Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4166

Appeal PA19-00507

Ministry of the Attorney General

July 21, 2021

Summary: The appellant is a reporter who submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the ministry) for a record showing the number of hours that government legal counsel spent on a specific matter each month from July 2018 to October 4, 2019. The ministry denied access to this record under the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*, and the appellant appealed the ministry's decision. In this order, the adjudicator finds that this record is exempt from disclosure under section 19(a) of the *Act* and he dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19(a).

Orders Considered: Order MO-2124-I.

Cases Considered: *Maranda v. Richer*, 2003 SCC 67 (CanLII), [2003] 3 SCR 193*; Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII); *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 (CanLII); *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 (CanLII); *British Columbia (Attorney General) (Re)*, 2018 BCIPC 38 (CanLII).

OVERVIEW:

[1] The issue to be resolved in this appeal is whether a record held by the Ministry of the Attorney General (the ministry) showing the number of hours that legal counsel spent on a specific matter each month from July 2018 to October 4, 2019 is exempt from disclosure under the discretionary exemption in section 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant is a reporter who submitted an access request to the ministry under the *Act* for the following record:

> A digital, machine readable list of the number of Crown attorneys who have advised or worked on the Ontario government's case for denying public access to Premier Doug Ford's mandate letters to Cabinet.
>
> For each Crown attorney please list the number of hours they devoted to the province's mandate letters case each month between July 2018 and the date of receipt of this request [October 4, 2019].

[3] The "mandate letters case" started with a previous access request that the same appellant submitted to Cabinet Office in July 2018 for Premier Ford's mandate letters to Cabinet. Cabinet Office decided to deny access to these records under the mandatory exemption in section 12(1) (Cabinet records) of the *Act*, and the appellant appealed that decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] In Order PO-3973, which was issued on July 15, 2019, Commissioner Brian Beamish found that section 12(1) did not apply to the Premier's mandate letters and ordered Cabinet Office to disclose them to the appellant. On August 15, 2019, the ministry filed a judicial review application with the Ontario Divisional Court, which later upheld Order PO-3973.[1]

[5] In response to the appellant's subsequent access request for the amount of time that legal counsel spent monthly on the mandate letters case from July 2018 to October 4, 2019, the ministry located a responsive record and then sent her a decision letter which stated that it was denying access to this record under section 19 of the *Act*.

[6] The appellant appealed the ministry's decision to the IPC. At the outset of the appeal, the ministry sent the IPC a letter which stated that it would not be providing the IPC with a copy of the record but instead provided the following description:

> One table, which lists the names of counsel by row, while the columns list the months at issue. Individual cells contain the amount of time spent by given counsel in a given month.

[7] The IPC assigned a mediator to assist the parties in resolving the issues in dispute. During mediation, with the ministry's consent, its letter containing a description of the record was shared with the appellant, who clarified that she is not seeking access to the names of the legal counsel identified in the record.

[8] This appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry under the *Act*. I sought and received representations from both the ministry and the appellant on whether the information in the record at issue is exempt from disclosure under section 19 of the *Act*.

[9] In this order, I find that the record at issue is exempt from disclosure under section

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[1] *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 (CanLII). On February 12, 2021, the Ontario Court of Appeal allowed an application of the Attorney General of Ontario seeking leave to appeal the Divisional Court's decision, and a hearing is scheduled for later this year.

19(a) and I uphold the ministry's decision to deny access to this record.

RECORD:

[10] The record at issue is a table held by the ministry showing the number of hours that legal counsel spent on the mandate letters case each month from July 2018 to October 4, 2019. The only information at issue is the columns listing the months, and the cells under those columns showing the amount of time spent by each legal counsel for each month.

DISCUSSION:

A. Does the discretionary exemption at section 19 apply to the record?

[11] The ministry claims that the record at issue is exempt from disclosure under section 19 of the *Act*. This exemption states, in part:

> 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;

[12] Section 19 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 Crown counsel") is a statutory privilege that is similar but not identical to the common law privilege in branch 1.

[13] The ministry claims that the record at issue falls within both branches of section 19. In particular, it submits that this record is exempt from disclosure under the common law solicitor-client communication privilege in section 19(a) of the *Act* because it contains "legal billing information" that is presumptively privileged, and the appellant cannot rebut this presumption. In addition, it submits that the record is exempt from disclosure under section 19(b) because it was prepared by Crown counsel in contemplation of litigation. I will start by assessing whether the record at issue is exempt from disclosure under the common law solicitor-client communication privilege in section 19(a).

Section 19(a) – Legal billing information

[14] The question of whether legal billing information is subject to solicitor-client communication privilege at common law has been addressed in a number of court decisions and IPC orders. Legal billing information includes items such as time dockets (e.g., the time spent by legal counsel on an activity or work and a description of the activity or work performed), fees and disbursements. In the appeal before me, the information at issue is the number of hours that each legal counsel spent on the mandate letters case each month from July 2018 to October 4, 2019.

Presumption

[15] The common law privilege in section 19(a) includes solicitor-client communication privilege, which 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]

[16] In *Maranda v. Richer*,[5] 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. The Court stated:

> . . . Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum . . .[6]

Rebuttal of presumption/onus

[17] The presumption that legal billing information, including the time spent by legal counsel on a matter, is covered by solicitor-client communication privilege is not absolute and can be rebutted if the person seeking access to it establishes that this information is neutral. In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*,[7] the amount of fees that the Ontario government paid to legal counsel was at issue and the Ontario Court of Appeal set out the following test:

> 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 in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII), 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

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders PO-2441, MO-2166 and MO-1925.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[5] 2003 SCC 67 (CanLII), [2003] 3 SCR 193.
[6] *Ibid.*, at para. 33.
[7] 2005 CanLII 6045.

> 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 discloseable 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*.[8]

[18] It is clear from the Court's decision that the onus is on a requester (i.e., the individual who made the access request under the *Act*) to rebut the presumption that legal billing information, including the time spent by legal counsel on a matter, is subject to solicitor-client privilege.

Summary of appellant's representations

[19] The appellant states that the record at issue does not include any information about the specific work that government legal counsel did on the mandate letters case. Instead, it consists of monthly hours worked, which she asserts is the exact kind of "aggregate" information in respect of which the IPC has found the presumption of privilege rebutted in the past.

[20] The appellant further submits that there is no reasonable possibility that disclosing this information to her would reveal any privileged communication because there is not enough information in the record to deduce anything other than the fact that government legal counsel spent a certain amount of time each month working on a case that was going to be argued through a judicial review at Divisional Court, which is "public knowledge."

[21] On the issue of whether she is an "assiduous requester," the appellant acknowledges that during the time frame of the requested record, she was aware that there would be litigation involving Order PO-3973, which had ordered Cabinet Office to disclose the Premier's mandate letters to her. However, she reiterates that the ministry's application for judicial review of that order was a matter of public record. She submits, therefore, that for the timeframe of the requested record, the knowledge that she had about the mandate letters case was no different than what was available on the public record.

[22] The appellant also denies that her knowledge of the mandate letters case could lead her to use the information in the record to deduce or otherwise acquire communications protected by privilege, such as any instructions that were provided to government legal counsel about this case. She submits that the only most obvious, banal deduction that she could make is that because the government decided to seek a judicial review of Order PO-3973 before the Divisional Court, it instructed a lawyer, or lawyers, to work on that case.

[23] She further states that she will leave it to the ministry to articulate what possible "deductions" and "inferences about the instructions provided to counsel" she could possibly piece together from the aggregate number of hours counsel spent on the mandate letters case each month.

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[8] *Ibid.*, at para. 12.

[24] In terms of case law, the appellant relies primarily on Order MO-2124-I, in which the adjudicator found that there was no reasonable possibility that disclosing the following information in the invoice portions of legal accounts to the requester would reveal privileged communications: the identities and addresses of the City of Toronto's outside counsel and its corporate adjuster; the date of each invoice and the matter, claim and bill numbers; and finally, the summary of fees , including the identity of the "timekeeper", hours billed, hourly rate and amount billed.

Summary of ministry's representations

[25] The ministry challenges the appellant's assertion that there is no reasonable possibility that disclosing the record to her will directly or indirectly reveal any communication protected by the privilege. It submits that her claim that nothing can be derived from the information requested beyond the fact the government legal counsel worked on the response to the underlying request for the mandate letters is "oversimplified."

[26] In particular, the ministry submits that the appellant is an "assiduous requester" who, as a party to the litigation in question, is aware of precisely what steps in the mandate letters case litigation have taken place during the time period covered by the request, and is therefore in a position to match the information regarding time expended by legal counsel with that knowledge and make deductions and draw inferences about the instructions provided to counsel regarding the conduct of the litigation.

[27] The ministry also disputes that the information in the record constitutes "aggregate" information. It states that an aggregate amount involves the consolidation of several smaller amounts into a global amount, and this is not what the requester has asked for in her access request. Instead, the request seeks a detailed breakdown of the hours spent by each counsel by each month of the relevant period. It submits that it is not one number that is at issue in this appeal, but the number of hours worked by each counsel for each of the 15 months at issue.

[28] In terms of case law, the ministry relies primarily on British Columbia (B.C.) jurisprudence and cites Order F19-47 of the Office of the Information and Privacy Commissioner for B.C., in which the adjudicator placed significant weight on the fact that the requester was the opposing party in litigation and found that there was a reasonable possibility that disclosing the total amount of legal fees incurred by the province in that ongoing litigation would allow the requester to deduce privileged communications between the province and its lawyers.[9]

Analysis and findings

[29] In the circumstances of this appeal, the record at issue is a table held by the ministry showing the number of hours that each legal counsel spent on the mandate letters case each month from July 2018 to October 4, 2019, which is a time period of approximately 15 months. The ministry claims that this record is exempt from disclosure under section 19(a) of the *Act*.

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[9] *British Columbia (Attorney General) (Re)*, 2019 BCIPC 53 (CanLII).

[30] In accordance with *Maranda* and other established jurisprudence, the information in this record is presumptively privileged and therefore also presumed to be exempt from disclosure under section 19(a). However, this presumption is not absolute and can be rebutted if the appellant can establish that this information is neutral. The onus lies on the appellant to rebut the presumption.

[31] The test that must be applied in determining whether this information is neutral was set down by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General)*.[10] In order to rebut the presumption that this information is covered by solicitor-client communication privilege, the appellant must establish that there is no reasonable possibility that disclosing it will directly or indirectly reveal any communication protected by the privilege. In particular, the appellant must show that there is no reasonable possibility that an "assiduous inquirer," aware of background information about the case available to the public, could use the information requested to deduce or otherwise acquire communications protected by the privilege.

[32] Given that the Supreme Court of Canada has found that solicitor-client privilege must be maintained "as close to absolute as possible,"[11] I have a duty to rigorously scrutinize the appellant's evidence to assess whether it rebuts the presumption of privilege. If the appellant satisfies me that no reasonable possibility exists that disclosing the information in the record will directly or indirectly reveal any communication protected by the privilege, this information is properly characterized as neutral and cannot be exempt from disclosure under section 19(a). However, if I conclude that the appellant has failed to meet this burden, then the privilege remains and the record is exempt from disclosure under section 19(a).

[33] For the reasons that follow, I find that the appellant has not rebutted the presumption that the information in the record is privileged and this record is therefore exempt from disclosure under section 19(a) of the *Act*.

Relevant case law

[34] In terms of case law, the appellant relies primarily on Order MO-2124-I, which was issued by the IPC in 2006. The appellant in that case, who had brought civil proceedings against the City of Toronto, was seeking a variety of records from the city, including legal billing information. The adjudicator found that based on the particular facts in that case, there was no reasonable possibility that disclosing certain information to the appellant, including the hours billed, hourly rate and amount billed, would reveal privileged communications.

[35] However, since that 2006 decision, there have been a number of court decisions, particularly in B.C., that have found that if the requester seeking legal billing information from a public body is the opposing party in litigation or is closely associated with that party, this is an important factor to consider in determining whether the requester has rebutted the presumption that such information is privileged.

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[10] *Supra* note 7.

[11] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574, citing *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 SCR 445, at para. 35.

[36] In *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*,[12] the Supreme Court of British Columbia stated the following in a case where the requester was also the opposing party in ongoing litigation:

> . . . [T]he access requests were made in the circumstances of ongoing litigation and sought information regarding the total amount of funds that the public body had spent in relation to litigation. The fact that the request related to litigation expenses generally does not change the situation. . . . [T]he possibility that such information could reveal privileged communications between a public body and its lawyer may require the public right of access to information to be tempered in these circumstances. I find that this is the case here.[13]

[37] More recently, in *British Columbia (Attorney General) v. Canadian Constitution Foundation*,[14] the British Columbia Court of Appeal found that the requester, which had funded the plaintiffs in a high-profile constitutional lawsuit against the provincial government, had failed to rebut the presumption that the total amount of legal fees incurred by the government in that litigation was privileged.

[38] That case began with a freedom of information request that the Canadian Constitution Foundation (CCF) had made to the Ministry of the Attorney General for legal billing records, including the amount of legal costs that the ministry incurred defending itself in the case of *Cambie Surgeries Corporation v. British Columbia (Attorney General).*[15] The CCF had provided financial support to the plaintiffs in that case, which was a constitutional challenge under the *Canadian Charter of Rights and Freedoms* to certain provisions of the *Medicare Protection Act*.[16]

[39] The ministry denied access to a record showing the total legal costs incurred over an eight-year period under the solicitor-client privilege exemption in section 14 of the B.C. *Freedom of Information and Protection of Privacy Act*[17] and the CCF appealed that decision to the Office of the Information and Privacy Commissioner for B.C.

[40] In Order F18-35,[18] the adjudicator found that even in the context of ongoing litigation, there was no reasonable possibility the decontextualized record would reveal information about the Attorney General's legal strategy, communications with counsel, or any other communication protected by solicitor-client privilege. She concluded that disclosure of the exact figure would only confirm what was already in public record – that the provincial government was "vigorously" defending an important constitutional case. As a result, she ordered the ministry to disclose the record to the appellant.

[41] The ministry sought judicial review of Order F18-35 before the Supreme Court of

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[12] 2012 BCSC 427 (CanLII).
[13] *Ibid.*, para. 132.
[14] 2020 BCCA 238 (CanLII).
[15] 2020 BCSC 1310 (CanLII).
[16] RSBC 1996, c 286.
[17] RSBC 1996, c 165.
[18] *British Columbia (Attorney General) (Re)*, 2018 BCIPC 38 (CanLII).

British Columbia, which overturned the adjudicator's decision.[19] It concluded that the CCF had not rebutted the presumption of privilege because the "difference between an $8 million expenditure and a $20 million expenditure would be telling to the assiduous inquirer."[20]

[42] The CCF then appealed that decision to the British Columbia Court of Appeal, which upheld the lower court's decision. In its reasoning, the Court noted that because the CCF was funding the plaintiffs in the *Cambie Surgeries* constitutional challenge, it must be treated not just as an ordinary assiduous observer, but as one that can be taken to be particularly well-informed. It further stated that the amount of public and private knowledge available about this case made it more and not less likely that inferences about privileged communications could be drawn.

[43] In reaching the conclusion that the CCF had failed to rebut the presumption that the total amount of legal fees incurred by the B.C. government was privileged, the Court rejected the notion that disclosing this information would only enable an assiduous requester to make deductions about legal strategy that are already public knowledge. It stated:

> Taking all of these considerations into account, a fully informed assiduous observer could well work out more about government strategy than just that the litigation is uncompromising and hard fought and considerable resources were being devoted to the defence of the government position. Such a person would have a good idea how many counsel were involved in the case, make a reasonable estimate of the number of support staff and form a reasonable estimate of the proportion of the total legal costs paid to professional staff. Knowing the amount of document production would allow a reasonably accurate estimate of the cost of document production. Knowing the number of expert reports that had been disclosed would again allow, in rough ball-park terms, an estimate of the cost of those items. Piece by piece it seems to me reasonably possible that by comparing these estimates, and what is unaccounted for, one could begin to form judgments about such matters as whether the government was employing consulting experts in addition to testimonial experts, or had in its possession expert reports that had not been disclosed and over which it was maintaining its claim for privilege.
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> . . .
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> In sum, a number [of] factors prevent me from reaching the conclusion that CCF rebutted the presumption of privilege in this case. It seems to me that what needs to be established is that there is no reasonable possibility of revealing privileged communications by disclosing the total amount of legal costs. That is an appropriately high threshold. There is a significant amount of public information available in this case. This information, combined with knowledge of the government's interim legal costs, risks the possibility of

[19] *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 (CanLII).
[20] *Ibid.*, at para. 62.

> allowing an assiduous inquirer to draw inferences about litigation strategy and communications between lawyer and client. Even more importantly, CCF is not a stranger to the litigation, and, in any event, any information it obtains will become a part of the public domain and available to the plaintiff in ongoing litigation.[21]

[44] The British Columbia Court of Appeal's decision in *Canadian Constitution Foundation* is not binding on me and in any event, each case, including the appeal before me, must be considered on its own facts and merits. However, in determining whether there is a reasonable possibility that disclosing legal billing information will directly or indirectly reveal any communication protected by privilege, the Court's decision lays down important principles to consider, particularly in cases in which the requester is the opposing party in litigation or closely associated with that party.

Aggregate vs. detailed information

[45] One factor to consider in the appeal before me is that the appellant is not simply seeking the total number of hours that government legal counsel spent on the mandate letters case between July 2018 to October 4, 2019. Instead, she is seeking more detailed information – the specific number of hours expended by each legal counsel for each month in that 15-month time period.

[46] The appellant submits that this information is the exact kind of "aggregate" information in respect of which the IPC has found the presumption rebutted in the past. In my view, however, her characterization of this information as "aggregate" is misleading and does not constitute persuasive evidence that could rebut the presumption that such information is privileged.

[47] An aggregate figure can be defined as a total number or an amount made up of smaller amounts that are collected and presented as one sum. Both the courts and the IPC have found that in some cases, depending on the circumstances, disclosing aggregate legal billing information to a requester, particularly the total legal fees expended over a relatively lengthy fixed period of time, would not create a reasonable possibility that the requester could use such information to deduce or otherwise acquire communications protected by the privilege.[22]

[48] The number of hours spent by each government legal counsel on the mandate letters case each month is clearly more aggregate in nature than the number of hours that they spent daily or weekly on that case. However, it is also considerably more detailed and therefore almost certainly more revealing than the total number of hours spent by all legal counsel on that case over the total 15 months.[23]

[49] In *Ontario (Ministry of the Attorney General),*[24] the Court of Appeal was

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[21] *Supra* note 14 at paras. 79 and 83.
[22] Orders PO-2484 and PO-2548, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2007 CanLII 65615 (ON SCDC). See also *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra* note 7.
[23] In the appeal before me, the total number of hours spent by legal counsel over 15 months is not at issue and I will not be making any finding in this order as to whether such information is privileged.
[24] *Supra* note 7.

determining whether the total amount of legal fees paid to counsel in two separate matters, including the Paul Bernardo murder case, was properly characterized as neutral and discloseable without impinging on solicitor client privilege. Although the information before the Court was the total amount of legal fees paid, it also commented on whether enabling an "assiduous inquirer" to glean a rough estimate of the total hours spent by legal counsel on a matter could pierce solicitor-client privilege. It stated:

> We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. *The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications.* We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in [Order] PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.[25]
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> [Emphasis added]

[50] As highlighted above, the Court acknowledged that in some circumstances, even knowing a rough estimate of the total number of hours spent by legal counsel on a matter over a relatively lengthy fixed period of time might enable an assiduous reader to deduce privileged communications between solicitor and client. However, in the case before me, the appellant is seeking more than the total number of hours that government legal counsel spent on the mandate letters case over the course of 15 months. She is seeking detailed information containing the number of hours expended by each legal counsel for each month, between July 2018 and October 4, 2019.

[51] In the particular circumstances of the appeal before me, I find that the appellant's characterization of this information as "aggregate" information does not serve to rebut the presumption that such information is privileged. In fact, the detailed nature of 15 separate months of information points to a reasonable possibility that the appellant could use it to deduce or otherwise acquire communications protected by the privilege. As will be explained below, the reasonableness of such a possibility occurring arises from the fact that the appellant is also the opposing party in litigation in the mandate letters case.

Opposing party in litigation

[52] Another key factor to consider is that the appellant is not an ordinary assiduous inquirer but the opposing party in litigation, which means that she has intimate, private knowledge of the mandate letters case that is not available to the public. The appellant, a journalist, submitted the access request to Cabinet Office for Premier's Ford's mandate letters, appealed Cabinet Office's refusal to disclose these records, and participated in the appeal process before the IPC that culminated in Order PO-3973. In addition, the appellant's employer was a party to the judicial review proceedings brought by the

[25] *Supra* note 7, para. 13.

Attorney General of Ontario before the Divisional Court.

[53] The appellant's chief argument is that there is no reasonable possibility that disclosing the information in the record to her would reveal any privileged communication because there is not enough information in this record to deduce anything other than the fact that government legal counsel spent a certain amount of time each month working on a case that was going to be argued through a judicial review at Divisional Court, which is "public knowledge."

[54] On the issue of whether she is an "assiduous requester," she submits that the only deduction that she could make from disclosure is the obvious, banal one that because the government decided to seek a judicial review of Order PO-3973 before the Divisional Court, it instructed a lawyer, or lawyers, to work on that case. She also claims that the knowledge that she has about the mandate letters case is no different from what is available on the public record.

[55] In my view, these submissions are not sufficient or convincing in terms of evidence or argument to rebut the presumption that the information in the record is privileged, particularly in circumstances in which she is not an ordinary assiduous requester but an opposing party in litigation who is seeking 15 separate months of information.

[56] The record at issue shows the number of hours that each government legal counsel spent on the mandate letters case each month from July 2018 to October 4, 2019. This time period would cover any involvement that such legal counsel may have had in this matter after Cabinet Office received the appellant's access request in July 2018 for Premier Ford's mandate letters; during the appeal process before the IPC, which included a mediation stage and an adjudication stage, culminating with the issuance of Order PO- 3973 on July 15, 2019; in the period leading up to the ministry's filing of a judicial review application with the Divisional Court on August 15, 2019; and in the period after this judicial application was filed, which ended with the appellant's new access request on October 4, 2019.

[57] The appellant has detailed knowledge of this case that is not available to the public. As a party in the appeal process before the IPC, she knows what happened at each step of this process, including the mediation and adjudication stages. After Order PO-3973 was issued, either she or her employer would have been served with the ministry's application for judicial review that was filed with the Divisional Court and possibly other legal correspondence after that.

[58] As noted above, the common law privilege in section 19(a) includes solicitor-client communication privilege, which 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.[26] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[27] 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

[26] *Supra* note 2.
[27] *Supra* note 3.

that advice can be sought and given.[28]

[59] The record showing the number of hours that each individual government legal counsel spent on the mandate letters case each month for 15 months would show various levels of intensity at specific points in time that could be correlated with activities that the appellant, as a party to the litigation, knows took place. This would include her knowledge of the different steps of the process and correlative timelines, during each stage of the appeal process before the IPC and the judicial review proceedings before the Divisional Court. Further, she would know, for example, what objections were raised by the parties, what legal issues were raised, and which specific submissions and representations were made by the parties at different times, likely requiring assistance by legal counsel and when.

[60] In my view, the detailed nature of the information in the record, coupled with the appellant's intimate knowledge of what transpired during the appeal and judicial review processes, creates a reasonable possibility that she could deduce both the nature and extent of privileged communications that took place between government legal counsel and their client about the mandate letters file, by correlating the hours spent by counsel with the particular stages of her access request and appeal, and the resulting judicial review proceedings.

Access request

[61] For example, the appellant made her access request to Cabinet Office in July 2018. Cabinet Office had a statutory duty to respond to her access request within 30 days.[29]

[62] The record at issue would show whether or not government legal counsel spent time on the mandate letters file in July and August of 2018, and if so, how many legal counsel were involved. This creates a reasonable possibility that the appellant could deduce the privileged communications which took place, such as whether or not Cabinet Office sought legal advice about how to respond to the appellant's access request, when that request was likely made, and how extensive was the legal advice given.

Appeal before IPC

[63] After the appellant appealed the ministry's access decision to the IPC, she participated in settlement discussions during the mediation stage and then the submission of written representations by the parties at the adjudication stage. These parts of the appeal process would have taken place over a number of months in 2018 and 2019.

[64] The record at issue would show how many government legal counsel were involved and how many hours each counsel spent on the mandate letters file during each of those months of the appeal process. I find that the appellant's intimate knowledge of what transpired during the appeal process, coupled with this detailed information in the record, creates a reasonable possibility that she could deduce privileged communications, such as whether or not Cabinet Office made a request for legal advice about the various issues that arose during the appeal process, the intensity of discussions between Cabinet

[28] *Supra* note 4.
[29] Section 26 of the *Act*.

Office and legal counsel, and the level of preparation. The comparative number of hours spent by legal counsel at the mediation stage versus the adjudication stage could reasonably reveal the government's tactical approach to settlement and its overall legal strategy.

Judicial review application before Divisional Court

[65] After the IPC found that section 12(1) of the *Act* did not apply to the Premier's mandate letters and ordered Cabinet Office to disclose them to the appellant in Order PO-3973, issued July 15, 2019, the ministry proceeded to file a judicial review application with the Divisional Court on August 15, 2019.

[66] Again, the record at issue would show how many government legal counsel were involved and how many hours each of them spent on the mandate letters case in July and August of 2019, which would have included receiving instruction to file a judicial review application and preparing the application. In addition, it would show how many hours they spent on this case after the judicial review application was filed, including the month of September 2019 and a small part of October 2019.

[67] Either the appellant or her employer would have been served with the ministry's application for judicial review that was filed with the Divisional Court and possibly other legal correspondence after that. I find that the appellant's intimate knowledge of the judicial review process, coupled with the detailed information in the record, creates a reasonable possibility that she could deduce privileged communications between government legal counsel and their client, such as when a request for legal advice about how to respond to Order PO-3973 was made, and the level and intensity of discussions about preparation and litigation strategy with respect to filing the judicial review application.

[68] For all of these reasons, I find that the appellant has failed to rebut the presumption that the information in the record at issue is privileged. I find, therefore, that this record is exempt from disclosure under section 19(a) of the *Act*.

B. Did the ministry exercise its discretion under section 19(a)? If so, should the IPC uphold this exercise of discretion?

[69] 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 IPC may determine whether the institution failed to do so.

[70] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[71] In either case, the IPC may send the matter back to the institution for an exercise

of discretion based on proper considerations.[30] The IPC may not, however, substitute its own discretion for that of the institution.[31]

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

- the purposes of the *Act*, including the principles that,
    - information should be available to the public; and
    - exemptions from the right of access should be limited and specific;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- 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; and
- the historic practice of the institution with respect to similar information.

[73] The ministry states that it exercised its discretion under section 19(a) of the *Act* and took the following factors into account in deciding to withhold the information in the record at issue:

- the purposes of the *Act*, including the principle that information should be made available to the public;
- the fact that the Supreme Court of Canada has recognized that the protection of privilege is integral to the solicitor-client relationship, and the section 19(a) exemption is not subject to the public interest override;
- the requested information is not personal information and the requester is acting on behalf of an organization;
- the information relates to litigation (which is currently ongoing), so its disclosure could prejudice the ministry's position in current or future proceedings; and

[30] Order MO-1573.
[31] Section 54(2) of the *Act*.
[32] Orders P-344 and MO-1573.

- the practice of the ministry has been to treat this type of detailed billing information as confidential.

[74] The ministry submits that it did not exercise its discretion in bad faith or for any improper purpose. It further asserts that it took into account all relevant factors and did not take into account any irrelevant factors.

[75] In her representations, the appellant does not address whether the ministry exercised its discretion appropriately when it decided to deny access to the record under section 19(a) of the *Act*.

[76] Based on the ministry's representations, I am satisfied that it exercised its discretion and did so properly in deciding to withhold the record at issue under section 19(a) of the *Act.* It took into account relevant considerations, including the principle that information should be made available to the public but weighed that factor against the importance that the Supreme Court of Canada has ascribed to protecting solicitor-client privilege as well as the fact that the appellant is currently involved in litigation against the ministry. There is no evidence before me to suggest that the ministry took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the ministry's exercise of discretion under section 19(a).

CONCLUSION:

[77] I find that the record showing the number of hours that each legal counsel spent on the mandate letters case each month from July 2018 to October 4, 2019 is exempt from disclosure under section 19(a) of the *Act.* In these circumstances, it is not necessary to assess whether it is also exempt from disclosure under section 19(b), as claimed by the ministry.

[78] I recognize that the appellant is seeking this record to inform the public through news reporting about the amount of time and resources that the Ontario government has devoted to resisting disclosure of the Premier's mandate letters as a matter of public interest. However, in the particular circumstances of this appeal, the information she seeks is exempt from disclosure because of solicitor-client privilege.

ORDER:

I uphold the ministry's access decision and dismiss the appeal.

Original signed by
Colin Bhattacharjee
Adjudicator

July 21, 2021