

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4239

Appeal MA20-00329

The Corporation of the Town of Laurentian Hills

August 17, 2022

Summary: The Corporation of the Town of Laurentian Hills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for invoices from a certain lawyer, invoices from an integrity commissioner, and certain resolutions relating to a specified court proceeding. The town identified legal invoices and disclosed the total amounts in them, but withheld the remaining information in these records; it also stated that there are no records relating to the other portions of the request. On appeal, the town was advised that it had not cited an exemption in its decision letter, and it issued an access decision citing the discretionary exemption at section 12 (solicitor-client privilege) over the portions of the legal invoices that it decided to withhold from disclosure. The appellant also raised the reasonableness of the town's search for records. In this order, the adjudicator decides that the town should be permitted to claim section 12, and that the presumption that legal billing information is privileged has not been rebutted; as a result, she upholds the town's decision to withhold the portions of the legal invoices that it redacted. However, the adjudicator does not uphold the reasonableness of the town's search for records responsive to the access request, and orders the town to conduct another search.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 16, and 17.

Cases Considered: *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; *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045.

OVERVIEW:

[1] The Corporation of the Town of Laurentian Hills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following items:

1. A copy of any invoice to the Town of Laurentian Hills from:
 - a. [Named lawyer and address]:
 - b. Integrity Commissioner, [named address], during [specified years], with regard to advice, or legal services, associated with the [dates of] Superior Court hearings in Pembroke for [specified court proceedings].
2. A copy of the Resolution of the Town Council public meeting, which gave direction for the Town's Application for [specified court proceedings] to proceed. (Court transcript reference provided)
3. A copy of Resolutions or authorizing request(s) from the Town of Laurentian Hills to the Integrity Commissioner and [named lawyer] for advice or legal services to be provided for the [specified court proceedings] Application and any associated reply correspondence.
4. A copy of Resolutions or authorizing request(s) from the Town of Laurentian Hills to [named lawyer] for advice or legal services to be provided, as a Town Solicitor, for the [specified court proceedings] Application and any associated reply correspondence.

[2] In response to the request, the town issued an access decision stating that it was attaching the invoices in response to part 1(a) of the request. The town also stated that no records existed in response to parts 1(b), 2, 3, and 4 of the request. After the town issued its access decision, it later provided the requester with an additional invoice, stating that this was also in response to part 1(a), and had been previously omitted.

[3] The requester (now the appellant) appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant noted that the town had redacted portions of the records, but had not cited any exemptions in the *Act* for the redactions. When the mediator raised this with the town, the town issued a revised access decision, in which it claimed the discretionary exemption at section 12 (solicitor-client privilege) of the *Act* over the redacted portions of the invoices. The appellant disagrees that this exemption applies, and takes the position that the town should not be permitted to claim it, as it was late to do so under Section 11.01 of the IPC's *Code of Procedure*. Therefore, both the section 12

exemption, and the town's ability to claim it during mediation, were added as issues to this appeal.¹

[5] In addition, at mediation, the appellant indicated his belief that the town should have a record of a council resolution permitting the town to go forward with legal proceedings, as well as an authorization by council for the town to seek legal representation in these proceedings. He was not satisfied with the town's statement that no such resolution or authorization exists, and advised the mediator that he wanted to proceed to adjudication on this matter. As a result, reasonable search was added as an issue to this appeal.

[6] Since no further mediation was possible, and the appellant stated that he wanted to proceed to adjudication on the remaining issues, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*.

[7] As the adjudicator of this appeal, I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the town. I sought and received written representations in response. I then sought and received written representations from the appellant in response. The parties exchanged further representations, though I withheld some of the town's representations from the appellant for confidentiality reasons.²

[8] For the reasons that follow, I uphold the town's application of section 12 to the records, but I do not uphold the reasonableness of its search, and I order it to conduct a further search.

RECORDS:

[9] The records remaining at issue are portions of four statements of legal accounts (of specified dates). The town disclosed the total amount of legal fees paid, the applicable taxes, the date of each legal service rendered, the initials of the individual who rendered the service, and, if applicable, the taxable and non-taxable disbursements. However, the town withheld the descriptions of each of the legal services rendered and, if applicable, the time spent associated with each service.

¹ Mediation also resulted in narrowing an issue from the scope of the appeal. The appellant stated that the town had given him conflicting information regarding the amount of the legal fees, as he had initially been told by the town that the amount was \$1,139. The town stated that this was the cost associated with the integrity commissioner, and not the legal fees for the named lawyer. After the mediator conveyed this information to him, the appellant stated that he would not proceed further on that point.

² Under *Practice Direction 7* (which deals with the sharing of representations) of the IPC's *Code of Procedure*.

ISSUES:

- A. Should the town be permitted to rely on the exemption at section 12, though it did not cite it in its initial access decision?
- B. Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the records?
- C. Did the town conduct a reasonable search for records?

DISCUSSION:

Issue A: Should the town be permitted to rely on the exemption at section 12, though it did not cite it in its initial access decision?

[10] Although the town redacted the legal accounts in its initial access decision, it did not cite section 12 as the reason for doing so. The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[11] Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[12] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.³

[13] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.⁴ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions

³ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

⁴ Order PO-1832.

can be raised after the 35-day period.⁵

[14] The parties were asked to consider the following:

- Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption. If so, how? If not, why not?
- Whether the institution would be prejudiced in any way by not allowing it to apply an additional discretionary exemption in the circumstances of this appeal. If so, how? If not, why not?
- By allowing the institution to claim an additional discretionary exemption, would the integrity of the appeals process be compromised in any way? If so, how? If not, why not?

[15] The town submits that it provided the appellant with the legal totals that he had requested, but through error, did not actually cite the section 12 exemption for the withheld information in its decision letter. Furthermore, the town states that had it not had to deal with delays associated with the pandemic, its error could have been rectified with the 35-day period cited in the *Code of Procedure*. It submits that although it only cited section 12 after the town had a chance to engage with the IPC mediator, the confidentiality of the solicitor-client privileged information has not changed.

[16] The appellant submits that the town's representations on this issue are not credible, as the town's lawyer appeared to have been giving the town advice (to tell the appellant to seek the legal totals through a freedom of information request). He states that the town redacted all details in the invoices, except for the amounts and item dates, without any justification. He also raises issues relating to a court action in which he and the town were involved.⁶ Furthermore, the appellant states that he believes that due to the town's "overall behaviour" (including the court action he refers to), I should consider the town's failure to cite the exemption in the initial decision letter as sufficient to order access to the redacted information, regardless of how or why the 35-day oversight occurred.

[17] Having considered the parties' representations, I am satisfied that the town should be allowed to claim the exemption at section 12 over the portions of the legal bills that it has not disclosed. The town's position from the outset has been to provide partial disclosure of the legal accounts. This is not a situation where the town initially decided, for example, to disclose the entire accounts and then resiled from that position in reliance on the discretionary exemption in section 12. I also find that the appellant

⁵ Orders PO-2113 and PO-2331.

⁶ The appellant's representations in this inquiry address matters related to this court proceeding, such as his views about the town's conduct or substantive issues related to that proceeding. As such matters are not relevant to whether the redacted information in the legal bills is exempt under section 12 and reasonable search, I will not summarize those representations in this order.

has not been prejudiced by the late raising of this discretionary exemption because he was given a full opportunity to provide representations about its application during the appeal. In addition, I find that the town *would* be prejudiced by not being allowed to claim a privilege that the Supreme Court of Canada has said must be maintained “as close to absolute as possible.”⁷ By allowing the town to claim the solicitor-client privilege exemption over the remainder of the legal bills, the integrity of the appeals process would not be compromised in any way, but it would be compromised if I did *not* allow the town to claim the exemption, given the importance of the exemption and the interests it seeks to protect. As a result, the town is permitted to expressly claim section 12 in relation to the withheld information.

Issue B: Does the discretionary solicitor-client privilege exemption at section 12 of the *Act* apply to the record?

[18] Section 12 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

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

[19] Section 12 contains two different exemptions, referred to in previous IPC decisions as “branches.” The first branch (“subject to solicitor-client privilege”) is based on common law. The second branch (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege created by the *Act*. The institution must establish that at least one branch applies.

[20] The town states that it disclosed the total legal billing amounts that the appellant had requested, and redacted details in the legal bills that are subject to solicitor-client privilege, citing the confidentiality of the communications between a solicitor and the town (as client). I understand this to mean that the town relies on the solicitor-client communication privilege in the first branch of section 12.

Section 12: legal billing information

[21] 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 (for example, the time spent by legal counsel on an activity or work and a description of the activity or work performed), fees and disbursements.

⁷ *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.

Presumption

[22] The common law privilege in section 12 includes solicitor-client communication privilege, which covers 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.⁸ 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.⁹ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.¹⁰

[23] Legal billing information is *presumed* to be solicitor-client communication privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.¹¹ The Supreme Court of Canada stated the following about this:

. . . 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[.]¹²

Rebuttal of presumption

[24] The presumption that legal billing information is covered by solicitor-client communication privilege is not absolute and can be rebutted if the information is neutral.¹³

[25] Like the adjudicator in the recently-issued Order PO-4285, 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*). Legal billing information is presumed to be solicitor-client communication privileged information unless the information is “neutral”

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

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

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹¹ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹² *Maranda v. Richer*, 2003 SCC 67 (CanLII), [2003] 3 SCR 193.

¹³ *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045.

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.

[26] The town has already disclosed the total amount of fees paid, so the relevant question in this appeal is whether there is any reasonable possibility that disclosure of the withheld information could reveal privileged communications. This includes consideration of whether an “assiduous inquirer” (someone taking a very methodical and persistent approach), aware of background information, could deduce or otherwise acquire privileged communications¹⁴ from the remaining information at issue.

[27] If 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 12. Otherwise, the presumption of privilege has not been rebutted and the record is exempt from disclosure under section 12.

The town’s representations

[28] The town states that the solicitor invoices are for the legal work being conducted on behalf of the town regarding an application in the Superior Court. The town states that the communications between the solicitor and client are confidential, and that trust and confidentiality between a solicitor and client are paramount. Furthermore, the town states that the invoices are working papers and serve as an ongoing record of what actions have been taken in preparation for and with the ongoing court application. The town explains that the invoices summarize and identify solicitor communications with identifiable persons, including town personnel, in connection with the ongoing court application.

[29] The town states that the appellant is not the client and does not share the solicitor-client privilege.

[30] The town states that it has not waived that privilege.

The appellant’s representations

[31] The appellant submits that solicitor-client privilege only applies to confidential communications between client and lawyer made during the course of seeking or giving of legal advice, or in contemplation of or for use in litigation. He states that the court

¹⁴ See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

proceeding to which he refers “was not litigation, but just a simple application for a court order, initiated on a without-notice basis.” He asserts that no legal advice was required or involved with” the court proceeding, “and hence [its] associated invoices.”

[32] The appellant also states that the town’s integrity commissioner provided the recommendation to obtain the court order, and that the town’s lawyer just prepared the application related to this, but did not provide the advice or recommendation to proceed.

[33] Furthermore, the appellant states that he expects that all the invoice items apply to general discussions with various persons, council and mayor, which are already mentioned in the court application order.

[34] He submits that invoice items summarizing time spent collecting affidavits made public for the order, court preparation time, court appearances and travel items should not be subject to solicitor-client communication privilege.

The town’s reply

[35] The town states that the legal invoices were only redacted of the portions that are subject to solicitor-client privilege. The town states that all other costs, including the approved budgeted expense of a specified amount, as well as expenses for courier services, telephone direct dial, a local advertisement, travel expenses, and taxes were not redacted from the invoices.

The appellant’s sur-reply

[36] In response to the town’s reply representations, the appellant submits that “solicitor-client privilege is a weak defence for non-release” of the redacted information. He reiterates his previously expressed views about the minimal contribution of the town’s lawyer to the court application, which he asserts is a public interest case. The appellant also asserts that there is no possibility that disclosure of the various details in the invoices would directly or indirectly reveal any information that is subject to solicitor-client privilege because all the court documents and transcripts are in the public record. Furthermore, he asserts that an assiduous inquirer, aware of background information, could not use the information requested to deduce or otherwise acquire privileged information.

Analysis/findings

[37] Having reviewed the parties’ representations and the information withheld in the legal invoices, I find that the presumption that the withheld information is subject to solicitor-client privilege has not been rebutted. The representations of the appellant amount to assertions that the details redacted in the legal invoices would not disclose information that is subject to solicitor-client privilege, directly or indirectly, and that an assiduous inquirer could not use that information to determine privileged information

either. He also relies on the fact that the court proceeding to which these legal invoices relate was a public proceeding, and that there has been a public court order in relation to the matter.

[38] In my view, however, there is a reasonable possibility that disclosure of the redacted information would reveal solicitor-client privileged communications. As I noted above, legal billings typically include a description of the work done and by whom it has been performed (for example, the time spent by legal counsel on an activity or work and a description of the activity or work performed). In my view, the information could be expected to contain not only items of which the appellant is already aware, but also instances of legal advice given and received on any number of matters related to the solicitor-client relationship, and other communications that form part of the continuum of communications between lawyer and client. The fact that the court proceeding was public is irrelevant to the issue of whether the legal billings in question are privileged.

[39] I also disagree that the invoice can be redacted to disclose items of which the appellant would already be aware, such as attendances at court hearings. In my view, disclosure of any of the redacted information raises a reasonable possibility that other information, subject to solicitor-client communication privilege, could be deduced. I find that this is particularly the case because the town chose to disclose the dates of legal services rendered and the initials of the individuals who rendered the service (although it could have chosen to withhold this information). By so doing, the town has provided the appellant with information that he can piece together with other knowledge he may have due to his involvement with the court proceeding. In this context, I find that disclosing the description of legal services and/or time spent on legal services for any items that the appellant would already be aware would raise a reasonable possibility that information subject to solicitor-client communication privilege could be deduced or directly revealed.

[40] Accordingly, the presumption is not rebutted, and I uphold the town's decision to withhold the redacted information in the legal invoices as exempt under section 12 of the *Act*. Based on the town's decision to disclose total amounts and withhold other information in the legal invoices to maintain the confidentiality of solicitor-client privileged information, I am also satisfied that the town exercised its discretion under section 12, and that it did so taking into consideration relevant factors. There is no evidence before me that the town exercised its discretion in bad faith or for improper purposes.

[41] In addition, I note the appellant's assertions that the information withheld should be disclosed because it relates to a "public interest case." To the extent that the appellant may be trying to raise the "public interest override" at section 16 of the *Act*, section 12 is not one of the exemptions listed under section 16, so the public interest

override cannot apply to records that are exempt under section 12.¹⁵

Issue C: Did the town conduct a reasonable search for records?

[42] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.¹⁶ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[43] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;¹⁷ that is, records that are "reasonably related" to the request.¹⁸

[44] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.¹⁹ Given my finding below with regards to the town, it is sufficient for me to say that the appellant's position is that records would reasonably be expected to be generated in relation to a court action.

[45] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.²⁰ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²¹

[46] The institution must provide a written explanation of all steps taken in response to the request, including: who conducted the search, the places searched, who was contacted in the course of the search, the types of files searched, and the results of the search. In the circumstances of this appeal, I find that the town has not provided this type of information, such that I can make a finding about the reasonableness of its search efforts, if any.

[47] The town submitted that it was legally allowed to hold meetings closed to the public, and that the appellant would not be entitled to access certain information, or types of information, relating to those meetings, under the *Act*.

¹⁵ Section 16 of the *Act* says: "An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

¹⁶ Orders P-85, P-221 and PO-1954-I.

¹⁷ Orders P-624 and PO-2559.

¹⁸ Order PO-2554.

¹⁹ Order MO-2246.

²⁰ Orders M-909, PO-2469 and PO-2592.

²¹ Order MO-2185.

[48] During the inquiry, I explained to the town that there is a distinction between conducting a search and not finding any responsive records, and conducting a search and finding records that the town can or must withhold from disclosure due to the application of one or more exemption(s) in the *Act*.

[49] However, in response to my correspondence, and the appellant's representations about the reasonableness of the town's search, the town continued to reiterate its position that there are no records that the appellant can access through the *Act* about the subject matter of his request. I note that the town's confidential representations also do not satisfy me that a reasonable search has been conducted.

[50] As a result, without evidence from the town about its search efforts, I do not uphold the reasonableness of its search efforts (if any), and will order it to conduct another search.

ORDER:

1. I uphold the town's decision to withhold the redacted information in the legal invoices under section 12 of the *Act*.
2. I do not uphold the reasonableness of the town's search. I order the town to conduct a further search for responsive records, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*. The town is not permitted to rely on the time extension provision in section 20 of the *Act*.

Original Signed by: _____

Marian Sami
Adjudicator

August 17, 2022 _____