Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4285

Appeal PA21-00502

Ministry of the Attorney General

July 29, 2022

Summary: The appellant made an access request to the ministry under the *Act* for the total number of hours spent by Ontario Crown counsel working on the government's response to the appellant's previous access request for the mandate letters issued to members of Cabinet.

The ministry withheld the total number of hours on the basis of the discretionary section 19 exemption for solicitor-client privilege. The appellant appealed.

In this order, the adjudicator finds that section 19 does not apply to the total number of Crown counsel hours and she orders this information to be disclosed to the appellant.

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

Orders and Investigation Reports Considered: Orders PO-4166, PO-1922, PO-1952, PO-2484, PO-2548, MO-4019, MO-2294, and MO-2481.

Cases Considered: *Descôteaux v. Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (SCC), *Balabel v. Air India,* [1988] 2 W.L.R. 1036, *Maranda v. Richer*, [2003] 3 S.C.R. 193, *British Columbia (Attorney General) v. Canadian Constitutional Foundation*, 2020 BCCA 238, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (CA), *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.), *School District No. 49 (Central Coast) v. British Columbia (IPC),* 2012 BCSC 427, *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522 (Div. Ct.), *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, *Cambie Surgeries Corp v. British Columbia (Attorney General)*, 2020 BCSC 1310.

OVERVIEW:

[1] This appeal is about an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a single number – the total number of hours spent by Ontario Crown counsel working on the government's response to another access request.

[2] The other access request was for copies of mandate letters that the Premier of Ontario provided to members of Cabinet in 2018. The ministry refused access to the mandate letters on the basis of the mandatory exemption for Cabinet records at section 12 of the *Act*. The requester appealed the access decision to the Information and Privacy Commissioner of Ontario (IPC) and in Order PO-3973 former Commissioner Brian Beamish granted the appeal and ordered disclosure of the mandate letters, finding that the Cabinet records exemption did not apply. The government brought an application for judicial review,[1] which was dismissed. The government then appealed to the Court of Appeal, which was also dismissed.[2] Leave to appeal to the Supreme Court of Canada has been granted.[3]

[3] The request at issue in the present appeal is the second request the appellant has made to the Ministry of the Attorney General (the ministry) for information about the amount of time spent by Crown counsel on the mandate letters matter. The appellant, a reporter with a media outlet, is also the requester/appellant in Order PO-3973.

[4] In the first request, the appellant sought access to the following information (emphasis added):

> 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 [the Premier's] mandate letters to Cabinet.
>
> For <u>each Crown attorney</u> please list the number of hours they devoted to the province's mandate letters case <u>each month</u> between July 2018 and the date of receipt of this request.

[5] The ministry denied access in full on the basis of the discretionary section 19 exemption for solicitor-client privilege. The decision was appealed to the IPC and in Order PO-4166, Adjudicator Colin Bhattacharjee upheld the ministry's decision.

[6] Following the release of Order PO-4166, the appellant made a new access request under the *Act* to the ministry for the following (emphasis added):

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[1] *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 (Div. Ct.).
[2] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2022 ONCA 74.
[3] Docket No. 40078.

> A digital, machine-readable copy of the total number of hours Crown attorneys have devoted to advising and working on the Ontario government's case for denying public access to [the Premier's] mandate letters to Cabinet between July 1, 2018 and the date of receipt of this request [July 21, 2021].
>
> I am not looking for the number of Crown attorneys involved, nor their names, with this request. Just the total number of Crown attorney hours devoted to this specific case.

[7] The ministry denied access to the information sought on the basis of the discretionary section 19 exemption for solicitor-client privilege. The appellant appealed the ministry's decision to the IPC.

[8] After a mediation to explore resolution, which was not achieved, the appeal was transferred to the adjudication stage.

[9] I conducted an inquiry by issuing Notices of Inquiry to the parties and inviting their representations. The parties made representations, which were shared with each other.

[10] In this order, I find that section 19 does not apply to the total number of Crown counsel hours and I therefore order the ministry to disclose this information to the appellant.

RECORD:

[11] The responsive record, which has not been provided to the IPC, consists of a single number – the total number of hours spent by Crown counsel in responding to the original mandate letters access request, including related court proceedings, for the time period July 1, 2018 to July 21, 2021.

DISCUSSION:

[12] The sole issue in this appeal is whether the discretionary exemption for solicitor-client privilege at section 19 applies to the total number of hours spent by Crown counsel on the mandate letters appeal.

[13] Section 19 exempts certain information from disclosure, either because it is subject to solicitor-client privilege or because it was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. It 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; ...[4]

[14] The IPC and the courts have referred in previous decisions to section 19 as comprising two "branches." The first branch, found in section 19(a) ("subject to solicitor- client privilege"), is based on common law. The second branch, found in section 19(b) ("prepared by or for Crown counsel") contains a statutory form of legal advice and litigation privilege created by the *Act*.

[15] The ministry submits that the information at issue – the total number of hours spent by Crown counsel – is exempt under section 19 because it consists of information that is presumptively privileged as a solicitor-client communication at common law (branch 1) or that it is subject to the statutory litigation privilege (branch 2).

[16] The appellant counters that the total number of hours is not exempt under section 19. She agrees that it is presumptively privileged at common law, but she submits that the presumption has been rebutted and that the information at issue is neutral, devoid of any solicitor-client privileged information. Regarding the claim of statutory litigation privilege, she says that any involvement of legal counsel in the preparation of the record is ancillary, not integral to use in litigation and that therefore section 19(b) does not apply.

[17] In the reasons below, I find that the total number of Crown counsel hours is not exempt under section 19. I will discuss section 19(a) first, then turn to section 19(b).

Section 19(a) – common law solicitor-client communication privilege and the presumption for legal billing information

Ministry's representations

[18] The ministry submits that the Supreme Court of Canada has held that legal billing information, like the information at issue in the present appeal, is presumptively privileged. It says that this includes, "time dockets, fees, disbursements, descriptions of services rendered etc." It refers to the following passage at paragraph 33 of *Maranda v. Richer* (*Maranda*):[5]

> 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

[4] Section 19(c) deals with educational institutions and hospitals and is therefore not relevant to the present appeal.
[5] [2003] 3 S.C.R. 193 (SCC).

> 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...

[19] The ministry says that the protection for legal billing information reflects the fact that it is central to the solicitor-client relationship. It is also necessary, it says, because an "assiduous requester" given the information as to a litigant's counsel's time expenditure could reach reasonably-educated conclusions as to details of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

[20] In support of the proposition that legal billing information is solicitor-client communication privileged, the ministry refers to the Supreme Court of Canada's decisions in *Maranda*[6] and *Descôteaux v. Mierzwinski* (*Descôteaux*),[7] as well as two decisions from British Columbia courts, *British Columbia (Attorney General) v. Canadian Constitutional Foundation* (*CCF*),[8] and *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*.[9]

[21] The ministry acknowledges that the presumption is not absolute and can be rebutted, citing the Ontario Court of Appeal decision, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (*Ontario AG 2005*).[10] It refers to the following passage from *Ontario AG 2005* (paragraph 12):

> 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), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.) [(*LSS v. BCIPC*)]. 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.

[22] The ministry says that the onus is on the appellant to rebut the presumption and that therefore there is no onus on the ministry "to establish that there is a reasonable possibility that disclosure of the time spent on the mandate letters request would reveal

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[6] Cited above.
[7] (1982), 141 D.L.R. (3d) 590 (SCC).
[8] 2020 BCCA 238 (BCCA).
[9] 1996 CanLII 521 (BCSC).
[10] [2005] O.J. No. 941 (CA).

anything about privileged communications" or that any particular inference could be drawn.

[23] Rather, it says that the onus is on the appellant to show that there is "no such reasonable possibility," citing the following excerpt from *CCF* (paragraph 85):

> Solicitor-client privilege is a fundamental principle of our legal system. Its protection must be as close to absolute as possible. The protection of the privilege has a constitutional dimension. It is fundamental to the rule of law. I think it appropriate therefore that [the requester] bears the burden of demonstrating that none of the possible inferences I have sketched above could reasonably be drawn by an assiduous observer.

[24] The ministry says that the information at issue concerns an "aggregate amount," which it says is a consolidation of several smaller amounts. The ministry says that there is no "magic to the term 'aggregate' and regardless of the adjective used to describe the information, the question is the same – can the appellant rebut the presumption?"

[25] The ministry states that the IPC has previously held that the presumption has not been rebutted in cases where the information at issue is more detailed than an aggregate figure, citing Orders MO-3455, MO-3664 and Adjudicator Bhattacharjee's Order PO-4166, referred to above.

[26] The ministry acknowledges that adjudicators in prior IPC orders have determined that the presumption has been rebutted for aggregate legal billings and that these findings have been upheld on judicial review, citing *Ontario AG 2005,*[11] *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* (*Ontario AG 2007*),[12] and *Corporation of the City of Waterloo v. Cropley and Higgins* (*Cropley and Higgins*).[13]

[27] The ministry, however, argues that the IPC's approach involving aggregate amounts is "markedly different from the approach taken in other jurisdictions." It refers to the B.C. Supreme Court decision in *School District No. 49 (Central Coast) v. British Columbia (IPC)* (*Central Coast*)[14] and the B.C. Court of Appeal in *CCF*. It explains,

> … in the *CCF* case, the requester argued that no privileged information could be derived from a 'bare total of the legal costs spent between 2009 and 2017.' The Court of Appeal disagreed, and held that the presumption had not been rebutted [*CCF* at para 82]:

[11] Cited above, which upheld Orders PO-1922 and PO-1952.
[12] [2007] O.J. No. 2769 (Div. Ct.), which upheld Order PO-2484.
[13] 2010 ONSC 6522 (Div. Ct.), which upheld orders MO-2294 and MO-2481.
[14] 2012 BCSC 427.

> [T]he difference between an $8 million and $20 million expenditure could be telling to an assiduous observer and reasonably possibly lead to the drawing of inferences about privileged communications.

[28] Further, the ministry says that the IPC's approach with respect to aggregate information is in contrast to *Maranda* itself. It points out that the information at issue in *Maranda* was a "gross amount of the fees and disbursements" (referring to paragraph 24) and that the Supreme Court of Canada found that the presumption had not been rebutted.

[29] The ministry says that it is not arguing that the presumption can never be rebutted in relation to aggregate information. It says that it is a case-by-case determination. It refers to the approach taken by B.C. because it illustrates that aggregate figures "can be privileged and that the presumption is still for the requester to rebut." It says that the starting premise with respect to aggregate amounts ought not to be that the privilege is "presumptively rebutted."

[30] The ministry argues that it is surprising that the presumption has been consistently found by IPC Adjudicators to have been rebutted with respect to an aggregate figure. It says that this is particularly so given the treatment of the matter by the B.C. courts and the Supreme Court of Canada with respect to aggregate legal billing amounts. It submits, "because the Ontario IPC always finds that the privilege has been rebutted for an aggregate figure, the practical effect is to reverse the onus mandated by the Supreme Court." The result, it says, is that instead of the appellant's having to show that the disclosure of an aggregate figure would not reveal privileged information, the institution is placed in the position of having to show that disclosure would reveal privileged information.

[31] The ministry says that the appellant cannot rebut the presumption in the present appeal. It explains that the appellant is the litigant who is opposing government counsel in the mandate letters cases. The ministry says that if there is any doubt about whether the appellant is an assiduous inquirer, I must decide in a way that protects the privilege, referring to the following passage of *LSS v. BCIPC*:[15]

> The real question is how and where one draws the line … If privilege must be retained as a right that is as close to 'absolute' as possible, the line must be drawn on the side of protection of the privilege.

[32] The ministry points to a list of factors set out in Decision F19-47 of the British Columbia Information and Privacy Commissioner (BCIPC) that it says assists with assessing whether the privilege has been rebutted:

1. the nature of the legal matters to which the billing information applies, and the background giving rise to those matters;

[15] Cited above.

2. if the legal matters involve litigation, the stage of the litigation;
3. the inquirer's involvement in the legal matters, including:
    i. the inquirer's level of background knowledge;
    ii. whether the inquirer is a party to the litigation; and
    iii. whether disclosure would prejudice an opposing party to the litigation;
4. the nature of the billing information, including:
    i. whether the information pertains to one or multiple legal matters; and
    ii. whether the information is a summary of total costs or a detailed breakdown; and
5. the length of time covered by the billing information.

[33] Taking these factors into account, the ministry submits that the presumption has not been rebutted by the appellant in the present appeal. It says:

- the underlying legal matter on which the time was spent is ongoing;
- the matter involves litigation, so information about the matter is available to the public (even to non-litigants), unlike a private matter, such as a property transaction;
- the matter is currently before the court;
- the requester is a party to the litigation;
- the requester is privy to detailed information about the scope, nature and timing of the proceedings;
- the disclosure of the requested information could be used against the ministry in the litigation; and
- the information relates to a single matter.

[34] The ministry submits that because the appellant is involved in the mandate letters case, she is not only an assiduous inquirer, but one with intimate private knowledge of the matter, citing the language used to describe the appellant by Adjudicator Bhattacharjee in Order PO-4166. Further on this point, the ministry says that the appellant is "particularly well informed." It says that privileged information relating to litigation strategies is much easier to deduce by the appellant from time information and that there is a reasonable possibility that the appellant could use the

information to deduce or acquire privileged communications.

[35] This is so, says the ministry, because she is aware of the steps taken in the litigation and would be able to match this knowledge, make deductions and draw inferences about the instructions provided to counsel regarding the conduct of the litigation.

[36] The ministry enumerates the type of information available to the appellant because of her counsel's interactions with Crown counsel: the amount of correspondence, phone calls, phone call participants, who authored correspondence and submissions, motions, schedule for exchange materials, the number of court appearances, and how many counsel were involved. The ministry says that this information can be correlated with the total number of hours spent and there is a reasonable possibility that the appellant will be able to assess the government's tactics in the litigation and instructions given to counsel.

[37] The ministry states that the appellant could compare the government's total hours with the total hours spent by the appellant's own legal counsel in relation to the very same proceedings. The ministry says that this ability to compare would provide insight into the government's strategy. The ministry refers to the following passage of *CCF,* in which the B.C. Court of Appeal acknowledged this type of insight (paragraph 79):

> 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 hours spent on document production. … 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…

[38] The ministry says that the possibility that the total number of hours may (or may not) be large does not negate the possibility that the appellant could derive privileged information from its disclosure. The ministry refers again to the above-noted passage from *CCF* that, it says, explains how disclosure of a total amount could reveal privileged information.[16] It says the relative difference between two big numbers can be very

[16] From paragraph 82 of *CCF*:

> [T]he difference between an $8 million and $20 million expenditure could be telling to an assiduous observer and reasonably possibly lead to the drawing of inferences about privileged communications.

revealing. It points again to *Maranda* and the fact that the Supreme Court of Canada held that the presumption of privilege was not rebutted for a gross amount of fees.

[39] The ministry stresses that the underlying litigation is ongoing. It argues that even if the proceedings were at an end, solicitor-client privilege is permanent and not lost at the conclusion of litigation. (At the time that the ministry filed its representations, the Supreme Court of Canada had not yet decided to grant leave to appeal.)

[40] The ministry says that the government is entitled to the same privilege as a private litigant and that there is "no public interest balancing" that would create a diminished level of privilege for this information because the entity which holds the privilege is government. It says that there is support for this position because the section 19 exemption is not subject to the public interest override at section 23 of the *Act*. It says that the level of privilege to which the government is entitled is not diminished because of the need for transparency.

[41] The ministry nevertheless acknowledges that the expenditure of public funds is a consideration in favour of transparency of government operations but states that this consideration is more appropriately considered when reviewing the government's exercise of discretion.

Appellant's representations

[42] The appellant acknowledges the importance of the solicitor-client privilege exemption. However, she submits that the information at issue does not disclose the kind of information protected by it.

[43] She says that the total number of hours "does not disclose advice or strategy concerning litigation." She frames the issue as follows: "All that is at stake for the [m]inistry in this appeal is whether or not they have to disclose how many total aggregate hours Crown attorneys worked on the government's case to keep [the] mandate letters secret between July 2018 and July 2021."

[44] The appellant acknowledges that following *Maranda,* legal billing information is presumptively privileged. She emphasizes, however, that the presumption is not absolute, citing the headnote summary of the dissenting opinion in *Maranda*.

[45] The appellant argues in reference to the majority decision in *Maranda* that the Supreme Court of Canada arrived at the presumption because of the difficulties inherent in determining the extent to which information in lawyers' accounts is neutral. She says that when the information about legal billing information is "as limited as it is" in the present appeal, it is clear that the information is neutral.

[46] She says that if she sought more detailed information, as she did in the request leading to Adjudicator Bhattacharjee's Order PO-4166, the ministry's argument would

hold more weight. She reiterates that she is seeking the total number of hours spent by Crown attorneys on the matter over the course of three years. She says that there is no reasonable possibility that disclosure of the single, aggregate, number could reveal the substance of the Crown attorneys' work itself.

[47] The appellant refers to the test articulated by the Ontario Court of Appeal in *Ontario AG 2005*:[17]

> 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.

[48] She says that there is no reasonable possibility that disclosure of the total number of hours could permit anyone to deduce anything, other than "the fact that a Crown attorney, or Crown attorneys, spent a certain number of hours working on a case…."

[49] She finds support in her argument in the judicial reviews of IPC orders referred to by the ministry in its argument, citing *Ontario AG 2005, Ontario AG 2007* and *Cropley and Higgins*.[18] She says that the present request is analogous to these cases. She says that all disclosure would reveal is the fact that Crown attorneys have continued to work on a case that is before the courts – a matter of public record – for three years.

[50] She says that the information she seeks is the same as aggregate information discussed by Adjudicator Bhattacharjee in Order PO-4166:

> 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.

[51] Specifically on this point, the appellant says that she seeks information over "a relatively lengthy period of time."

[52] The appellant rejects that an assiduous inquirer, aware of background information, could use the information to acquire privileged communications. She says that all that would be revealed is information that is a matter of public record.

[53] She acknowledges that her employer is the opposing party in the ongoing

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[17] Cited above.
[18] All cited above.

litigation relating to the mandate letters. However, she says that the nature of the information she is seeking is aggregate and pertains to activities over the course of three years within the public record.

[54] The appellant specifically rejects the ministry's submissions that she, in particular, is able to make any deductions or inferences based on the aggregate number of hours all Crown counsel spent over the course of three years. At best, she says, she will be able to conclude that the litigation continued over the course of three years, which she says is already publicly known.

[55] She specifically denies that she knows much of the information that the ministry says is in her possession that could "allegedly be 'correlated'" with the total number of hours in such a way that she could glean the government's tactics and instructions to counsel. She admits that she has reviewed the court filings and is aware of the number of public court appearances and number of counsel involved in those court appearances. However, she says, "[n]one of that information is secret, nor inaccessible to other members of the public who are not party to the litigation."

[56] She says further that as a journalist, she is not interested in the government's strategy; she is interested in the outcome of the case. She says that the ministry's speculations about the purpose for which she seeks the information is fanciful.[19]

Reply

[57] The ministry points out that the passage of *Maranda* referred to by the appellant was contained in the dissenting opinion. The ministry therefore says it has no bearing on the meaning of *Maranda,* in which the Court decided on an 8-1 majority that the same type of aggregate figure at issue in this appeal was privileged.

[58] The ministry replies to the appellant's assertions about her stated lack of knowledge with respect to the mandate letters proceedings. It says that this is inconsistent with the case law surrounding assiduous requesters and is inconsistent with the findings of Adjudicator Bhattacharjee in Order PO-4166.

Analysis and finding (section 19(a))

[59] Section 53 of the *Act* establishes that where an institution refuses access to information, the burden of proof that the information falls within one of the specified exemptions in the *Act* lies upon the institution.

[60] The ministry argues, and the appellant agrees, that to meet this burden of proof it is entitled to rely on a rebuttable presumption that the total number of hours is

[19] The appellant also stated her purpose for seeking access to the total number of hours; however, the appellant's purpose in seeking access is not relevant to a determination of whether the section 19 exemption applies.

common law solicitor-client communication privileged and, therefore, exempt under section 19(a).

[61] Before discussing the presumption, it is necessary to review some general principles in relation to solicitor-client communication privilege. The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[20] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[21] The law recognizes that solicitor-client communication privilege is more than a rule of evidence, but rather a substantive rule and fundamental right protecting the confidentiality of communications between solicitor and client in any circumstances where such communications are likely to be disclosed without the client's consent.[22] The privilege covers not only the legal advice itself and the request for advice, but the continuum of communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[23]

[62] As noted, the ministry seeks to establish that the total number of hours is privileged by relying on the presumption that the legal billing information is presumptively subject to solicitor-client privilege.

[63] As is clear from the parties' representations, whether legal billing information is subject to solicitor-client privilege at common law was addressed by the Supreme Court of Canada in *Maranda.*[24] *Maranda* concerned the execution of a search warrant within a lawyer's office. One of the issues in dispute was whether legal billing information is subject to solicitor-client privilege and therefore not subject to seizure pursuant to a search warrant issued in a criminal investigation. By the time the matter reached the Supreme Court, the underlying prosecution had been withdrawn rendering many issues moot; however, the Court took the opportunity to review and clarify the state of the law regarding privilege and legal billing information.

[64] The IPC has applied *Maranda* in appeals addressing privilege claims over legal billing information. The IPC's most authoritative and comprehensive description of its approach in a case involving legal billing information as informed by *Maranda* is found in Order PO-2484, a decision of Adjudicator John Higgins. This order (along with Order PO- 2548) was upheld on judicial review by the Divisional Court in *Ontario AG 2007*,[25] a case referred to above by both parties.

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[20] Orders PO-2441, MO-2166 and MO-1925.
[21] *Descôteaux*, cited above.
[22] *Descôteaux,* cited above.
[23] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[24] Cited above.
[25] Cited above.

[65] In Order PO-2484, Adjudicator Higgins described the approach to legal billing information as follows:

> *Onus to prove rebuttal of the Presumption*
>
> The Ministry argues that the onus is on the appellant to rebut the presumption and that the appellant has not done so.
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> The appellant submits that in [*Ontario AG 2005*], the Divisional Court decided that it was "open to" it to conclude that portions of the account are neutral information that is not privileged.
>
> I considered a similar issue in Order PO-2483. In that appeal, unlike the one before me here, the appellant did not provide representations. My conclusion on that point was as follows:
>
> > … while the Court of Appeal did indicate in [*Ontario AG 2005*] that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. The entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the requester. (In fact, in one of the orders under review in [*Ontario AG 2005*], the requester had not provided representations at all – see Order PO-1922.) This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner.
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> In my view, similar considerations apply where the appellant has provided representations on the issue, but the records themselves are a source of important information. Even if the appellant participates in the appeal, as in this case, his or her ability to provide the necessary evidence and argument to rebut the presumption is hampered by not having seen the records. In this situation, in my view, the Commissioner must review the records and consider the evidence they provide on this point, just as the

> Court of Appeal did in [*Ontario AG 2005*]. Any other approach would be unfair to the appellant.
>
> *Conclusion*
>
> As previously stated, I have concluded that *Maranda* and its interpretation in [*Ontario AG 2005*] represent the most authoritative law with respect to whether the amount paid for legal services, including actual invoices, is privileged. In determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

[66] In dismissing an application for judicial review of Order PO-2484, the Divisional Court in *Ontario AG 2007*[26] concluded that Adjudicator Higgins had followed the correct approach, as set out in *Maranda* and *Ontario AG 2005*, and that he had not erred when he determined that there was no reasonable possibility that disclosure of the total amount of fees would permit an assiduous inquirer to deduce privileged information. Justice Lederman for the Divisional Court held (in 2007),

> [25] The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicators clearly considered that the Requesters and counsel were "assiduous" and "knowledgeable" and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the MAG or any other type of information that may be subject to privilege. Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation.
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> …
>
> [27] It is clear that the IPC applied the proper legal principles as articulated by the courts in *Maranda* and [*Ontario AG 2005*] and on the totality of the evidence before them, the adjudicators correctly found that the presumption of privilege was rebutted in the two cases. Thus, the s. 19 exemption did not apply. In applying the rebuttable presumption of

[26] Cited above, at para 22.

> privilege analysis and ordering that this information be severed from the records and disclosed to the requesters, the IPC committed no reviewable error.[27]

[67] I will follow the approach outlined in *Ontario AG 2005* and later in Order PO-2484 (as upheld by the Divisional Court in *Ontario AG 2007*), which can be summarized as follows.[28] Legal billing information is presumed to be solicitor-client communication privileged information unless the information is "neutral" and does not directly or indirectly reveal privileged communications. In order for information to be "neutral," there must be no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. One consideration that is relevant to making this determination is whether an "assiduous inquirer" (someone taking a very methodical and persistent approach), aware of background information, could use the information requested to deduce or otherwise acquire privileged communications.

[68] Before I turn to the circumstances of the present appeal, it is important that I address *CCF,* the B.C. Court of Appeal case referred to by the ministry. In *CCF* the B.C. Court of Appeal upheld a judicial review decision of the B.C. Supreme Court overturning a decision of the B.C. Information and Privacy Commissioner (BCIPC) that ordered disclosure of aggregate legal billing information. The BCIPC found that the presumption that aggregate legal billing information in a particular lawsuit had been rebutted and ordered the information to be disclosed. The reviewing courts disagreed.

[69] While the decision in *CCF* follows *Maranda,* it may appear at first blush to depart from the approach taken in *Ontario AG 2005* and *Ontario AG 2007*. In the discussion that follows, I explain that the court in *CCF* has actually taken a similar approach to the Ontario courts.

[70] The first possible way that *CCF* may appear to depart from the approach taken in *Ontario AG 2005* and *Ontario AG 2007* is that the Court in *CCF* appears to place the onus exclusively on the requester/appellant to rebut the presumption, as opposed to leaving it open to the decision-maker to find that the presumption is rebutted based on the totality of the evidence.[29]

[71] While the Court in *CCF* indeed framed the onus as being on the appellant, it is also clear that to reach the conclusions that it did the Court considered all of the evidence and argument before it, such as the records themselves and the arguments made by both parties. Further, the Court did not treat this as an evidentiary onus alone. This is made clear where the Court approved of the statement of the B.C. Supreme Court below that "the onus is on CCF to establish through evidence *or argument* that

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[27] *Ontario AG 2007,* cited above.
[28] This summary follows the Notice of Inquiry issued to the parties in the appeal.
[29] *CCF,* cited above, at para 61.

there is no such reasonable possibility."[30]

[72] On this issue, I also observe that the nature of the onus to rebut the presumption in the context of an access to information appeal was extensively canvassed in *Central Coast,* a decision of the B.C. Supreme Court that was cited with approval for other principles by the B.C. Court of Appeal in *CCF.* Like Order PO-2484 (and, by extension, *Ontario AG 2007*), the Court in *Central Coast* recognized that, in assessing whether the onus has been discharged, the BCIPC was entitled to "take the nature and context of the information into account in determining if a claim of privilege should be upheld."[31]

[73] The court in *Central Coast* observed (emphasis added):

> [111] A search by public authorities in a criminal context for documents in a lawyer's office has some similarities to a request by an access applicant for information relating to litigation expenditures. However, it is not by any means analogous. While the Crown may be required to "make the allegation adequately" in an application for a search warrant, *it would be inappropriate to place a similar burden on an access applicant*. An access applicant has neither the resources nor the powers available to the Crown and police.
>
> [112] Further, the principle set forth in Maranda can be upheld and applied without placing, in every case, an evidentiary burden, or a requirement to make submissions, on an access applicant. So long as the test is properly applied – privilege is presumed; and there is no possibility that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged information - then it may be possible to reach a conclusion that the documents are not privileged.
>
> [113] If the Commissioner could not take the nature and context of the information into account in determining if a claim of privilege should be upheld, the Commissioner would be deprived of material evidence. *The nature and context of records and information will almost always have evidentiary value when considering claims of privilege. This is particularly so where the access applicant has a limited ability to put forward other evidence regarding the records or information.* There is nothing in the Act, or the relevant jurisprudence, which precludes the Commissioner from considering this important evidence for the purpose of determining whether privilege has been properly claimed.

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[30] See *CCF,* cited above, at para 68 (quoting from *Central Coast,* cited above, at para 58).
[31] See *Central Coast,* cited above. The Court in *Central Coast* elaborated on this discussion in paragraphs 111 to 115.

> [114] Accordingly, I conclude that the Acting Commissioner did not err when he found, at para. 44:
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> > [44] I agree that the lack of submissions directly on point by the applicant cannot be determinative of the proper application of *FIPPA*. *It is still incumbent upon me to consider the nature of the information and the circumstances and context of the case to determine whether the presumption is rebutted*.
>
> [115] ... Furthermore, irrespective of any submissions by the access applicant on the point, the high standard of the "assiduous inquirer" provides sufficient protection against possible interference with the privilege.

[74] In any event, to the extent there may be a difference between the approach taken in *CCF* and the approach taken in *Ontario AG 2005* and *Ontario AG 2007,* I prefer to follow the approach taken in *Ontario AG 2005* and *Ontario AG 2007.* This approach recognizes that I may consider the "totality of the evidence before me," to use the phrasing of *Ontario AG 2007* or, the "nature and context of the information," to use the phrasing of the B.C. Supreme Court in *Central Coast,* to determine whether the presumption has been rebutted. In my view, this is the fairest and most appropriate way to proceed in the context of an access to information request.

[75] The second possible way that *CCF* may be thought to depart from the approach taken in *Ontario AG 2005* and *Ontario AG 2007* is that, in *CCF*, the B.C. Court of Appeal appears to cast a wider net for the kinds of inferences that may be drawn if aggregate legal billing information is disclosed. In my view, however, this is not a difference in approach but rather a function of the fact that the B.C. Court of Appeal was engaged in a case-by-case analysis of the particular circumstances of the matter immediately before it.

[76] There are many significant differences between the matters requiring legal advice in *CCF* and the present appeal. The underlying litigation at issue in *CCF* was a relatively complex civil action raising constitutional issues and involving lengthy pre-trial discovery activities and the production of extensive expert evidence.[32]

[77] The underlying matters at issue in the present appeal are an access to information request, an appeal to the IPC, a judicial review and an appeal. Unlike the litigation at issue in *CCF,* a judicial review of an IPC decision is typically based on a fixed record of proceedings.

[78] As is clear from the decision, in arriving at its decision in *CCF* the B.C. Court of Appeal placed considerable weight on the stage of the ongoing litigation, the nature of

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[32] The judgment of the British Columbia Supreme Court in that case is reported at *Cambie Surgeries Corp v. British Columbia (Attorney General)*, 2020 BCSC 1310.

the information at issue and the underlying circumstances when reaching the conclusions that it did. This is made clear by the Court's examination of the rebuttal issue in light of the early stage of the litigation, when the billing information was requested, and the numerous pre-trial steps, some of which were known to the parties but not on the public record.

[79] Although the passages cited from *CCF* below are lengthy, I believe the Court's granular analysis of the particular circumstances of the litigation at issue in that case demonstrates how distinct the circumstances before the Court in *CCF* are from the appeal now before me (emphasis added):

> [72] It is important to reiterate that we must assess whether there is a risk of disclosing solicitor-client communications in the circumstances that existed at the end date of the disclosure period ... and not as the case subsequently unfolded.
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> ...
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> [74] The reality of litigation is that whether the disclosure of information is capable of revealing solicitor-client communications is likely to vary or change as litigation progresses. Communications about litigation strategy are ongoing but are more likely to be confidential (which means they are about information that is not known to the other side and to the world) earlier on in the case... *What may become obvious, or be reasonably capable of being inferred, as litigation unfolds may not be so at earlier stages of litigation or a trial. What may have been privileged early in a case may not remain so throughout the trial as government strategy and other matters are revealed. It is for this reason that the timing of disclosure matters*.
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> [75] *In this case, it is important that the disclosure would have occurred at an early stage in the trial; a trial that could reasonably be expected to be lengthy. There had been a substantial period of pre-trial preparation. The proposed disclosure related to extensive pre-trial preparation and the first part of the trial.* Much information was in the public domain. There had no doubt been many pre-trial applications. Significant numbers of expert reports had been exchanged. It would have been known how many days of discovery had taken place. At the same time, one would expect that there was much that was known to the parties that was not public, since *much information would have been still subject to implied undertakings of confidentiality.*
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> ....

> [77] ... With more information, it seems to me more likely that a knowledgeable person, armed with information about total legal costs, *particularly in an ongoing matter where much of the hand is yet to be played*, could draw inferences that will fill in gaps, make further connections, or illuminate what may not otherwise be clear about matters protected by the privilege.
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> ...
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> [79] 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... 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*.
>
> [80] Piecing all of the information together, more specific inferences about government strategy than just the obvious ones evident from what was already known might become available. *Given that the disclosure of fees would have occurred at what was still a relatively early stage of what turned out to be a very long trial*, it might reveal yet more about the government's state of preparation and future strategy in the remainder of the trial. (emphasis added)[33]

[80] It is clear from the Court's reasons that the type of litigation and the various steps taken at the pre-trial and early stages of the litigation figured prominently in the Court's reasoning. Generally speaking, the types of steps and strategy considerations undertaken by the parties in *CCF* are not comparable to the types of steps that one would expect to see in an access decision made under the *Act* that is appealed and judicially reviewed.

[81] When closely examined in this way, it is apparent that the approach in *CCF* is not inconsistent with the approach that I have decided to follow. The B.C. Court of Appeal acknowledged the case by case approach when it made the following comments about the Ontario Court of Appeal's finding in *Ontario AG 2005*:

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[33] *CCF*, cited above, at paras 72, 74, 75, 77, 79, 80.

> [84] I recognize the attraction and the force of the argument that a mere decontextualized number of grounds no inferences beyond the fact that the number is the amount spent on a case. The Ontario Court of Appeal was able to reach that conclusion in respect of the amount of fees spent in connection with [a particular case]: see [*Ontario AG 2005*]. That conclusion, however, was reached on different facts when the case was concluded. I am not able, confidently and with the necessary degree of assurance, to reach the same conclusion in the circumstances of this case.

[82] I will now turn to the circumstances of the present appeal.

Is the presumption in place?

[83] To begin, I accept, as the parties have for the purposes of this appeal, that the information at issue consists of legal billing information within the meaning of *Maranda* and is therefore presumed to be solicitor-client communication privileged.

Is the information neutral, thereby rebutting the presumption?

[84] I must now assess whether the information is neutral. If the information is neutral, the presumption will have been rebutted. In reaching the following conclusions, I have considered the totality of the evidence and arguments contained within the representations of the ministry and the appellant, the underlying circumstances of the appeal, and the type of litigation and its context.

[85] Forefront in the analysis is the information at issue. In this case it is a single number reflecting the total number of hours worked by all Crown counsel over a three-year period[34] pertaining to a matter that progressed through several venues and stages – the initial access request to the ministry, the appeal to the IPC, the application for judicial review to the Divisional Court, the application for leave to the Court of Appeal and preparation for the Court of Appeal hearing (milestone events).

[86] In assessing whether the presumption of privilege has been rebutted, I have considered the appellant's submissions on this point that may be summarized as follows:

- All that is at stake ... is ... how many total aggregate hours Crown attorneys worked on the government's case over the course of three years.
- This is "a relatively lengthy period of time."
- The total number of hours, "does not disclose advice or strategy concerning litigation."

[34] July 1, 2018 to July 21, 2021.

- There is no reasonable way to conclude that disclosure of the single, aggregate, number could reveal the substance of the Crown attorneys' work itself.

- She denies that information in her possession could be "correlated" with the total number of hours in a way that reveal the government's tactics and instructions to counsel.

- She denies that an assiduous inquirer, aware of background information, could use the information to acquire privileged communication.

- When the information about legal billing information is "as limited as it is" in the present appeal, it is clear that the information is neutral.

[87] There is little more that the appellant could say in support of her position that the presumption has been rebutted. This calls on me to examine all of the circumstances and "take the nature and context of the information into account in determining if a claim of privilege should be upheld."[35]

[88] In arriving at my decision below, I have also considered the factors listed by the ministry that it says I should take into account when determining whether the presumption has been rebutted, such as the fact that the matter is currently before the courts, that it involves litigation on the public record, and that the appellant is a party to the litigation. All of these factors inform my assessment of the nature and context of the information at issue, but none of them are determinative.

[89] Is there a reasonable possibly that disclosure of the total number of hours could *directly* reveal privileged communications? The answer is no. The total number of hours – a single number – contains no information about any particular communication between Crown counsel and instructing public officials. It is a total number of hours only, devoid of any substance that could be characterized as the giving or receiving of legal advice.

[90] Is there a reasonable possibility that disclosure of the total number of hours could *indirectly* reveal privileged communications? Answering this question requires me to take the position of an assiduous inquirer, someone who is knowledgeable about the underlying matter, who takes a persistent approach and is methodical.

[91] The essence of the ministry's argument is that an assiduous inquirer, such as the appellant, could combine the total number of hours with other information known to them and deduce solicitor-client privileged communications – specifically the government's tactics in the litigation and instructions given to counsel. Although it is not necessary for me to make such a finding, I agree that the appellant, her employer and their counsel are assiduous inquirers because of their involvement with the appeal to the IPC and subsequent court proceedings.

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[92] The ministry says that the government's tactics and instructions to counsel could be revealed if the total hours are combined with the following information within the possession of the appellant, her employer or their counsel: the amount of correspondence exchanged, the number of phone calls made, the identity of phone call participants or the authors of correspondence and submissions, motions, the schedule for exchange of materials, the number of court appearances, and how many counsel were involved.

[93] I disagree. If the total number of hours were combined with any or all of the examples of information listed by the ministry, I am unable to identify or articulate any kind of inference or conclusion that could possibly be drawn by an assiduous inquirer, including the appellant, her employer and their counsel, about any privileged communication, such as instructions to counsel, litigation tactics or state of preparedness.

[94] I am unable to make such a conclusion because the time period at issue is relatively lengthy and it covers a variety of milestone events. Disclosure of the total number of hours – again, a single number – combined with the information enumerated by the ministry could not reveal anything more about the amount of time spent on any one stage because the time period includes several varied milestone events. In my view, a single number disclosing only the total number of hours could not reveal any more about the points in time when relatively more work was undertaken than would be revealed by an awareness of the milestone events themselves.

[95] I have also considered the underlying context. The total hours consist of time spent over a period of three years and, as noted, relates to at least five different milestone events stemming from an access request made under the *Act.* To the extent that the ministry required legal advice to deal with the access request, such advice would have focused on the application of the *Act,* the IPC appeal procedures and commencing and advancing a judicial review application, which takes place against a fixed record of proceedings. Unlike the specific litigation considered in *CCF*, the litigation in a judicial review of an IPC order for disclosure entails no lengthy periods of pre-trial preparation assembling evidence, no discoveries or implied undertakings, no document production, and no closely-held expert reports, such that disclosure could potentially reveal "the government's state of preparation and future strategy in the remainder of the trial."

[96] I find the concerns raised by the ministry to be speculative and theoretical. If an assiduous inquirer could, for example, add up the number of hours that she observed counsel to be in court, and then deduct this sum from the total number of hours from the record at issue, she could determine how many hours ministry counsel spent outside of court. However, I am unable to conclude that there is a reasonably possibility that this would provide any insight about the government's instructions to counsel.

[97] On this point, I acknowledge that if it were possible to accurately deduce the

number of hours spent outside of court, it could reveal *something* (that the case was hard fought, perhaps) but I cannot articulate any type of solicitor-client privileged communication that is at risk of being revealed. In other words, the *something* that would be revealed is not a solicitor-client privileged communication.

[98] The ministry emphasizes in particular that the appellant could compare the total number of hours worked by her counsel with the total number of hours worked by Crown counsel. It says that this alone would enable the appellant to assess the government's tactics in the litigation and reveal instructions to counsel. I do not agree. Such a comparison would reveal the difference in total hours spent by two parties to a matter with many stages – no more and no less.

[99] The purpose of common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter and to protect communications of a confidential nature between lawyer and client made for the purpose of seeking, obtaining or giving legal advice.[36] I find there is no reasonable possibility that disclosure of the total number of hours – a single number – would impinge on those legitimate interests in the circumstances of this case.

[100] In further reliance on *CCF*, the ministry submits that disclosure of the total hours would reveal the government's magnitude of effort, which it says would provide insight into the government's strategy. In the circumstances of the present appeal, I cannot agree. The facts in *CCF* are markedly distinct from the present appeal. As discussed above, the underlying proceeding in *CCF* involved the pre-trial and early stages of a single lawsuit, not an access request and a subsequent judicial review and appeal as in the case at hand.

[101] As noted, the total hours span a period of three years and involve at least five different milestone events (i.e. decision in response to the access request, the IPC appeal, judicial review, leave to appeal to the Court of Appeal, and preparation for the Court of Appeal). Against this backdrop and without any breakdown by time, I can confidently conclude that an assiduous inquirer would not be able to make any reasonable deductions of solicitor-client communications information if the relative difference in number of hours worked by counsel for both parties was known. As I explain above, I disagree that in the circumstances, the quantum of Crown counsel hours expended on the mandate letters matter could reveal solicitor-client privileged communications.

[102] I also disagree with the ministry that the approach that I am following is inconsistent with *Maranda* itself. In *Maranda* the Supreme Court established that legal billing information, even in an aggregate form, is presumptively subject to privilege. But it is important to note that by the time *Maranda* reached the Supreme Court of Canada, issues relating to the authorization of a search warrant of a lawyer's office were moot

[36] *Descôteaux*, cited above.

and the Court proceeded to "examine the issue in the terms defined by the parties, who assumed that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements." Consequently, there was little contextual information on which the Court could assess the issue of rebuttal, including the failure of the Crown to even "make that allegation adequately in its application for the issuance of a warrant."[37] As the Court explained: "In this case, the Crown neither alleged nor proved that disclosure of the amount of Mr. Maranda's billings would not violate the privilege."[38]

[103] Since *Maranda*, the courts and this office have fleshed out the appropriate approach to the presumption and rebuttal analysis in an access to information context, as I have set out above. There is nothing inconsistent in that approach with the Court's ruling in *Maranda*, given the particular circumstances of that case.

[104] In summary, I find that the total number of hours Crown attorneys have devoted to advising and working on the Ontario government's case in response to the access request for the mandate letters is neutral information in the particular circumstances of this case. Although the ministry was entitled to rely on the presumption that the total number of hours are privileged, I find that the presumption has been rebutted. The total hours are not privileged and I find that section 19(a) does not apply.

Section 19(b) - statutory litigation privilege

[105] The ministry claims in the alternative that the total number of hours is exempt under the statutory litigation privilege component of section 19(b). Section 19(b) states:

> A head may refuse to disclose a record,
>
> (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

[106] Section 19(b) is a statutory privilege that applies where the records were "prepared by or for Crown counsel … in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

[107] The statutory litigation privilege applies to records prepared by counsel employed or retained by the Crown "in contemplation of or for use in litigation." Similar to common law litigation privilege, it does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[39]

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[37] *Maranda,* cited above, at para 28.
[38] *Maranda*, at para 34.
[39] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) *(Big Canoe)*; *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (*Goodis*).

Ministry's representations

[108] The totality of the ministry's argument under section 19(b) is:

> Branch 2 of s. 19 is a statutory privilege which protects records prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. The record in this case is a compilation of records prepared by Crown counsel, as they are the time spent by counsel in responding to litigation. They are therefore prepared in contemplation of litigation.
>
> Indeed, the underlying time dockets would not be responsive to the request if they had not been prepared in contemplation of litigation. Therefore, it is submitted that the requested record also falls within the scope of Branch 2, as the records were created by Crown counsel for the specific purpose of the ongoing litigation matter.

Appellant's representations

[109] The appellant disputes the ministry's claim that the information is subject to section 19(b). She says that the total number of hours spent is ancillary, rather than integral to the process of giving legal advice or litigation, referring to Order PO-2484, in which Adjudicator Higgins held,

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.

[110] The appellant then points to the following passage from Order PO-2484:

> … the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared to be used in actual or contemplated litigation. In my view, they were not.

[111] The appellant says that if I ask the same question ("were the records prepared to be used in actual or contemplated litigation") about the total number of hours, the answer would be the same as the adjudicator's in Order PO-2484, no.

[112] She elaborates that the information about the total number of hours was created

because of the litigation but the "content was not prepared for use in litigation." She argues that although Crown counsel created the record to keep track of how much time was spent working on the mandate letters case, the count of hours is not material to the content or arguments made in denying the access to information request and the various appeals the government has undertaken in the mandate letter case.

Analysis and findings

[113] Section 19(b) is a statutory form of privilege. The starting place is that pursuant to section 53 of the *Act*, the ministry has the burden of proof to establish that the section 19(b) exemption applies. Unlike the discussion pertaining to section 19(a), there is no presumption that the information is subject to the statutory litigation privilege. Further, the ministry relies only on the statutory form of litigation privilege and does not rely on the statutory form of communication (legal advice) privilege.

[114] I am unable to conclude that the record containing the total number of Crown counsel hours "was prepared by or for Crown counsel … in contemplation of or for use in litigation" and I find that the total number of hours is not exempt under section 19(b). In my view, the counsel hours were merely tracked and recorded during the course of the litigation, which is insufficient to attract the protection of section 19(b).[40] I note that this finding is consistent with the finding made by Adjudicator Higgins in the passages from Order PO-2484 cited by the appellant above.

[115] In *Magnotta*,[41] the Court of Appeal found that the second branch of section 19 (now section 19(b)) encompasses litigation privilege at common law, but "is not limited to, or co-extensive with, litigation privilege." By saying that second branch is not limited to litigation privilege, the Court is not saying it is unlimited. Not everything that is merely "related to" or incidental to litigation is caught by the statutory form of litigation privilege. There must be a rationale for extending that protection as the Court of Appeal concluded in *Magnotta* with respect to settlement privilege.

[116] In *Magnotta,* the records at issue were settlement documents, which were found to be "part of the litigation process" and therefore subject to the statutory form of litigation privilege. The Court contrasted the settlement documents at issue in *Magnotta* with simple correspondence exchanged between counsel as in *Big Canoe* and *Goodis*.[42] While those documents were prepared "during the course of litigation" they were not prepared "for use in litigation" and there was no public policy reason (as there was in *Magnotta*) that would justify finding that they fell "within any reasonable 'zone of privacy.'" In the words of the Court:

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[40] *Big Canoe,* cited above and *Liquor Control Board of Ontario v. Magnotta Winery Corporation,* 2010 ONCA 681 at para 45 (*Magnotta*).
[41] Cited above.
[42] Both cited above.

> I do not view the Divisional Court decisions in Big Canoe 2006 and Goodis 2008 as inconsistent with the Divisional Court's interpretation of the second branch of s. 19 in the present case. In Big Canoe 2006, simple correspondence between counsel during the course of a prosecution was held to be outside the scope of the second branch. Simple correspondence is not a document that was prepared "for use in the litigation". Rather, it was a document that was prepared during the course of litigation. Nor would counsel reasonably expect that simple correspondence would fall within the "zone of privacy". Contrast that with the Disputed Records in the present case. The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".[43]

[117] Turning to the circumstances of this appeal, I accept that the total number of hours was derived from docketed time records kept "during the course of litigation"; however, it was not prepared "in contemplation of or for use in litigation." Further, in contrast to *Magnotta*, I have not been presented with any argument, nor is it apparent to me, that there is a public policy reason or other rationale that would justify finding the total number of docketed hours falls within a "reasonable zone of privacy."

[118] The ministry bears the onus of establishing the exempt status of a record under section 19(b). Because I am unable to conclude that the total was prepared "in contemplation of or for use in litigation," I find that the total number of Counsel hours is not exempt under section 19(b).

ORDER:

By August 29, 2022, I order the ministry to disclose to the appellant the total number of hours spent by Crown counsel in responding to the original mandate letters access request for the time period July 1, 2018 to July 21, 2021.

Original Signed By: July 29, 2022
Valerie Jepson
Adjudicator

[43] Paragraph 45.