

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4332

Appeal MA21-00584

Township of Puslinch

February 22, 2023

Summary: The Township of Puslinch (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for invoices for legal services provided to the township over a five-year period.

The township denied access to the requested information under the discretionary exemption at section 12 (solicitor-client privilege) of the *Act* but provided the appellant with the annual aggregate amount that it spent on legal fees for each of the five years identified in the request. The appellant continued to seek access to the legal invoices, in their entirety.

In this order, the adjudicator partially upholds the township's decision not to disclose the legal invoices under section 12. She finds that section 12 does not apply to the bottom line total amount of each invoice and orders the township to disclose that information to the appellant. However, she finds that the remaining information in the invoices is exempt from disclosure under section 12 and upholds the township's decision to withhold it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 12.

Orders and Investigation Reports Considered: Orders PO-2484, PO-2727.

Cases Considered: *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] O.J. No. 941, 2005 CanLII 6045 (ON CA); *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC).

OVERVIEW:

[1] This order addresses an appeal of a decision by the Township of Puslinch (the township) to deny access to legal invoices for legal services provided to the township over a five-year period.

[2] Following receipt of a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all invoices for legal services provided to the township over a period of five years, the township located the responsive records and denied access to them, in their entirety, claiming the exemption for solicitor-client privileged information at section 12 of the *Act*. In its decision letter, the township provided the requester with aggregate annual amounts paid by the township for legal services provided during each of the five years specified in the request.¹

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

[4] A mediator was assigned to assist the parties in attempting to reach a mediated resolution. During mediation, the township maintained its position that the legal invoices are exempt from disclosure under section 12. The appellant maintained his position that he disagrees, and confirmed that he continues to pursue access to the legal invoices, in their entirety.

[5] The appeal was transferred to the adjudication stage of the appeal process and as the adjudicator, I decided to conduct an inquiry. I sought and received representations from both parties.

[6] In this order, I uphold the township's decision in part. I find that the solicitor-client privilege exemption at section 12 of the *Act* does not apply to the bottom line totals of each invoice; I order the township to disclose that information to the appellant. However, I find that the remaining information in the invoices is subject to solicitor-client communication privilege and exempt from disclosure under section 12; I uphold the township's decision to withhold that information.

RECORDS:

[7] The records at issue are the invoices for legal services provided to the township over a period of five years. The township provided the IPC with a representative sample of invoices, providing sample invoices from all law firms with whom it did business over the identified years. The invoices are dated and numbered and contain summaries of work undertaken by the relevant law firm for the township, as well as the associated fee and the total amount of the invoice and any disbursements.

¹ The amount for the final year was a "year-to-date" total.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the discretionary solicitor-client privileged exemption at section 12 of the *Act* applies to the legal invoices, either in whole or in part, and if so, whether the township properly exercised its discretion under that section not to disclose them.

[9] 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.

[10] 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 and encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The second branch (“prepared by or for counsel employed or retained by an institution or in contemplation of or for use in litigation”) is a statutory privilege created by the *Act* that is similar but not identical to the common law privilege in branch 1. The institution must establish that at least one branch applies.

[11] The township submits that the requested legal invoices fall within both branches of section 12. It submits that it disclosed the aggregate total of legal billing amounts for each of the five years identified in the appellant’s request but that the legal invoices themselves are subject to the exemption for solicitor-client privileged information at section 12, citing the common law solicitor-client privilege (branch 1) and also the statutory solicitor-client communication privilege (branch 2). The township also submits that some of the legal invoices are also subject to the section 12 exemption as a result of the application of the common law litigation privilege (branch 1) and statutory litigation privilege (branch 2).

[12] Section 42 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. Therefore, in this case, the township bears the burden of proof in establishing that section 12 applies to the legal invoices.

[13] For the reasons below, I find that the bottom line totals of each invoice are not exempt under section 12. However, I find that the remaining information in the legal invoices is exempt from disclosure under section 12, as a result of the application of the common law solicitor-client communication privilege at branch 1.

[14] I will first discuss the application of the solicitor-client communication privilege

under the common law, at branch 1. Then, I will consider whether the bottom line totals are subject to the common law litigation privilege or statutory litigation privilege, as also claimed by the township.

Common Law solicitor-client communication privilege in the context of legal fee and billing information

[15] Previous court decisions and IPC orders have addressed the specific question of whether legal billing information is subject to solicitor-client communication privilege at common law. Legal billing information includes items such as time dockets (which set out the time spent by legal counsel on an activity or work and a description of the activity or work performed), fees and disbursements.

Presumption against disclosure

[16] The common law privilege in branch 1 includes solicitor-client communication privilege, which protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.² The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁴ Branch 2 contains a statutory privilege, protecting information prepared by or for counsel employed or retained by an institution for use in giving legal advice. The two privileges, while similar, are not identical.

[17] Legal billing information is *presumed* to be privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.⁵ In *Maranda v. Richer*⁶ the Supreme Court of Canada stated:

...Because of the difficulties inherent in determining the extent to which the information contained in lawyers’ bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privilege category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more

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

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

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

⁵ *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67 (CanLII); 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); (*Ontario AG 2007*) (*Maranda v. Richer*); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941, 2005 CanLII 6045 (ON CA) (*Ontario AG 2005*).

⁶ *Maranda v. Richer*, *Ibid.*

consistent with the aim of keeping impairments of solicitor-client privilege to a minimum[.]⁷

Presumption against disclosure is rebuttable

[18] The presumption that legal billing information is covered by solicitor-client communication privilege is not absolute and can be rebutted.⁸

[19] In considering whether legal billing information is privileged, the IPC follows 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” 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, use the information requested to deduce or otherwise acquire privileged communications.⁹

[20] 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.

[21] The township has already disclosed the aggregate amounts of fees paid for legal services for each of the five years identified by the appellant in his request. However, the appellant continues to seek access to the individual invoices from which those aggregate amounts were calculated. Therefore, what must be determined is whether there is any reasonable possibility that disclosure, either in full or in part, of the legal invoices detailing legal fees paid by the township over the course of five years could reveal communications subject to solicitor-client privilege.

The township’s representations on solicitor-client communication privilege

[22] The township submits that the legal invoices sought by the requester are subject to solicitor-client communication privilege at common law (branch 1) and under the statutory communication privilege (branch 2). It submits that if a record falls within the common law privilege, it will also fall within the scope of the statutory privilege.

[23] The township submits that the appellant has a significant knowledge about the

⁷ *Maranda v. Richer*, *supra* note 5.

⁸ *Ontario AG 2005*, *supra* note 5.

⁹ See Order PO-2484; see also *Ontario AG 2005*, *supra* note 5.

subject matter of legal services sought by the township and has already received aggregate yearly totals for the years in question. It submits that, as was found in Order PO-2727,¹⁰ the fact that the appellant is seeking more itemized information suggests that he is not merely interested in obtaining general information about fees paid, but also wishes to subject the invoices themselves to further scrutiny. The township submits that, as a citizen, the appellant has relevant knowledge and access to considerable public information in relation to the township's operations and affairs, including the subject matter of the legal services rendered. As such, the township submits the appellant is an assiduous inquirer and there is a reasonable possibility that were it to provide him with the legal invoices, privileged information will be disclosed.

[24] The township further submits it has not waived solicitor-client privilege with respect to these invoices, either explicitly or implicitly.

The appellant's representations on solicitor-client communication privilege

[25] The appellant disagrees that the legal invoices fall within solicitor-client communication privilege, submitting that they are not communications to or from township lawyers but are invoices from the lawyers' firms. He submits that it is his view that this is the very type of information that the *Act* was created for, to provide transparency to the public with regards to the activities of a township where taxpayers' dollars are being spent. The appellant explains that he seeks access to the legal invoices in order to calculate the amounts spent on legal fees for certain categories or legal work which are of interest to him. In his representations, he does not specifically outline what these categories are.

[26] The appellant also notes that in the past, the township provided him with copies of legal invoices where only limited portions of the narrative description of the work undertaken was severed.¹¹

Analysis and findings on common law solicitor-client communication privilege

[27] In accordance with *Maranda v. Richer*¹² and other established jurisprudence, the information in the requested legal invoices is presumptively privileged and therefore also presumed to be exempt from disclosure under the common law solicitor-client communication privilege protected by section 12. However, as discussed above, this presumption can be rebutted if the information is "neutral" and does not directly or

¹⁰ In Order PO-2727, the requester was found to not have only significant relevant knowledge related to the legal accounts, but had already received aggregate information and had made other requests seeking access more detailed or itemized information

¹¹ The section 12 exemption is a discretionary exemption meaning that, even if the exemption might apply, the township may exercise its discretion to disclose information that is subject to it. Additionally, each case must be considered on its own facts and merits. Therefore, the fact that the appellant may have previously been provided with legal invoices by the township has no bearing on whether or not the legal invoices at issue in this appeal are subject to exemption.

¹² *Supra*, note 5.

indirectly reveal privileged communications.

[28] Having considered the totality of the evidence before me, including the parties' representations and the legal invoices at issue, I find that the presumption of privilege for billing information has been rebutted for the bottom line total of each invoice because it is neutral information. However, I find that the presumption has not been rebutted for the remaining information because there is a reasonable possibility that its disclosure would reveal communications subject to solicitor-client privilege. My reasons for reaching these conclusions follow.

[29] At issue in this appeal are five years' worth of legal invoices submitted to the township by various law firms who provided it with legal advice on a variety of different types of matters. The appellant submits that he seeks access to the actual legal invoices rather than the aggregate annual amounts already provided to him in order to calculate total amount of legal fees paid by the township on various "categories" of interest to him. I interpret this submission to mean that the appellant seeks access to the individual legal invoices in order to break down the aggregate legal fee amounts already provided to him to calculate them in other ways, for example, by the total amounts spent by the township by type of legal advice sought (i.e. administrative, employment, criminal etc.).

[30] In my view, the majority of the information in the legal invoices is not neutral because there is reasonable possibility that its disclosure would either directly or indirectly reveal communications protected by the privilege. In reaching this conclusion I have considered and found that an "assiduous inquirer," such as the appellant, taking a methodical and persistent approach, could use the information contained in the legal invoices together with background information about the township and its legal matters, available to the public, to deduce or otherwise acquire privileged communications.

[31] As is typical in legal invoices, the sample legal invoices that have been provided to me by the township include information including the law firm name, the date of the invoice, an itemized description or summary of the work undertaken, the dates on which each item of work was performed, the name of legal counsel who performed the work, the time spent by counsel on that work, and the billable amount for each item of work completed. The invoices also include the total fee for the work done during the period covered by the invoice, as well as any disbursements.

[32] I find that it is reasonable to conclude an individual, such as the appellant, with some knowledge of and interest in the business of the township during the five-year period covered by his request, might be able to match information contained in the legal invoices with publicly available information about the township's legal affairs in a manner that would enable him to discern, either directly or indirectly, information such as instances of legal advice given and received on any number of matters and other communications that form part of the continuum of communications between lawyer and client.

[33] However, I have also considered whether any part of the invoices could be disclosed. Specifically, I have considered whether, were some of the information severed, such as the descriptions of the legal work undertaken, together with all associated information including dates, time spent and the identities of legal counsel, it might render the remaining information neutral, thereby rebutting the presumption against disclosure of that specific information.

[34] Based on the evidence before me, including my independent review of the sample invoices, I have concluded that it is reasonably possible that by revealing the dates of the invoices, when the work was done and/or the names of the law firms who provided legal advice to the township (many of which are small firms that specialize in very particular areas of law), the appellant, who I accept is an assiduous requester, may be able to discern information that might be subject to solicitor-client privilege. This includes whether legal advice was sought and received by the township on particular matters, known or reasonably suspected by the appellant or any other individuals who might have an interest in and knowledge of the business of the township.

[35] However, I have concluded that were the legal invoices severed to reveal only the bottom line total amount of each invoice, the invoices would be rendered neutral and the presumption against disclosure of these totals would be rebutted. I do not accept that the evidence before me establishes that the bottom line total fee amount of each invoice, without other information such as the nature of the work done, dates or firm names, could be used by the appellant, together with any information available in the public realm, in a manner that would reveal legally privileged information. In my view, in the circumstances of this case, there is no reasonable possibility that disclosure of the bottom line total fee amount on each invoice would reveal, directly or indirectly, communications subject to solicitor-client privilege. As the presumption has been rebutted for the bottom line total fee amount for each invoice, I find this information is not subject to exemption under common law solicitor-client communication privilege. Below, however, I will consider whether the bottom line total fee amount for each invoice is subject to either statutory solicitor-client privilege or litigation privilege, both at common law and under the statute.

[36] While each case must be decided on its own facts, I note that in previous orders, including Order PO-2484, the IPC has found that the bottom line total dollar amounts of legal invoices alone is neutral information that is not exempt under the solicitor-client privilege exemptions under either the *Act* or its provincial equivalent,¹³ provided that other information, including the dates of the invoices and the narrative description of the work undertaken is severed. I also acknowledge that in *Ontario AG 2007*, the Divisional Court upheld the findings in Order PO-2484 and the analysis in Order PO-2484 has been adopted by subsequent IPC decisions.¹⁴

¹³ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 19.

¹⁴ See order PO-3001, MO-3253, MO-2885 and others.

[37] I acknowledge that the appellant has already been provided with aggregate information about legal fees paid by the township over the five-year period set out in his request and that the township's position is that, as a result of this disclosure of aggregate billing information, it is not required to disclose the actual legal invoices to the appellant. The township relies on Order PO-2727 to support its position.

[38] In Order PO-2727, the adjudicator considered the disclosure of the bottom line total legal fees, including disbursements, charged on 700 legal invoices, and found that information to be subject to solicitor-client communication privilege under the provincial equivalent of section 12 of the *Act*. The township submits that the adjudicator noted that an aggregate total had already been disclosed to the requester and, on this basis, distinguished Order PO-2484, where the most aggregate information found to be available was the bottom line totals of legal invoices.

[39] In my view, the township's reliance on Order PO-2727 to support its decision in this case is misplaced.

[40] First, I note that in considering the disclosure of legal billing information, the test to be applied is not what is the highest order of aggregate information available to be disclosed, but whether the responsive information can be described as neutral information such that the presumption of privilege is rebutted.

[41] Second, I note that the approach in assessing the neutrality of legal billing information adopted in *Ontario AG 2005* and *Ontario AG 2007*, recognizes that each circumstance must be considered on a case-by-case basis and I may consider the "totality of the evidence" before me.¹⁵

[42] In Order PO-2727, while the fact that aggregate billing information had already been disclosed to the requester was considered by the adjudicator, his decision not to order disclosure of the bottom line legal fees was ultimately based on his consideration of the evidence before him which established that the requester in that appeal sought the additional content of the invoices in order to glean further information about the solicitor-client relationship, and that there was a reasonable possibility that disclosure would reveal privileged communications. The adjudicator concluded that, given the evidence before him, the bottom line total legal fees were not neutral information and the presumption against the disclosure of legal billing information was not rebutted.

[43] For the reasons set out above, considering the totality of the evidence before me, I have found that it has not been established that disclosure of the bottom line total fee amount on each invoice would either directly or indirectly reveal communications subject to solicitor-client privilege and that it is neutral information. The presumption against its disclosure has been rebutted.

[44] Accordingly, I find that, with the exception of the bottom line total legal fee amount

¹⁵ *Ontario AG 2007, supra.* note 5, para 27.

in each invoice, the presumption of privilege that is attributed to legal billing information has not been rebutted with respect to the majority of the information in the legal invoices. Therefore, subject to my consideration of waiver and the township's exercise of discretion, all information, except for the bottom line total legal fees amounts on each invoice, is subject to solicitor-client communication privilege at common law and exempt from disclosure under branch 1 of the section 12 of the *Act*. As a result of my finding I will not consider whether the bottom line total legal fee amounts on each invoice are also subject to the statutory solicitor-client privilege.

Statutory solicitor-client privilege

[45] For the information I have not found subject to the common law solicitor-client communication privilege, the bottom line total legal fees in each invoice, I have considered whether the statutory solicitor-client privilege at branch 2 applies, and find, for similar but not identical reasons, that it does not apply.¹⁶

[46] The statutory solicitor-client privilege at branch 2 applies to information that was prepared by or for counsel retained by the institution for use in giving legal advice. Pursuant to section 42 of the *Act*, the township has the burden of proof to establish that the statutory privilege applies. Unlike the discussion pertaining to solicitor-client communication privilege, there is no presumption that legal billing information is subject to the statutory privilege.

[47] Based on the evidence before me, I do not accept that the information that remains at issue in the legal invoices was either prepared by or for counsel retained by the township *for use in giving legal advice*. While the invoices result from legal services, the bottom line amount charged cannot be said to have been used in giving legal advice. I find therefore, that the statutory solicitor-client privilege does not apply to the bottom line total legal fee charged in each invoice.

Waiver of solicitor-client communication privilege

[48] Under common law, solicitor-client privilege can be waived by the client, who is the holder of the privilege. Waiver of privilege can either be explicit (where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege)¹⁷ or implied (where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it).¹⁸ In this case, there is no evidence before me to suggest that the township has waived its privilege with respect to the information that I have found to be subject to solicitor-client communication privilege, either explicitly or implicitly, and I find that it has

¹⁶ As with my finding with respect to solicitor-client communication privilege at common law, my finding with respect to the statutory privilege is subject to my consideration of waiver.

¹⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁸ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

not.

Common law and Statutory Litigation Privilege

[49] The township claims that while all of the legal invoices are already protected by the common law and statutory solicitor-client communication privileges, some of the legal invoices are also exempt from disclosure under common law and statutory litigation privilege. Therefore, I will consider whether the information that I have not found to be subject to solicitor-client communication privilege above –the bottom line legal fee totals for each invoice – is subject to litigation privilege and exempt under section 12.

Common law litigation privilege

[50] Common law litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that legal counsel for a party has a “zone of privacy” in which to investigate and prepare a case for trial.¹⁹ It protects a lawyer’s work product and covers material going beyond communications between lawyer and client.²⁰ 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.²¹

[51] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.²² Common law litigation privilege generally comes to an end with the termination of litigation.²³

Statutory litigation privilege

[52] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.²⁴

[53] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.²⁵

Representations on litigation privilege

[54] The township submits many of the invoices contain communications and information exchanged with counsel, which specifically relate to legal services rendered

¹⁹ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

²⁰ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

²¹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

²² Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, 1999 CanLII7320 (ON CA); see also *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII).

²³ *Blank v. Canada (Minister of Justice)*, cited above.

²⁴ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

²⁵ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

in contemplation of, or for use in, litigation. It submits that many of those invoices relate to non-concluded litigation or prospective litigation and fall within the common law litigation privilege under branch 1. It submits that because those invoices were prepared by counsel in contemplation or for use in litigation, the statutory privilege under branch 2 also applies. It notes that the statutory privilege applies to the invoices relating to concluded litigation and past prospective litigation that did not proceed.

[55] The appellant does not make representations on the possible application of the litigation privilege component of the section 12 exemption.

Analysis and findings on litigation privilege

[56] As indicated above, under section 42 the township bears the onus of establishing whether information is exempt from disclosure, including whether information is exempt under common law or statutory litigation privilege.

[57] For a record to be covered by common law or statutory litigation privilege, litigation must be ongoing or reasonably contemplated at the time of the record's creation.²⁶ Determining whether litigation was "reasonably contemplated" is a question of fact that must be decided in the specific circumstances of each case.²⁷ In Order PO-3651, the adjudicator commented on what constitutes "contemplated" litigation stating, in part:

[I]n order to conclude that there was "contemplated" litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.

[58] In this appeal, the township has provided insufficient evidence to demonstrate that the law firm name and bottom line totals for any of the invoices relate to any ongoing or reasonably contemplated litigation, let alone that any of the legal invoices were created for the dominant purpose of or use in litigation.

[59] Because I have insufficient evidence to conclude that any of the legal invoices were prepared "in contemplation or for use in litigation," I find that that the information that remains at issue, the bottom line legal fee totals on each invoice, is not subject to exemption under either the common law or statutory litigation privilege at section 12. I will order the township to disclose that information to the appellant.

Exercise of discretion

[60] Section 12 is a discretionary exemption; even if the exemption applies, the township may exercise its discretion to disclose information that may be subject to it. On appeal, I may determine whether the township failed to exercise its discretion or whether

²⁶ Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

²⁷ Order PO-3561.

it erred in doing so. I may not, however, substitute my own discretion for that of the township.

[61] I have reviewed the considerations relied upon by the township, and I am satisfied that it exercised its discretion and that did so properly in deciding to withhold the exempt portions of the legal invoices under section 12 of the *Act*. While I have reached a different conclusion on the township's application of section 12 to the bottom line total fee amount of each invoice, with respect to the information to which I have found the exemption to apply, I am satisfied that the township took into account relevant considerations and did not take into account irrelevant ones. In particular, I note that it weighed the principle that information should be made available to the public against the importance that the Supreme Court of Canada has ascribed to protecting solicitor-client privilege.

[62] There is also no evidence before me to suggest that the township exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the township's exercise of discretion in deciding to withhold the exempt information in the invoices under section 12 of the *Act*.

ORDER:

I order the township to disclose to the appellant, **by March 24, 2023** copies of the legal invoices, severed to reveal only the bottom line legal fee total amount, on each invoice.

Original Signed by: _____
Catherine Corban
Adjudicator

February 22, 2023 _____