

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4008-I

Appeals PA12-266, PA13-337 and PA17-152

University of Ottawa

November 25, 2019

Summary: The appellant sought access to records relating to the university's funding of a specified lawsuit. The responsive records consisted of legal invoices and a document the university created setting out the total legal fees and disbursements that appear on each separate invoice submitted to the university. Relying on the discretionary exemption in section 19(a) (solicitor-client privilege), and the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) the university denied access to the responsive records, in full. The appellant appealed the university's access decisions. In this interim order, the adjudicator upholds the university's decision to withhold all the information at issue except for the total global amount of the invoices which he finds does not qualify for exemption under sections 17(1) or 19(a) of the *Freedom of Information and Protection of Privacy Act*. He defers a determination of whether the total global amount of the invoices alone qualifies for exemption under section 21(1), until he has given the parties an opportunity to address it by way of further representations.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, as amended, sections 17(1), 19(a) and 23.

Orders Considered: PO-1922, PO-1952, PO-2483, PO-2548 and PO-3154.

Cases Considered: *Maranda v. Richer*, 2003 SCC 67; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2007 CanLII 65615 (ON SCDC); *Township of Langley Records, Re*, 2000 CanLII 14390 (BC IPC); *Certain Employees of Starbucks Corporation v Starbucks Corporation*, 2002 CanLII 52794 (BC LRB), *Certain Employees of Starbucks Corporation v Starbucks Corporation*, 2003 CanLII 62637 (BC LRB).

OVERVIEW:

[1] This order addresses three appeals arising out of three access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*).

[2] The University of Ottawa (the university) initially received a request under the *Act* for access to records related to the university's funding of a specified defamation action brought by one of its employees (the current employee or affected individual) against a former employee. In particular, the request was for access to:

All financial records (such as [a named law firm's] invoices) about the university's funding of the [current employee] vs. [former employee] defamation lawsuit. I expect these records to be in the appropriate finance department or service that would be implicated in a university's funding of litigation using an external law firm.

[3] The appellant's request stated that "[m]y main interest is ascertaining how much money has been spent or committed in this litigation."

[4] In the course of the defamation action, the former employee brought an unsuccessful champerty motion to stay or dismiss the action on the basis of his allegation that the action was improperly financed by the university using public money.

[5] The university located records responsive to the request and subsequently issued a decision relying on the discretionary exemption at section 19(a) (solicitor-client privilege) and the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to deny access to the responsive records, in full.

[6] The appellant appealed the university's decision to this office and appeal file number PA12-266 was opened. During the mediation stage of appeal PA12-266, the appellant was told that the records at issue were law firm invoices. The appellant confirmed his interest in pursuing access to the records in their entirety and requested any records that indicated the maximum amount the university was willing to spend on the specified litigation. In response to the appellant's additional request, the university advised that no further records exist.

[7] Mediation did not resolve the issues in appeal PA12-266, and the matter was moved to the adjudication stage of the appeal process. During the inquiry into appeal PA12-266 representations were sought and received from the university, the current employee and the named law firm (the affected parties), and the appellant, and were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[8] In the meantime, this office received another appeal from the appellant arising from a decision of the university denying access to similar information but for a later time period, which was assigned appeal file number PA13-337. In particular, the

request at issue in appeal file number PA13-337, which was put on hold by the Registrar at the intake stage of the appeals process, was for access to:

A summary record of the total dollar amount of the university's expenditures on legal fees (including lawyers' fees and disbursements) in the defamation lawsuit [current employee] v. [former employee]. This summary record should contain a list of invoice dates and dollar totals for each invoice, plus a grand total of money spent. The respondent period for the first summary record is from March 13, 2012 to present.

I also request that a new summary record be created on a monthly basis, for the next two years, to provide an update regarding the amount spent in each month following filing of this request

[9] In its decision letter at issue in Appeal PA13-337, the university did not identify any additional responsive records, but wrote that the appellant was seeking the same type of information at issue in Appeal PA12-266, and that it would "wait for the IPC's decision before responding to this part of the request". With respect to the request to produce a summary record, the university took the position that "access cannot be provided as there is no such record". As appeal PA13-337 did not move past the intake stage no representations were sought or exchanged.¹

[10] Then, once all the proceedings in the defamation lawsuit had been completed, the appellant filed a third request, which covered the time period of the first two requests and was for access to:

All records about the [university's] funding of the [current employee] v. [former employee] defamation lawsuit. The respondent period is January 1, 2011 to present.

[11] The requester explained in his third request that:

My goal in this request is to determine the total dollar amount of the publicly-funded university's expenditures on legal fees (including lawyer's fees and disbursements) in the above-mentioned lawsuit. ...

Although it is expected that many of the records will be privileged, you nonetheless have a duty to create and disclose a summary record containing invoice dates and dollar amounts,

¹ In my view, as all proceedings that were the subject of the requests have been completed, all the legal invoices are at issue and both the university and the appellant made extensive submissions on the request for access to the invoices, no further representations are necessary for me to make my determinations on the issues raised in Appeal PA13-337.

... I will consider my request completed if such a summary document is provided.

[12] The university then created a new summary record containing the total legal fees and disbursements that appear on each of the 51 separate invoices submitted to the university. After receiving the position of the affected parties on disclosure, the university denied access to it. The appellant appealed the decision and the appeal was assigned appeal file number PA17-152, which was moved directly from intake to the adjudication stage, bypassing mediation. During the inquiry of appeal PA17-152, representations were sought and received from the university, the affected parties, and the appellant, and were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*.

[13] In the course of the exchange of representations in both appeals PA12-266 and PA17-152, the possible application of the public interest override at section 23 of the *Act* became an issue to be addressed in the appeals.

[14] The appeals were then all transferred to me to adjudicate them.

[15] As all three appeals share common issues, and the same parties, I have decided to address them all in this order.

[16] In this interim order, I uphold the university's decision to withhold the dates, body and particular amounts of each invoice, as well as a document the university created in Appeal PA17-152, but find that the total global amount of the invoices alone does not qualify for exemption under sections 17(1) or 19(a) of the *Act*. I have decided in all the circumstances, to defer a determination on whether the total global amount of the invoices alone qualifies for exemption under section 21(1), including whether any of the circumstances in section 21(4), such as 21(4)(a) (employee benefit) applies, until after I have sought further representations on this issue.

RECORDS:

[17] The responsive records in this appeal are the 51 invoices for legal services issued by the affected law firm as well as a document the university created in Appeal PA17-152 setting out the total legal fees and disbursements that appear on each of the 51 separate invoices submitted to the university (the new record). In making my findings in this appeal, I have considered that the four invoices at issue in Appeal PA12-266 reflect the type of information that would be contained in the other invoices pertaining to the other two appeals and which are summarized in the document created by the university in Appeal PA17-152.

ISSUES:

- A. Does the discretionary exemption at section 19(a) apply to the information at issue?
- B. Does the mandatory exemption at section 17(1) apply to the total global amount of the invoices alone?
- C. Did the university exercise its discretion under section 19(a)? If so, should this office uphold the exercise of discretion? Does the public interest override at section 23 apply?

DISCUSSION:

Preliminary matter

[18] In light of my conclusion with respect to the application of sections 17(1) and 19(a) below, there remains an outstanding issue: whether the total global amount of the invoices alone qualifies for exemption under section 21(1). Accordingly, I have decided in all the circumstances to defer a determination on whether the total global amount of the invoices alone qualifies for exemption under section 21(1), including whether any of the circumstances in section 21(4), such as 21(4)(a) (employee benefit) applies, until after I have sought further representations on this issue.

Issue A: Does the discretionary exemption at section 19(a) apply to the information at issue?

[19] In this appeal, the university and the affected parties assert that the legal invoices at issue are subject to solicitor-client privilege in their entirety. The appellant disagrees.

[20] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[21] The university and the affected parties all claim that section 19(a) applies to the information at issue.

[22] Section 19(a) encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In this appeal, the university and the affected parties rely on the first type: solicitor-client communication privilege.

Solicitor-client communication privilege

[23] 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.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ 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.⁴ The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

[24] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

Legal Billing Information

[25] Legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.⁸

Waiver

[26] 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

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³ Orders MO-1925, MO-2166 and PO-2441.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁸ *Maranda v. Richer*, 2003 SCC 67; 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; 2005 CanLII 6045 (C.A.).

- voluntarily demonstrates an intention to waive the privilege.⁹

[27] 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.¹⁰

[28] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹¹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹²

The university's representations

[29] The university asserted that there is a reasonable possibility that an assiduous inquirer, aware of the defamation litigation and other related information that is available to the public, could use the legal billing information in the invoices "to deduce or otherwise acquire communications protected by the privilege".

[30] In appeal PA17-152, the university submitted that after receiving the appellant's third request, it created a record containing the total legal fees and disbursements that appear on each separate invoice submitted to the university. It denied access to the new record.

[31] The university submitted in appeal PA17-152 that:

- the invoices are protected by solicitor-client privilege;
- financial records, and the amounts and dates of invoices, arise out of the solicitor-client relationship and what transpires in it;
- the information extracted from the invoices to create the new record remains protected under solicitor-client privilege;
- there was no loss or waiver of solicitor-client privilege by the affected individual;
- solicitor-client privilege survives the litigation¹³; and

⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹¹ J. Sopinka et al., *The Law of Evidence in Canada*; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹² *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹³ The university references *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 in support of this submission.

- the appellant was not a party to the litigation matter, but there is a reasonable possibility that he is nevertheless an assiduous inquirer given his public support of the defendant in the litigation.

[32] The university submitted in appeal PA12-266 that the risk of public disclosure of the legal billing information could impinge upon the solicitor-client relationship and the attached privilege. It adds:

... If legal billing information is supplied to the university, in the context of the university's obligation or commitment to reimburse the employee for legal fees incurred due to a loss suffered arising from the employee's performance of their employment duties, there is a reasonable possibility that such risk of public disclosure will have a perverse effect on the solicitor-client privilege when the university, not a party to the legal action, receives documents, otherwise protected by the privilege, only for payment purpose.

The representations of the affected party and the law firm

[33] In appeals PA12-266 and PA17-152 the law firm provided representations on behalf of itself and the affected individual. I collectively refer to them as the affected parties. A portion of the representations in each appeal were submitted in confidence and cannot be shared in full. Where necessary, in order to protect any confidence, I have summarized them in the decision that follows. As set out above, no representations were provided in appeal PA13-337.

[34] In appeal PA12-266, the affected parties provided extensive representations, along with attachments, to support their position.

[35] The affected parties rely on *Maranda v. Richer*¹⁴, which established that law firm invoices are subject to a rebuttable presumption of privilege, and submit that in this case the presumption has not been rebutted because the information at issue is not "neutral".

[36] The affected parties state that the issue of "neutrality" of the information, as well as the use that a requester intends to make of the information, were considered relevant factors by the Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*¹⁵ (*Ministry of the Attorney General*). The affected parties rely on the following passage from that decision:

¹⁴ 2003 SCC 67.

¹⁵ 2005 CanLII 6045 (ON CA) (*Ministry of the Attorney General*).

The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach of *Legal Services Society v. Information and Privacy Commissioner of British Columbia* 2003 BCCA 278 (CanLII), (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.¹⁶

[37] In their submissions in appeal PA17-152, they distinguish Orders PO-1922 and PO-1952 (the orders upheld in *Ministry of the Attorney General*) and assert that the legal fee information sought by the requester cannot be considered as "neutral". They assert that this concern is not speculative because the requester is an assiduous inquirer who has acute awareness and intimate knowledge of the litigation in issue.

[38] The affected parties add that in a decision in the defamation action, the trial judge found that the former employee had engaged in unreasonable conduct throughout the proceedings and in the reprehensible conduct of repeatedly publishing comments about his views on the trial process. In so doing, he continued to defame the affected individual.

[39] Pointing to the decision of the Ontario Court of Appeal dismissing the former employee's appeal of the trial decision, the affected parties further submit that the Court of Appeal referred to the trial judge's finding that the former employee had demonstrated a total disregard for the judicial process, and that his conduct both before and during the trial, made it more probable than not that he will continue to defame the current employee.

[40] The affected parties submit that:

... The disclosure of the amount of invoice dates and legal fees and disbursements is not "neutral" in that [the former employee] or one of his

¹⁶ *Ministry of the Attorney General*, at para. 12.

supporters can be expected to use the information in issue to publicly defame and ridicule [the current employee], her counsel, and the University of Ottawa.

[41] The affected parties further submit that in a ruling in the champerty motion, the judge held that the invoices were subject to both litigation privilege and solicitor-client privilege and that the former employee never appealed this ruling.

[42] The affected parties submit that despite the conclusion of all litigation in the defamation lawsuit, the former employee, or one of his supporters, continues to file access requests in a relentless attempt to obtain the current employee's privileged information.

[43] The affected parties submit that disclosure of the information will cause "serious prejudice" to the former employee and add that information that is substantively privileged must not be disclosed in a context where it will be used in a manner that will prejudice her.

[44] The affected parties added that any privilege in the invoices belongs to the affected individual and that she has not waived that privilege. They submit that the affected individual was obligated to provide the university with the invoices so that they could be paid. The affected parties take the position that the university only has possession of the legal invoices because it was reimbursing the legal fees at the request of the employee, and that the privilege is hers alone. They submit:

... The libel action in issue is a private action commenced by [the employee] as a result of [former employee's] racist defamation of her personally. The university is not a party to the libel action and was never a client of [the law firm] with respect to this action.

[45] The affected parties also rely on the following excerpt from correspondence that university counsel sent to the former employee to explain the reason why the university reimbursed the legal fees:

Indeed, the [university] is reimbursing [the current employee] for her legal fees incurred in her defamation proceeding in the courts against you. Your defamatory remarks about [the current employee] were occasioned by work which she undertook at the request of the university and in the course of her duties and responsibilities as an employee. Her efforts were not personal, but in the interests of the university. Furthermore, your outrageously racist attack upon her takes this case out of the ordinary and, in the view of the university, alone creates a moral obligation to provide support for her in defence of her reputation.

[46] They further submit that there is no evidence or indication of a deliberate choice by the affected individual to waive her solicitor-client privilege with respect to the

invoices. They rely on a 2003 decision of the British Columbia Labour Relations Board¹⁷, which they submit held that for solicitor-client privilege to be lost, the client must waive privilege deliberately and knowingly, and not inadvertently. They rely on a 2002 decision of the same Board¹⁸ to argue that financial arrangements with third parties may attract privilege where they permit inferences to be drawn as to matters between a lawyer and client, such as the details of a lawyer's bill which are central to the solicitor-client relations.

[47] The affected parties submit that:

... The details of a lawyer's invoice are central to the solicitor-client relationship. The mere fact that [the former employee] provided the invoices to the university is in no way a waiver of the solicitor-client privilege in the absence of a clearly demonstrated intention by [the former employee] to waive the privilege. At no point did [the former employee] demonstrate a clear intention to deliberately waive her solicitor-client privilege in providing the [law firm's] invoices to the university for payment.

[48] Relying on *Township of Langley Records, Re*¹⁹, the affected parties submit that the fact of providing a lawyer's invoices to a third party who pays the invoices does not constitute a waiver of the solicitor-client privilege. The affected parties submit that:

Indeed, a contrary result would lead to absurd consequences as employees would lose their solicitor-client privilege as a result of the mere fact that their employer pays for the litigation in which the employer is involved and to which the employer is not a party. Employers often pay for the expenses of employees in lawsuits arising out of circumstances related to their employment and such arrangements have been found to be fully legitimate.

The appellant's representations

[49] Like the affected parties, the appellant relies on the *Ministry of the Attorney General* decision. However, he argues that there is no reasonable possibility that disclosure of the amount of fees paid will directly or indirectly reveal any communication protected by privilege, and there is similarly no possibility that an assiduous inquirer, aware of the background information available to the public, could use the information requested concerning the amount of fees paid to deduce or

¹⁷ *Certain Employees of Starbucks Corporation v Starbucks Corporation*, 2003 CanLII 62637 (BC LRB) at para 11.

¹⁸ *Certain Employees of Starbucks Corporation v Starbucks Corporation*, 2002 CanLII 52794 (BC LRB).

¹⁹ 2000 CanLII 14390 (BC IPC).

otherwise acquire communications protected by the privilege.

[50] The appellant asserts that the *Ministry of the Attorney General* decision established that the total amount of money paid by a publicly funded institution to a law firm for legal services is not solicitor-client privileged, and that the details of counsel's work are not revealed by the total amount. Based on the finding in the *Ministry of the Attorney General* decision, the appellant submits that there is no reasonable expectation that the total amount would be kept in confidence by the publicly funded university.

[51] The appellant urges me to also follow the findings in Orders PO-1922 and PO-1952, which were the orders upheld in the *Ministry of the Attorney General* decision. He states that in those orders, the total amount spent by the Ministry of the Attorney General on legal fees stemming from the representation of an accused by an external lawyer in a criminal matter, was found not to be subject to solicitor-client privilege. He notes that the disclosure of a record containing the total amount spent (PO-1922) and a chart containing dates of legal invoices with corresponding dollar figures as well as the sum total of the amount paid (PO-1952) was upheld on appeal by both the Divisional Court and the Court of Appeal for Ontario.

[52] The appellant further relies on Orders PO-2483 and PO-2548, upheld on judicial review in Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)²⁰. He submits that, "[t]hese orders were again for the Ministry to release the total dollar amounts of its spending on legal services".

[53] The appellant adds that the new record the university created in Appeal PA17-152 is virtually identical to one of the records at issue in the *Ministry of the Attorney General* decision:

... As in the instant case, the record in [*Ministry of the Attorney General*] was a list of "a number" of dates and dollar amounts of a public institution's payment of an individuals legal fees, where the litigation spanned several years

[54] Relying on the findings at paragraph 13 of the *Ministry of the Attorney General* decision, the appellant submits that similarly, "... no communication between the plaintiff and her lawyers could possibly be deduced or gleaned from a list of dates and dollar amounts on invoices submitted to the University of Ottawa".

[55] The appellant adds:

However, if protected communications between the third party and her lawyers can be deduced or otherwise acquired (which is denied), in the

²⁰ 2007 CanLII 65615 (ON SCDC).

alternative, the appellant asks that the IPC release the total dollar amount of the 51 invoices submitted to the university, and the dates of the first and last said invoices (two dates).

[56] The appellant also takes the position that the affected individual has waived her privilege in the invoices by providing them to the university for payment. The appellant states that the university had no obligation to pay the affected individual's legal fees or to fund the defamation litigation that she commenced. He argues that in the absence of such an obligation, the affected individual's disclosure of the invoices to the university constitutes a voluntary intention to waive privilege. The appellant argues that the affected individual undoubtedly knew of the privilege in the invoices, yet voluntarily decided to submit her invoices to the university, which is not a party in the defamation litigation and which does not share a common interest with her.

[57] The appellant also argues that fairness is a key consideration in determining waiver; and in the circumstances, it would be unfair for him to be denied access to the total dollar amount of the publicly-funded institution's spending on the affected individual's legal fees as well as the dates of the invoices. The appellant adds that in the circumstances of a request for access to information under the *Act*, it would be unfair to allow the publicly-funded university to use a private individual's solicitor-client privilege "as a shield to hide the total dollar amount of its spending on the individual's legal fees in her private litigation." The appellant concludes his representations on waiver by stating that he does not object to limiting the affected individual's waiver, such that only the total dollar amounts and dates of the invoices be ordered disclosed as a result of the waiver.

Analysis and findings

Privilege in legal billing information

[58] At common law, legal billing information, including legal fees, may be subject to solicitor-client privilege. The leading authority on legal billing information is *Maranda* where the Supreme Court of Canada found such information to be presumptively privileged, which may be rebutted if the information is "neutral". The burden is not on the university or the affected parties by way of evidence or argument to establish that the presumption of privilege is not rebutted. Rather the burden resides with the appellant to show that the presumption is rebutted.

[59] As explained at paragraph 9 of the *Ministry of the Attorney General* decision, which is relied upon by both the appellant and the affected parties:

... . Assuming that *Maranda v. LeBlanc*, supra, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not

violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

[60] The Court of Appeal goes on to explain at paragraph 12 of the decision that the presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. If there is a reasonable possibility that the "assiduous inquirer", aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the appellant in this case satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.

[61] Typically, the test is expressed in the form of the following questions, which were posed in the Notices of Inquiry sent to the parties to this appeal:

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?²¹

[62] In that regard, it is not sufficient to simply state that, because previous authorities have held aggregate legal fees to be "neutral" and the presumption of privilege was rebutted in the specific circumstances of those cases, this will always be the case. For example, the *Ministry of the Attorney General* decision does not stand for the broad proposition that there is no reasonable possibility that privileged inferences can be deduced from a party's bare legal fees. Rather, at paragraph 13 of the decision, the Court of Appeal accepted that in some circumstances an assiduous inquirer may use the amount of fees paid to deduce privileged information but found no realistic possibility "in this case".

[63] The defamation action that is the subject of the appeals before me has received a fair amount of publicity and it is no secret that the university committed to reimbursing the affected individual's legal fees. The litigation was particularly contentious and protracted with multiple interlocutory motions and appeals over the course of approximately five years. The litigation has now concluded, after having

²¹ See 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 *Ministry of the Attorney General*.

wound its way in some form all the way to the Supreme Court of Canada. I am satisfied that the appellant has a great deal of knowledge of the circumstances that gave rise to the litigation and the path that it took. In my view, he qualifies as an "assiduous inquirer".

[64] I start with the request for access to the invoices in their entirety. In my view, it is clear that disclosing the invoices in their entirety would directly reveal communications protected by the privilege. The appellant's representations have not satisfied me otherwise. Accordingly, the privilege has not been rebutted with respect to this information.

[65] I also find that disclosing the date of each invoice and associated amount, or even the total sum of the invoices in combination with the first and last invoice date, could be used by an "assiduous inquirer", who is aware of background information, to deduce or otherwise acquire privileged communications. Accordingly, in the circumstances of this appeal, the privilege has not been rebutted with respect to this information.

[66] I do not make the same finding with respect to the amount representing the total sum of all the invoices, alone. In my view, this qualifies as "neutral information". This is not a request for the total amount of interim billing. The litigation has ended and the employee was successful. There is also a permanent injunction in place regarding any further defamatory action against the affected individual by the former employee. I am not convinced that there is any reasonable possibility that disclosure of the total fees paid will directly or indirectly reveal any privileged communications, even to an assiduous inquirer such as the appellant. Furthermore, disclosure of the total dollar amount of all the invoices, alone, does not, in these circumstances, give rise to any reasonable possibility that privileged information such as the nature or content of any solicitor-client communication could be revealed or deduced, even when combined with other information that may already be known by an assiduous inquirer, such as the appellant. As access to the total amount of all the invoices was never at issue in the court proceeding referenced by the affected parties in which it was held that the invoices were subject to both litigation privilege and solicitor-client privilege, I am not bound by any determinations made therein.

[67] In conclusion, I find that the appellant has not rebutted the presumption of privilege in the invoices in their entirety, or with respect to the information in the new record, or with respect to the total sum of the invoices in combination with the first and last invoice date. I will address below the appellant's argument that privilege was waived in the invoices when they were presented to the university for payment.

[68] I am therefore satisfied that the presumption of privilege is rebutted only with respect to the total amount of the sum of the invoices. The issue of waiver of privilege in this information does not arise as it is not subject to solicitor-client privilege under section 19(a) of the *Act*. That said, I will go on to consider whether this information alone is subject to section 17(1) of the *Act* under issue B.

Waiver

[69] The appellant takes the position that any privilege in the invoices was waived when they were presented to the university for payment.

[70] However, I am satisfied that a common interest existed between the affected individual and the university such that there was no waiver of the affected individual's solicitor-client privilege in the invoices.

[71] In Order PO-3154, I reviewed the jurisprudence, including orders of this office, pertaining to a determination of whether the common interest exception to waiver of privilege existed in the context of the commercial matter under consideration in that appeal. At paragraph 179 of that decision, I articulated the following test:²²

. . . the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, ... , requires the following conditions:

(a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and

(b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[72] I found above that the invoices alone, or the total sum of the invoices in combination with the date of the first and last invoice, were subject to solicitor-client privilege, thereby satisfying the first part of the test.

[73] I accept that in submitting the invoices to the university, the affected individual's intention was to have the legal fees paid and that this intention was the sole purpose for her disclosure. I also accept that turning over the invoices was required for payment. There is no evidence before me that the affected individual, being, I accept, very well aware of the existence of solicitor-client privilege in those invoices, evinced an intention to waive or voluntarily waived the privilege. The reason the university agreed to pay the affected individual's legal costs for her defamation action were set out in a letter referred to above. The alleged defamatory remarks about the affected individual were occasioned by work that she undertook at the request of the university and in the course of her duties and responsibilities as an employee of the university. Her efforts were not personal but in the interest of the university. Furthermore, the racist attack upon her created a joint interest in supporting her defence of her reputation and

²² This test was followed by Adjudicator Donald Hale in Order PO-3167 and referred to by me in Order MO-2936.

integrity and by association, that of the university.

[74] To pursue that common interest the university agreed to fund her defamation action, and the invoices were provided to the university for that purpose. I find that this common interest was sufficient to negate any waiver of the affected individual's solicitor-client privilege in the invoices when they were provided to the university for payment.

[75] In conclusion, I uphold the university's decision to apply section 19(a) to the legal invoices, with the exception of the total global amount of the invoices alone.

[76] I will now consider whether the total global amount of the invoices, alone, qualifies for exemption under section 17(1) of the *Act*.

Issue B: Does the mandatory exemption at section 17(1) apply to the total global amount of the invoices alone?

[77] Section 17(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, where 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.

[78] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.²³

²³ *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.).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²⁴

[79] For section 17(1) to apply, the institution and/or the affected parties 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 17(1) will occur.

Part 1: type of information

[80] The types of information listed in section 17(1) have been discussed in prior orders:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.²⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²⁶

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.²⁷

Part 2: supplied in confidence

Supplied

[81] The requirement that the information was “supplied” to the institution reflects

²⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

²⁵ Order PO-2010.

²⁶ Order P-1621.

²⁷ Order PO-2010.

the purpose in section 17(1) of protecting the informational assets of third parties.²⁸

[82] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.²⁹

In confidence

[83] In order to satisfy the “in confidence” component of part two, 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. This expectation must have an objective basis.³⁰

[84] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.³¹

Part 3: harms

[85] Parties resisting disclosure must establish a 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.³²

[86] 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

²⁸ Order MO-1706.

²⁹ Orders PO-2020 and PO-2043.

³⁰ Order PO-2020.

³¹ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

³² *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.

of the consequences.³³ The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.³⁴

[87] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).³⁵

The representations of the university and the affected parties

[88] The university submits that the invoices contain financial information, they were supplied in confidence and that disclosure of the information at issue could reasonably be expected to cause harm.

[89] The university submits that disclosing the information would reveal the named law firm's billing information and practices and that it would be reasonable to conclude that disclosure of the information could affect or jeopardize the law firm's relations with other clients, or result in adverse inferences about the financial information in the records.

[90] The affected parties submit that the fees charged for legal services constitute confidential commercial and financial information supplied by the affected parties to the university in confidence. They submit that disclosure of the information will result in competitive and financial harm to the law firm and will interfere with contractual and other negotiations, "in that the records reveal the confidential amounts of fees actually charged by the law firm, including discounts."

[91] The affected parties submit that the fees charged for legal services represent the buying and selling of professional services and the amount of the legal fees thereby constitutes "commercial information".

[92] In addition, the affected parties submit that the information qualifies as financial information because disclosing it would reveal the actual amounts charged by the law firm and its pricing practices. They submit that the amounts of the legal fees and disbursements were at all times treated as confidential by the affected law firm and the affected individual.

³³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

³⁴ Order PO-2435.

³⁵ Order PO-2435.

[93] The law firm submits that the disclosure of the invoices and amount of legal fees will cause competitive harm and will interfere with the law firm's contractual or other negotiations and provide confidential submissions in support of their position.

The appellant's representations

[94] The appellant argues that because the number of hours of work would not be indicated, nor any details of the work provided or the lawyer doing the work identified, disclosing the information would not allow a person familiar with the lawsuit to infer the named law firm's pricing practices. He adds that pricing practices of a large law firm cannot be inferred from a single litigation. All that would be known, he submits, is how much would be charged for the particular litigation.

[95] The appellant takes the position that the named law firm has tendered insufficient evidence to establish the section 17(1) harms alleged. He submits that the affected individual's legal costs were paid by the university without a spending limit and even if knowledge of the affected law firm's pricing practices could somehow be obtained from a list of dates and dollar amounts (which he denies), no competitor would acquire any advantage from such knowledge in an arrangement in which legal fees are paid without a spending limit.

Analysis and finding

[96] Even if I were to accept that the first two parts of the section 17(1) test are satisfied, part 3 is not. In my view, the allegations of harm are speculative, in light of the information remaining at issue. I have not been provided with sufficient evidence to establish that disclosing only the total global amount of the invoices would reveal the law firm's pricing practices, reveal the discounts charged by the law firm, jeopardize the law firm's relations with other clients or "result in adverse inferences about the financial information in the records". Simply put, the university and affected parties have failed to provide me with sufficient evidence to establish that it is reasonable to expect that disclosure of the total global amount of the invoices alone, rather than their specific details, specific amounts or dates, could result in any section 17(1) harms.

[97] I therefore find that the total global amount of the invoices alone does not qualify for exemption under section 17(1) of the *Act*.

[98] Therefore, neither section 19(a) nor section 17(1) applies to this information. However, as noted above, the university also claimed the section 21 (personal privacy) exemption. I will invite further representations on this issue, as noted below.

Issue C: Did the university exercise its discretion under section 19(a)? If so, should this office uphold the exercise of discretion? Does the public interest override at section 23 apply?

[99] I will now consider whether the university properly exercised its discretion in

withholding the information to which I have found that section 19(a) applies. The appellant also argued that it is in the public interest that the information that he seeks be disclosed, thereby raising the possible application of the public interest override at section 23 of the *Act*.

[100] Section 19 is not listed as a section being subject to the section 23 public interest override. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*³⁶, the Supreme Court of Canada held that the legislature's decision not to make documents found to be exempt under section 19 of the *Act* subject to the section 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*³⁷. Accordingly, Section 23 does not apply. However, as set out below, there is a public interest component when addressing the university's exercise of discretion under section 19(a).

[101] The section 19(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.

[102] 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.

[103] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁸ This office may not, however, substitute its own discretion for that of the institution.³⁹

[104] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁰

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

³⁶ 2010 SCC 23, [2010] 1 S.C.R. 815.

³⁷ Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

³⁸ Order MO-1573.

³⁹ Section 54(2).

⁴⁰ 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 representations

[105] The university states that in exercising its discretion it did not act in bad faith or for an improper purpose. It submits that it considered the purposes of the *Act*, that the appellant is not seeking his own personal information and that in its view he does not have a sympathetic or compelling need to receive the information.

[106] The university explains that it also turned its mind to the importance of the privilege being maintained. The university confirmed that its practice is to never disclose solicitor-client communications in its possession and to maintain this privilege and that this practice increases public confidence in its operation. The university concludes by stating that in an attempt to protect its integrity and the privacy of individuals, and showing deference to the affected parties claiming solicitor-client privilege, it exercised its discretion not disclose the records.

[107] The affected parties submit that where the institution is in possession of solicitor-client information by virtue of its obligation to reimburse an employee for legal fees for an action that arose within the context of her employment duties, the institution must exercise its discretion in a manner that protects the solicitor-client privilege.

[108] The appellant made no specific representations on the university's exercise of discretion but asserts that there is a public interest in the disclosure of the requested information. The appellant adds that public commentators, including the Editorial Committee of the university student newspaper have taken the position that the litigation amounts to a Strategic Lawsuit Against Public Participation, otherwise known as a SLAPP suit. He submits that this media interest demonstrates a strong public interest in the disclosure of the information that I have ordered withheld.

Analysis and finding

[109] I am satisfied that the university appropriately exercised its discretion to withhold the information I have found exempt under section 19(a), given the very significant interests the solicitor-client privilege exemption serves to protect. I am satisfied that the university took only relevant factors into account and did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I uphold the university's exercise of discretion with respect to the information that I have found to qualify for exemption under section 19(a) of the *Act*.

Conclusion

[110] In this interim order, I have upheld the university's decision to withhold the dates, body and particular amounts of each invoice, as well as the new record, but find that the total global amount of the invoices, alone, does not qualify for exemption under sections 17(1) or 19(a) of the *Act*. I have decided, in all the circumstances, to defer a determination on whether the total global amount of the invoices qualifies for exemption under section 21(1), including whether any of the circumstances in section 21(4), such as 21(4)(a) (employee benefit) applies, until after I have sought further representations on this issue.

ORDER:

1. Except for the total global amount of the invoices alone, I uphold the university's decision to withhold all the other information at issue in the appeal.
2. I defer a determination on whether the total global amount of the invoices alone qualifies for exemption under section 21(1), and if it does, whether it is subject to any limitation, such as that found at section 21(4)(a) (employee benefit), until after I have sought further representations on this issue.

Original signed by
Steven Faughnan
Adjudicator

November 25, 2019