be arguing that the common-law solicitor-client communication privilege component of branch 1 of section 12 is the applicable part of that exemption that must be considered with respect to legal billing information. They have not put any evidence before me to suggest they are arguing that the common-law litigation privilege component of branch 1 or any part of the statutory privilege in branch 2 applies to the information at issue in this particular appeal.

[28] 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.⁸ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁹ 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.¹⁰

[29] The question of whether legal billing information, including legal fees, is subject to solicitor-client privilege at common law has been addressed in a number of court decisions. In *Maranda v. Richer*, the Supreme Court of Canada found that legal billing information is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.¹¹

[30] In determining whether or not the presumption has been rebutted, the following questions are 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 knowledge of privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.¹²

[31] For the reasons that follow, I find that the the total dollar amounts in each of the three legal invoices are “neutral” information and do not directly or indirectly reveal privileged communications between NBHHL and its solicitor. As a result, this information is not exempt from disclosure under section 12 of the *Act*.

[32] In its representations, NBHHL states that it will leave it up to the adjudicator to determine whether the total figures in each of the three invoices should be disclosed to the appellant. However, it cites the case of *Corporation of the City of Waterloo v. Copley and Higgins*, in which the Ontario Divisional Court upheld two IPC decisions which ordered the disclosure of the total dollar figures for legal services provided to the city.¹³ In upholding these decisions, the Court noted that:

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Orders PO-2441, MO-2166 and MO-1925.

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹¹ [2003] 3 S.C.R. 193 (*Maranda*).

¹² Order PO-2484, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2007 CanLII 65615 (ON SCDC). See also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.); *Corporation of the City of Waterloo v. Copley and Higgins*, 2010 ONSC 6522 (CanLII).

¹³ *Ibid.* The court upheld Orders MO-2481 and MO-2294.

. . . the adjudicators ordered the City to disclose total dollar figures concerning legal services with no dates relating to when the services were charged and no details of the nature of the services rendered. Furthermore, the totals did not have to be disclosed in any particular sequence.¹⁴

[33] NBHHL submits that in keeping with the court's decision, if the adjudicator decides to order that the total dollar amounts in each of the three legal invoices be disclosed to the appellant, such disclosure should not include any dates relating to when the services were charged or any details of the nature of the services rendered, and the totals do not have to be disclosed in any particular sequence.

[34] In its representations, the law firm states that there is a long history between the appellant, who is an "assiduous, vigorous seeker of information," and NBHHL. It submits that given that context, it is particularly difficult to determine the extent to which fee information, including aggregate information, is "neutral."

[35] In rebuttal, the appellant submits that the legal fees in question are "neutral" and their disclosure presents no reasonable possibility that any privileged communications would be revealed to any inquirer, assiduous or otherwise.

[36] At the outset, I would emphasize that the only information at issue in this appeal is the total dollar amounts in each of the three legal invoices. Although NBHHL has asked that other information in the invoices, such as the dates and the nature of the legal services rendered, not be disclosed, this information is not at issue in this appeal.

[37] In accordance with the Supreme Court of Canada's decision in *Maranda*, I will start with the premise that the total dollar amounts in each of the three legal invoices are presumptively privileged unless this information is "neutral" and does not directly or indirectly reveal privileged communications between NBHHL and its solicitor.

[38] Previous IPC orders have found that the total dollar amounts in legal invoices or similar records do not directly or indirectly reveal privileged communications, even if the requester is an "assiduous inquirer."¹⁵ For example, in Order PO-2484, former Senior Adjudicator John Higgins had to determine whether the total dollar figures which appeared on nine separate legal invoices (with all other information, including the dates and number of hours, severed) qualified for exemption under the provincial equivalent to section 12 of the *Act*.¹⁶ He found that the total figures in each of the nine invoices were "neutral information" and must be disclosed.

¹⁴ *Ibid.*, para 4.

¹⁵ See, for example, Orders PO-2484 and MO-2294.

¹⁶ Section 19 of the *Freedom of Information and Protection of Privacy Act*.

[39] The institution in that case sought a judicial review of Order PO-2484. In *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, the Ontario Divisional Court reviewed both Order PO-2484 and another similar order, and upheld both decisions.¹⁷ In doing so, the court stated:

The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicator . . . clearly considered that the Requesters and counsel were “assiduous” and “knowledgeable” and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the [Ministry of the Attorney General] or any other type of information that may be subject to privilege. Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation. Thus, the only information that was ordered disclosed consists of amounts with no corresponding dates or descriptive information.¹⁸

[40] In my view, although the court’s findings provide some guidance here, each case must be assessed on its own facts. In the circumstances of this appeal, I find that the appellant likely qualifies as an “assiduous inquirer” to some degree, because based on the wording of his access request, he appears to be familiar with the fact that NBHHL amended its shareholder agreement. In his representations, he also does not dispute the law firm’s claim that there is a “long history” between himself and NBHHL.

[41] In my view, however, there is no reasonable possibility that disclosing only the total dollar amounts in each of the three legal invoices to the appellant will directly or indirectly reveal any communication between NBHHL and its solicitor that is protected by the common-law privilege in section 12 of the *Act*. Although the appellant clearly has some knowledge about the amending of the shareholder agreement, I cannot see how disclosing the total dollar amounts in each of the three legal invoices could somehow enable him to deduce or otherwise acquire knowledge of privileged communications between NBHHL and its solicitor relating to that matter.

[42] As a result, I have concluded that the total dollar amounts in each of the three legal invoices are “neutral” information and the presumption that such information is privileged has been rebutted. In such circumstances, I find that this information is not subject to solicitor-client privilege under section 12 of the *Act* and must be disclosed to the appellant. In accordance with previous IPC orders and the Ontario Divisional Court’s

¹⁷ *Supra* note 12.

¹⁸ *Ibid.*, para 25.

decision in *Corporation of the City of Waterloo*,¹⁹ I find that NBHHL is not required to disclose this information in any particular sequence.

ORDER:

1. I order NBHHL to disclose the total dollar amounts in each of the three legal invoices to the appellant by July 5, 2019 but not before July 1, 2019.
2. To verify NBHHL's compliance with order provision 1, I reserve the right to require it to provide me with a copy of the information that it discloses to the appellant.

Original Signed By: _____
Colin Bhattacharjee
Adjudicator

_____ May 31, 2019

¹⁹ *Supra* notes 12 and 13.