Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4510

Appeal PA20-00200

The Ottawa Hospital - Civic Campus

April 16, 2024

Summary: After the hospital commenced and settled a lawsuit, a request was made under the *Act* for a breakdown by year of the hospital's costs for legal and accounting firm services, and for settlement payments made. The request was denied on several grounds and the requester appealed to the IPC.

In this order, the adjudicator first finds that the legal and accounting firm fees are not excluded from the *Act* under section 65(6) (employment or labour relations) as argued by the hospital. However, she upholds the hospital's decision to withhold the legal fees and the settlement payments on the basis of sections 19(a) and (c) (solicitor-client information). She orders the hospital to disclose the accounting firm fees, finding that these are not exempt under sections 19 or 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1)(a), 19, 65(6)1, 65(6)3.

Orders Considered: Orders MO-3664, MO-4019, MO-2810, MO-2589, PO-2673, MO-3778, PO-4008-I, PO-4285, and PO-2484.

Cases Considered: *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.), Order F20-30 BCIPC, *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238, *Maranda v. Richer*, [2003] 3 S.C.R. 193, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* [2005] O.J. No. 941 (C.A.), *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner*), [2007] O.J. No. 2769, 2007 CanLII 65615, *Liquor Control Board of Ontario v.*

Magnotta Winery Corporation, 2010 ONCA 681, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.

OVERVIEW:

Context

[1] The Ottawa Hospital – Civic Campus (the hospital) commenced a lawsuit against several corporations and individuals, including two of its former employees. In the lawsuit, the hospital claimed damages for several causes of action including fraud, conspiracy, unjust enrichment, and breach of contract against all of the defendants. Against the employee defendants, the hospital also claimed damages for breach of fiduciary duty. The lawsuit was preceded by an investigation into the conduct of the defendants (the investigation). The lawsuit was eventually settled and the hospital entered into confidential settlement agreement(s) with the defendants.

The request

[2] A member of the media made a request to the hospital under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

- **Request 1:** A breakdown by year beginning January 1, 2015 of all costs pertaining to legal fees related to the investigation and [the lawsuit]. … I'd also like an accounting of all fees connected with the [lawsuit] preceding the [date the lawsuit was filed], including the cost of the [named accounting firm] audit used as part of the evidence in the [lawsuit].

- **Request 2:** The total cost related to any settlement with the parties that involved cost to the hospital.

[3] The hospital issued a decision denying access to the requested information, in full, relying on sections 18(1)(c) (the exemption for economic and other interests), 19 (the exemption for solicitor-client privilege) and 65(6) (the exclusion for labour relations or employment matters) of the *Act*. During the inquiry, the hospital refined its position, as explained below.

The appeal

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

[5] A mediator was assigned to explore resolution. By the time of the mediation, the lawsuit had been settled. With the assistance of the mediator, the parties agreed that the relevant time period for Request 1 ended on the date that the lawsuit settled.

[6] During the mediation, the hospital agreed to reconsider its access decision and, toward that end, notified affected third parties. After notifying affected third parties, the hospital confirmed its decision to withhold access to the requested information, in full. The hospital added an additional claim, the mandatory exemption for third party information at section 17(1) in relation to information responsive to Request 1.

[7] The appellant stated that she wished to pursue access to the requested information at adjudication and raised the possible application of the public interest override in section 23 of the *Act*.

[8] I conducted a written inquiry in which I issued Notices of Inquiry and invited and received representations from the appellant, the hospital and affected parties. The appellant's representations were shared with the hospital, in full. In accordance with the IPC's *Code of Procedure* and *Practice Direction 7,* the non-confidential portions of the hospital's and the affected parties' representations were shared with the appellant.

[9] During the inquiry, the hospital refined its arguments, arguing that the labour relations and employment exclusion applies only to the information responsive to Request 1 and abandoning its claim that section 18(1)(c) applies.

[10] In this order, I uphold the hospital's decision to withhold access to the settlement payments (the information responsive to Request 2) on the basis of the exemption at section 19(c), statutory litigation privilege.

[11] Regarding the breakdown of legal and other fees (the information responsive to Request 1), I find that the labour relations and employment exclusion does not apply. I find, however, that the breakdown by legal firm and year of the legal fees is exempt from disclosure under section 19(a), the common law solicitor client communication privilege. However, I find that the breakdown by firm and year of the accounting fees is not exempt from disclosure under either section 19 or section 17(1) and I order this information to be disclosed.

RECORDS:

[12] This appeal deals with two types of information.

Information responsive to Request 1 – fees

[13] For the purposes of the appeal, the hospital provided the IPC with a chart containing a summary broken down by year and firm name of amounts paid to law firms and an accounting firm over the relevant time period. The hospital says that it created the chart using invoices from law firms and an accounting firm.

Information responsive to Request 2 – settlement costs

[14] The hospital did not provide the IPC with the information responsive to Request 2, but has provided it with confidential evidence about the information. In this order, I will refer to this information as "the settlement costs."

ISSUES:

A. Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the fees (Request 1)?

B. Does the mandatory exemption for third party information at section 17(1) of the *Act* apply to the fees (Request 1)?

C. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the fees (Request 1)?

D. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the settlement costs (Request 2)?

E. Did the hospital exercise its discretion under section 19 in relation to the legal fees and settlement costs?

DISCUSSION:

Issue A: Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the fees (Request 1)?

[15] Section 65(6) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[1] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[2]

[16] As described by the hospital in its representations, the information responsive to Request 1 is (emphasis added):

> … a chart containing a breakdown by year of legal and other fees related to an investigation and subsequent [l]awsuit for the duration of the

[1] *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (CanLII) (*MCSS v. John Doe*).
[2] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (*Goodis*) (Div. Ct.).

> proceedings. … The information set out in summary form in the chart was prepared, collected, … maintained, and/or used by the [h]ospital and/or on its behalf, *through a compilation of invoices from the law firms and accounting firm involved in the investigation and subsequent litigation*.

[17] The exclusions in the *Act* apply to records as a whole.[3] The information in the chart is derived from invoices described by the hospital above. The hospital's arguments pertain to the circumstances leading to the creation of the invoices and not to the creation of chart. (The chart was prepared to respond to the access request and for the purposes of this appeal.) I therefore consider the hospital's exclusion claim to be one that applies to the invoices referred to by the hospital to create the chart (the invoices). It is important to note, however, that the appellant seeks access only to the information within those invoices that is necessary to create the summary information in the chart.

[18] The hospital claims that either or both of the exclusions at sections 65(6)1 and 65(6)3 apply to exclude the invoices from the *Act*. Section 65(6) states, in part (emphasis added):

> 65(6) Subject to subsection (7)[4], this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution *in relation to* any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity *relating to* labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations *relating to* labour relations or to the employment of a person by the institution between the institution, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications *about* labour relations or employment related matters in which the institution has an interest.
>
> …

[19] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the subjects mentioned in section 65(6), there must be "some connection" between them.[5]

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[3] Order MO-3798-I at para 29.
[4] None of the exceptions in section 65(7) are relevant to the present appeal.
[5] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).

[20] As will be seen, the hospital and the appellant refer at length to Order MO-3664, which was upheld on judicial review in *Brockville (City) v. Information and Privacy Commissioner, Ontario,* 2020 ONSC 4413 ("*Brockville*"). In Order MO-3664, the adjudicator determined that the labour relations exclusions in the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) (the equivalent to sections 65(6)2 and 65(6)3) did not apply to certain accounting documents. The adjudicator reasoned that because accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations did not have "some connection" to labour relations.

[21] Although *Brockville* (and Order MO-3664) deals in part with the *MFIPPA* equivalent to section 65(6)2, which is not at issue in the present appeal, it is relevant to the interpretation of "in relation to" whenever it appears in section 65(6). Regarding the equivalent to section 65(6)2, the adjudicator found that any connection between the records and labour negotiations was in a "tangential way" that did not meet the "some connection" standard.

[22] Likewise, regarding the *MFIPPA* equivalent to section 65(6)3, the adjudicator in Order MO-3664 found that the records were created, maintained, prepared or used for accounting purposes and were only tangentially connected to meetings, discussions, consultations or communications about labour relations matters.

Overview of positions

[23] Both parties acknowledge that for the information at issue to be excluded under sections 65(6)1 or 65(6)3, the hospital must establish the following requirements.

[24] For section 65(6)1:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.V

[25] And, for section 65(6)3:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[26] The hospital's main argument is that the fees are excluded under section 65(6)1 and its arguments therefore focus on its view that the invoices have some connection to the lawsuit, which it says is a proceeding relating to the employment of a person. In very brief alternative argument, the hospital submits that the invoices (and therefore the fee information in the chart) are excluded under section 65(6)3, on the basis that they have some connection to meetings, etc., about employment-related matters in which the hospital has an interest.[6]

[27] As a backdrop to its arguments, the hospital refers to the legislative history of section 65(6), as described in Orders MO-3583-I and MO-3981.[7] The hospital emphasizes that the exclusion was added to the *Act* to prevent disclosure when an institution is acting as an employer, and that the amendment was intended to treat labour relations and employment information similarly to how such information would be treated in the private sector. The hospital concedes that the exclusion is not intended to apply to records "in the context of a provincial institution's operational mandate," referring to *MCSS v. John Doe.*[8]

[28] The appellant agrees with the characterization of the purpose of the exclusion as argued by the hospital, but she says that the exclusion does not apply to the information that she seeks. The appellant focuses her argument on the subject matter of the lawsuit, which she says is not related to the employment of a person. She also argues that because the records are similar, I should reach a similar finding as the adjudicator did in Order MO-3664.

Section 65(6)1

Requirement 1

[29] The parties agree that requirement 1[9] has been met for section 65(6)1. I agree and find that the records at issue – invoices from the law firms and the accounting firm involved in the lawsuit from which the summary fee information in the chart was derived – were maintained and used by the hospital.

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[6] The totality of the hospital's alternative argument about the possible application of section 65(6)3 is:

> Further and in the alternative, [the Breakdown] is excluded pursuant to section 65(6)3 because the information contained within [the Breakdown] has been collected, prepared, maintained, and/or used by the [h]ospital in relation to meetings, discussions, consultations and communications about employment-related matters in which the [h]ospital has an interest.

[7] Orders considering the equivalent section in the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56 (*MFIPPA*).

[8] Cited above.

[9] "The record was collected, prepared, maintained or used by an institution or on its behalf."

Requirements 2 and 3

Representations of the parties

[30] The hospital argues that requirement 2[10] is met where the information at issue was prepared *in relation to* proceedings or anticipated proceedings before a court. It says that the lawsuit is a proceeding and also that the information pertaining to the fees incurred prior to the lawsuit were prepared "in anticipation of" the lawsuit, citing Order MO-840.

[31] Pointing to *Toronto Star,*[11] the hospital argues that "in relation to" is a low threshold. It says that its burden is to demonstrate that *a* primary – not *the* primary – purpose for collecting, maintaining or using the record at issue is the lawsuit, referring to Order PO-3572 in applying the "some connection" test. Although the hospital argues that Order MO-3664 and *Brockville* are distinguishable from the present appeal*,* it also submits that the Court in *Brockville* affirmed the "some connection" test.

[32] The hospital says that "a primary purpose for which the information was collected, prepared, maintained, and/or used was in order to facilitate the investigation and subsequent prosecution of the" lawsuit. The hospital says that the information in the invoices was "relied upon by the [h]ospital in relation to the [l]awsuit and [were] not a mere by-product of the [l]awsuit."

[33] The hospital argues that the circumstances of the present appeal are distinguishable from those in Order MO-3664/*Brockville,* arguing that Order MO-3664 was upheld by the Court in *Brockville* "primarily on the basis of the evidentiary record before the IPC," referring to paragraph 39 of *Brockville.* I will describe this argument in more detail below.

[34] The appellant argues that I should follow the reasoning in *Brockville*/Order MO-3664 in the present appeal and she disputes that there is "some connection" between the records at issue and "employment matters," referring generally to the subject matters in section 65(6)1 and 3.[12] She refers to the following passage from *Brockville* in support of her position: "… the connection between labour relations and accounting documents detailing public expenditures by a municipality is not enough to meet the 'some connection' standard" (paragraph 40).

[35] The appellant submits that *Brockville* is full answer to whether the fees in the chart are subject to the section 65 exclusion. She says, "[c]learly the *Act* does not mean to exclude all litigation records simply because an employee is a party." On this point, the

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[10] "This collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity."
[11] Cited above.
[12] The appellant states that she concedes that requirement 2 is met; however, her substantive arguments are inconsistent with this position.

hospital replies that I must engage in my own analysis and, as I understand the argument, not a rote application of the appellant's interpretation of *Brockville* to the circumstances of this appeal.

[36] The appellant also responds to the hospital's efforts to distinguish *Brockville/* Order MO-3664. She says that it is not accurate to say that *Brockville* turned entirely on a lack of evidence. She says that, to the contrary, the Court said that lack of evidence was significant but that its finding about the insufficiency of the connection between legal fees paid and the purpose of section 65 is a finding of law applicable to all cases.

[37] The hospital replies that the "[R]ecords are clearly employment related and more than meet the evidentiary standard articulated in *Brockville*… for finding that the exclusion applies, namely, that disclosure would give rise to an 'identifiable risk' of prejudice in an employment related matter."

[38] With reference to requirement 3[13] of section 65(6)1, the hospital submits that the lawsuit and a preceding investigation involve claims against former employees for breach of employment contracts. It also explains that at least one of the employee defendants filed a counterclaim for wrongful dismissal.

[39] Referring to *Goodis,*[14] the hospital submits that the investigation and eventual lawsuit relates to misconduct of hospital employees in the facilities and planning department and their relationship between these employees and hospital contractors. It says that the claims in the lawsuit relate to employment policies at the hospital, as well as employees' contractual and fiduciary duties to the hospital.

[40] The hospital points out that, as alleged in its statement of claim, it took several actions against the employees that impacted their employment with the hospital. Taking all of this into account the hospital argues that the litigation clearly meets the description in *Goodis* – that is, litigation relating to terms and conditions of employment.

[41] The hospital also refers to Order MO-2589 in support of its position. In Order MO-2589, the adjudicator concluded that the records at issue – "litigation records" relating to litigation initiated against two former employees for misconduct – was excluded under the municipal equivalent to section 65(6)1 (section 52(3)1 of *MFIPPA*). The adjudicator accepted that the proceedings at issue related to employment, including litigation relating to terms and conditions of employment. The hospital notes that in the case of Order MO-2589, there was also a counterclaim for constructive dismissal. The hospital says that the circumstances in Order MO-2589 are analogous to the present appeal and a similar result is warranted.

[42] Lastly, the hospital refers again to *Goodis,* in which the Divisional Court held that

[13] That is: 3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.
[14] Cited above.

section 65(6) did not apply when the records related not to the employment of individuals but to actions of the individuals that might make the employer vicariously liable. The hospital says that this does not describe the circumstances underlying the present appeal because the misconduct in this case relates to "directly liability of [its] former employees to the hospital," not vicarious liability.

[43] The appellant argues that the "pith and substance" of the lawsuit is that the defendants had conspired and engaged in a "massive fraud" against the hospital, which resulted in significant financial loss. The appellant says that in the context of the lawsuit, the hospital was not acting as an employer in the regulation of its workforce; rather, it was acting as a victim of a large-scale fraud. The appellant says that although two of the alleged co-conspirators are former employees, this does not "convert a fraud case into a labour relations matter that is excluded by section 65." She says that her position is reinforced by the same case law that the hospital relies on.

[44] The appellant refers again to *Brockville* and the Divisional Court's statement, "The 'some connection' standard must still involve a connection that is relevant to the statutory scheme and objects understood in their proper context," citing paragraph 39.

[45] The appellant says that the purpose of section 65(6) is to ensure the confidentiality of labour relations information and to protect sensitive labour relations and employment-related information, points that she says were also made by the hospital. She says the lawsuit is "essentially a claim in civil fraud" and that the mere fact that two of the defendants were employees of the hospital is incidental to that claim.

[46] Regarding the counterclaims filed, the appellant says that those claims are inextricable from the fraud claims being alleged by the hospital. Lastly, she submits that it cannot be said that a civil fraud claim against two former employees and several contractors touches on "sensitive labour relations and employment related information" as contemplated by section 65 of the *Act.*

Analysis and findings

[47] I must decide whether the invoices, portions of which were used by the hospital to compile the chart, were maintained "in relation to" a proceeding or anticipated proceeding that "relates to" the employment of a person by the hospital.

[48] To begin, I accept that in this case the litigation at issue relates to "the employment of a person" by the hospital (requirement 3). I considered but rejected the appellant's argument that the lawsuit is "in pith and substance" litigation about fraud because I agree with the hospital that a significant component of the litigation pertains to the actions of employees and the potential misconduct of these employees. The litigation has some connection to the terms and conditions of employment of the employee defendants and the hospital's role as their employer.

[49] However, regarding requirement 2, I find that there is not a sufficient connection

between the invoices and the litigation for the exclusion to apply. I find that the invoices – and therefore the information in the chart – were not maintained "in relation to" the lawsuit within the meaning of section 65(6)1. I find that the invoices were maintained or used for accounting purposes and are at most, "tangentially-related" to the lawsuit.[15]

[50] Like the adjudicator in MO-3664, I find that when I balance the interests protected by section 65(6)1 with the overall interests and objectives of the *Act,* it is necessary to interpret the exclusion narrowly and in a way that is "relevant to the statutory scheme and objects understood in their proper context."[16]

[51] The hospital argues that I should reach a different conclusion than the adjudicator in MO-3664. It argues that unlike the institution in Order MO-3664, it has provided sufficient evidence to support a finding that the records at issue are excluded. Here, the hospital refers to the Divisional Court's observation in *Brockville* that it was "very significant that there was no evidence adduced before the adjudicator [in Order MO-3664] that would help her understand how the release of legal fee figures from negotiations would have any effect on labour relations, let alone an unbalanced or de-stabilizing effect."[17]

[52] As evidence, the hospital describes its status and size as an employer in the Ottawa area. It submits that disclosure of the information in question will have a destabilizing impact on future employment-related proceedings because future litigants would have knowledge of what the hospital spent in the past and this knowledge could allow them to draw inferences as to the strategy likely to be employed by the hospital. Specifically, the hospital says that insights that could be gained are its willingness to litigate to conclusion and, its risk tolerance; it says that these insights are not available to private sector employees.

[53] The hospital submits that it must have the same ability as private sector employers to obtain legal representation in respect of employment-related legal proceedings. It argues that it would be inconsistent with the purpose of the exclusion for employees of the hospital to have access to legal cost information and accordingly gain insight into the hospital's strategy and level of commitment to such proceedings.

[54] In my view, the evidence provided by the hospital does not shed any new light or establish any new interests that ought to be considered when interpreting section 65(6). Rather, the hospital's evidence illuminates and reinforces the well-established interests that the labour relations exclusion in section 65(6) are intended to protect. These interests are the reasons why the IPC and the courts have consistently found that "some connection" is a low bar. There is a recognition that removing certain records from the scope of the *Act* protects the ability of employers to carry out their functions,

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[15] Orders MO-3664, as upheld in *Brockville*, and MO-4019.
[16] *Brockville.*
[17] *Brockville* at para 39.

responsibilities and activities as employers.

[55] However, it has also been recognized that these interests must be balanced against the overall purpose and objectives of the *Act* when read in its entirety and viewed in its context (as explained by the Court in *Brockville)*. The information at issue in this appeal consists of aggregate and summary information derived from invoices detailing use of public funds. When I consider the other competing interests of transparency, particularly about the use of public funds, I remain of the view that the invoices at issue in this appeal, while tangentially related, do not bear "some connection," to the litigation.

[56] For these reasons, I find that section 65(6)1 does not exclude the chart from the *Act*.

Section 65(6)3 – meetings, consultations, discussions, etc.

[57] The hospital has the burden of establishing that the exclusion applies.[18] As indicated above, the hospital briefly argues that the exclusion at section 65(6)3 applies, stating only that the information contained in the chart was maintained in relation to meetings, consultations, discussions or communications about employment-related matters in which the hospital has an interest.[19]

[58] Section 65(6)3 states:

> 65(6) Subject to subsection (7)[20], this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution *in relation to* any of the following:
>
> > 3. Meetings, consultations, discussions or communications *about* labour relations or employment related matters in which the institution has an interest.

[59] For section 65(6)3 to apply, I must conclude that the records from which the chart was derived were "collected, prepared, maintained or used" by the hospital (part 1) "in relation to meetings, consultations, or communications" (part 2) "about … employment related matters in which the institution has an interest" (part 3). The term "employment related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective

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[18] Orders MO-3316, MO-2439, and MO-3294-I.

[19] The totality of the hospital's alternative argument about the possible application of section 65(6)3 is:

> Further and in the alternative, [the chart] is excluded pursuant to section 65(6)3 because the information contained within [the chart] has been collected, prepared, maintained, and/or used by the [h]ospital in relation to meetings, discussions, consultations and communications about employment-related matters in which the [h]ospital has an interest.

[20] None of the exceptions in section 65(7) are relevant to the present appeal.

bargaining relationship.[21]

[60] As I did in relation to section 65(6)1, I accept that the records from which the chart was derived were maintained by the hospital, meeting part 1 of the test. I also find that the lawsuit (and the investigation that preceded it) constitutes an employment related matter that the hospital has an interest in, meeting part 3 of the test. The misconduct at issue in the lawsuit involved in large part the relationship between the hospital and the employee defendants.

[61] However, I find that part 2 of the test has not been met. For the same reasons outlined in relation to section 65(6)1, I find that the records from which the chart was derived have only a tangential connection, but not some connection, to any meetings, consultations, or communications about the employment related matter (i.e., the lawsuit).

[62] In summary, I find that section 65(6)3 does not exclude the chart from the *Act.*

[63] Having found that the information at issue is not excluded under section 65(6), I will proceed to consider the hospital's alternative exemption claims.

Issue B: Does the mandatory exemption for third party information at section 17(1) of the *Act* apply to the fees (Request 1)?

[64] The hospital and two affected parties argue that the mandatory exemption for third party information at section 17(1)(a) applies to the information responsive to Request 1, the chart containing a breakdown of fees.

[65] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[22] where specific harms can reasonably be expected to result from its disclosure.[23]

[66] Section 17(1)(a) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[21] Order PO-2157.
[22] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[23] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[67] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

The information is commercial or financial information

[68] The hospital and the affected parties say that the information in the chart contains third party information in the form of commercial or financial information of law firms, the accounting firm and an insurer. The hospital and the affected parties refer to Orders PO-2010, MO-3778, PO-2673, MO-2208 and PO-3183 as examples of when the IPC has found that amounts billed for legal and accounting services consist of financial or commercial information. The appellant did not address this component of section 17(1)(a).

[69] The IPC has consistently described and defined the types of information protected under section 17(1) in various previous orders.[24] Having regard for those descriptions and considering the nature of the information at issue, I find that it is commercial or financial information.

The information was not supplied in confidence

[70] The requirement that the information has been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[25] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[26]

[71] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[27]

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[24] Orders PO-2010 and P-1621.
[25] Order MO-1706.
[26] Orders PO-2020 and PO-2043.
[27] Order PO-2020.

Hospital and affected party representations

[72] The hospital says that the invoices from which the chart was compiled were "supplied directly by" the law firms and an accounting firm in confidence. It says that the law and accounting firms all had an implicit and explicit expectation of confidentiality at the time the information was supplied. It says that confidentiality between the firms and the hospital is "fundamental and inherent in the entire relationship between the hospital and its legal counsel." It says that "all communications which the hospital received from the Law Firms were marked as confidential," but even without such an explicit request, it was implicit.

[73] Regarding the legal fees, the hospital refers to Order PO-3183, an order in which, it says, the adjudicator agreed that information about legal fees had been supplied in confidence by an affected party, in part, because of the solicitor-client relationship between the affected party and the institution. The hospital says that the adjudicator agreed that the nature of the relationship "lent credence" to the affected party's expectation that the record would be treated in a confidential fashion and that the same reasoning ought to apply in the present appeal.

[74] The hospital made additional confidential representations that pertain specifically to one affected party, which I am not able to describe further in this order due to confidentiality concerns.

[75] One affected party (a legal firm) "confirms" the hospital's statements that the information from which the chart was derived was supplied to the hospital by the firm in confidence. It explains that the information at issue was prepared only for the hospital, communicated only to the hospital, kept in confidence and in the context of a solicitor-client relationship.

[76] Another affected party (the second affected party) made confidential representations arguing that I could find that the information pertaining to legal fees was supplied in confidence by this party.

[77] Regarding the billing information pertaining to the accounting firm, the hospital also argues that it was provided in confidence and states that "the work done in this matter by the Accounting Firm was at the request of an under the direction of internal and external legal counsel to the hospital and is therefore subject to solicitor-client privilege." It refers to Order PO-3665 in support of this argument.

[78] In this appeal, the legal firm also supports the hospital's position that the information at issue is subject to solicitor-client privilege. I will discuss this further below. However, the following part of the legal firm's representations is relevant to the discussion about section 17(1). The legal firm says that the information at issue is subject to solicitor-client privilege and that the privilege belongs to the client. The firm says that as long as the hospital, as client, does not waive the privilege, it remains.

Appellant's representations

[79] The appellant disputes that the information at issue was supplied by the legal and accounting firms. She says that a finding that the total amounts paid by a public institution for services rendered under contract would mean that every invoice for every product supplied or service provided could be withheld simply by declaring it confidential.

[80] Further, she says that according to several orders of the IPC, the provisions of a contract are treated as mutually generated rather than supplied, citing order PO-2226.

Hospital's reply

[81] The hospital says that the appellant's arguments present an unreasonable and exaggerated characterization of the hospital's position.

[82] It says that the IPC has consistently concluded that legal and accounting invoices are *supplied* for the purpose of the third-party exemption, citing Orders PO-2673 and MO-3778.

Discussion

[83] I first considered the appellant's arguments that a contract is consistently deemed not to be "supplied" but rather "mutually generated." The appellant is correct about this principle in general;[28] however, I do not find these authorities to be relevant to the circumstances of this appeal. The information at issue is high level information about fees actually charged. While there may well be a contract between the hospital and the affected parties, this contract is not at issue in this appeal.

The information was not supplied by the second affected party

[84] I will next address the claims made by the second affected party. I am unable to conclude that any of the fee information was supplied in confidence by the second affected party to the hospital. I am not able to elaborate further on the reasons why to protect the identity of the affected party and its confidential information (that is not at issue in this appeal).

[85] I formed this conclusion after considering the confidential representations of the second affected party, as well as the type of information contained in the chart. In my view, the second affected party (and the hospital) are attempting to establish that certain *information that is not at issue in the appeal* was supplied in confidence. Their arguments are not relevant to the information that is at issue or their concerns are too dependent on a variety of speculative contingencies. I find that the second affected party did not

[28] See *Boeing Co.,* cited above, and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII).

supply the information at issue to the hospital.

The information was not supplied in confidence by the accounting firm

[86] I will next address the fees pertaining to the accounting firm. I do not have evidence before me to assist me in understanding the circumstances regarding how the invoices of the accounting firm were supplied to the hospital. I acknowledge that the hospital says that the accounting firm was retained and directed by the hospital's external and internal lawyers, but this high-level description contains no detail about how the invoices containing the fees were issued and to whom and why there was an objective expectation of confidentiality. Although invited to do so, the accounting firm made no representations in this appeal.

[87] Without sufficient evidence on this issue, I find that the information pertaining to the accounting firm's fees was not supplied in confidence to the hospital.

The information was not supplied in confidence by the law firms

[88] I will now turn to the legal fees in the chart. I am not satisfied that the legal fees in the chart were supplied in confidence to the hospital by the law firms. I understand that the hospital hopes to maintain its legal accounts in confidence and that it expects its lawyers to do the same as a manifestation of their professional obligations.

[89] The purpose of section 17(1) is to protect the confidential information assets of third parties, not institutions. In this appeal, the expectation of confidentiality arises from the hospital, not the affected party law firm. I accept that the hospital expects its lawyers to maintain confidentiality over the invoices issued, but I am unable to conclude that the law firms supplied their invoices to the hospital with any obligation at all that the hospital would keep this information confidential. Indeed, the law firm who participated in the inquiry explained that it understands that the hospital could waive its privilege over the billing information at any time.

[90] I considered the orders cited by the hospital. In one case (Order PO-2673), the adjudicator concluded that while invoice information may have been supplied, it was not done so in confidence. In the other (Order MO-3778), the adjudicator was dealing with different evidence about the confidential nature of the information and, in any event, determined that the exemption did not apply because the affected party had not established the requisite harms. These orders do not assist the hospital.

[91] I find that the information at issue in the chart was not supplied in confidence by the law firms to the hospital.

Conclusion

[92] To establish the section 17(1) exemption, all three parts of the test must be met. Having does not apply. Having concluded that the information at issue was not supplied

in confidence to the hospital and therefore that the second part of the section 17(1) test has not been met, I find that section 17(1) does not apply to the information at issue.

Issue C: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the fees (Request 1)?

[93] Section 19 exempts certain information from disclosure, either because it is subject to common law solicitor-client privilege or because it was prepared by or for legal counsel for an institution.

[94] Below, I explain why I find that the accounting firm fees contained within the chart are not exempt from disclosure under section 19. I also explain why I find that the chart of legal firm fees is solicitor-client communication privileged and therefore exempt from disclosure under section 19.

Section 19 and the common law presumption for legal billing information

[95] Section 19 states:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege,
>
> [section 19(b) pertains to Crown counsel]
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[96] The parties agree generally with the following statements of principle about section 19, and I therefore do not repeat their detailed arguments and submissions on these points.

[97] 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. At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[98] 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.[29] 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.[30] The privilege covers not only the legal advice itself and the request for advice, but also

[29] Orders PO-2441, MO-2166 and MO-1925.
[30] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.) (*Descôteaux*).

communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[31]

[99] *Common law litigation privilege* is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[32] The litigation must be ongoing or reasonably contemplated for the common law litigation privilege to apply.[33] This privilege protects records created for the dominant purpose of litigation. It protects a lawyer's work product and covers material going beyond communications between lawyer and client.[34]

[100] Litigation privilege 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.[35] Common law litigation privilege generally comes to an end with the termination of litigation.[36]

[101] The second branch, found in section 19(c) ("prepared by or for counsel employed or retained by … a hospital") contains statutory privileges created by the *Act*. The statutory and common law privileges, although not identical, exist for similar reasons.

[102] Similar to the common law solicitor-client communication privilege, the *statutory communication privilege* covers records prepared "for use in giving legal advice." The *statutory litigation privilege* applies to records prepared by counsel employed or retained by a hospital "in contemplation of or for use in litigation." 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.[37]

The presumption for legal billing information – solicitor client communication privilege

[103] The central dispute between the parties is whether the presumption that legal billing information is solicitor-client communication privileged applies to the chart. This is an argument that the common law solicitor-client communication privilege applies to legal billing information. As will be discussed in more detail below, legal billing information is presumptively privileged unless the information is "neutral" and does not directly or

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[31] *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.
[32] *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) (*Blank*).
[33] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank*, cited above.
[34] *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commission, Inquiry Officer*) (2002), 62 O.R. (3d) 167 (C.A.).
[35] *Goodis*, cited above.
[36] *Blank*, cited above.
[37] See *Ontario* (*Attorney General*) *v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Goodis*, cited above.

indirectly reveal privileged communications.[38]

Discussion and analysis

[104] I will first discuss the accounting firm fees, then the legal firm fees.

Accounting firm fees

[105] The chart contains the annual totals of the amount of fees charged by an accounting firm. These fees pertain to the investigation that preceded the lawsuit.

[106] The hospital's representations do not contain many particulars about the investigation or how it was carried out. The information provided consists of the following:

- "In July 2015, the Hospital initiated a confidential and privileged investigation into certain irregularities in the Hospital's Planning and Facilities department. That investigation was directed by internal and external legal counsel and was conducted for the purpose of providing legal advice to the Hospital, and in contemplation of litigation."

- "The information relating to periods before January 1, 2016, was collected, prepared and maintained in anticipation of the Lawsuit."

- "From the outset of the investigation, the Hospital contemplated that litigation would be required as a result of the matters which were under investigation. The investigation was therefore conducted throughout with a view to litigation, and the records regarding fees incurred in the course of same were therefore prepared in contemplation of anticipated litigation." (From its representations about section 65(6)1.)

- "As the IPC has previously found, the work done in this matter by the Accounting Firm was at the request of and under the direction of internal and external legal counsel to the hospital and is therefore subject to solicitor-client privilege," citing Order PO-3665. (From its representations about section 17(1)).

- "The invoices from which the information present in Record 1 is drawn were supplied directly the Law Firms and Accounting Firm. … The information was further supplied in confidence, as the Law Firms and Accounting Firm had both an implicit and explicit expectation of confidentiality as the time the information was provided."

[107] The appellant argues that the presumption for legal billing information does not

[38] *Maranda v. Richer, [2003] 3 S.C.R. 193* (*Maranda*); 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*); see also *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 941 (C.A.) (*Ontario AG 2005*).

apply to the "accounting invoice." The hospital did not address the appellant's arguments about the "accounting invoice."

[108] The rebuttable presumption that legal billing information is privileged arises from the common law solicitor client communication privilege, which pertains to communications between legal counsel and their clients. Unlike legal billing information, there is no presumption at law that billing information for non-legal services are presumptively solicitor-client privileged. I therefore find that the hospital is not entitled to rely on the presumption for legal billing information as it relates to the accounting firm fees.

[109] Although it has not expressly stated as such, I understand the hospital to also argue that the accounting firm fees are otherwise exempt under section 19, either because they are common law solicitor client, or statutory, communication privileged or common law or statutory litigation privileged.

[110] I will first deal with the communication privilege arguments. On the face of them, the accounting firm fees in the chart are not confidential communications between legal counsel and the hospital for the purpose of giving or receiving legal advice nor are they prepared "for use in giving legal advice." Rather, they are the total amount of fees incurred by the hospital for the services provided, nothing more. I find therefore that the accounting firm fee information is not subject to either the common law or statutory communication privilege. In reaching this conclusion, I considered the hospital's statement that its legal counsel directed the activities of the accounting firm; however, I also took into account that the source invoices for the totals in the chart were provided by the accounting firm to the hospital.

[111] I will deal next with the litigation privilege arguments. To begin, the common law litigation privilege cannot apply because the particular litigation is at an end. This leaves the argument about statutory litigation privilege – i.e. that the accounting firm fee information was prepared by or for the hospital's counsel in contemplation of, or for use in, litigation. Because the information at issue consists only of annual totals of the amount of fees charged by the accounting firm, I am unable to conclude that this information was prepared by or for counsel employed or retained by the hospital in contemplation of litigation of or for use in litigation. While I accept that the work carried out by the accounting firm was associated with anticipated litigation, this does not lead to the conclusion that the information was prepared in contemplation of or for use in litigation. Rather, I find that the information at issue was prepared for the ancillary purpose of documenting the accounting firm services provided to the hospital.[39]

[112] In summary, I find that the parts of the chart pertaining to the accounting firm fees are not exempt under section 19 and I will therefore order this information to be

[39] See Orders MO-4019 and PO-2483.

disclosed to the appellant.

[113] I will now consider the law firm fees contained within the chart.

Law firm fees

[114] The IPC consistently applies *Maranda* in appeals involving privilege claims over legal billing information. The IPC's most authoritative and comprehensive description of its approach 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*.[40]

[115] In Order PO-2484, Adjudicator Higgins described the approach to legal billing information in detail. He began by finding that the IPC must consider both the evidence offered by the appellant (if any) and the information at issue when deciding whether the legal billing information is sufficiently neutral to rebut the presumption. He then summarized the approach as follows,

> 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.

[116] In dismissing an application for judicial review of Order PO-2484, the Divisional Court in *Ontario AG 2007*[41] 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

[40] Cited above.
[41] Cited above, at para 22.

> 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.
>
> …
>
> [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 privilege analysis and ordering that this information be severed from the records and disclosed to the requesters, the IPC committed no reviewable error.[42]

[117] This approach can be summarized as follows. 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.

[118] The parties agree generally with the approach taken by the IPC, referring to and citing *Maranda* and *Ontario AG 2005.*

[119] The hospital also argues that I should consider Order F20-30, a decision of the B.C. Information and Privacy Commissioner, IPC Order PO-4008-I, *British Columbia (Attorney General) v. Canadian Constitution Foundation* (*CCF*),[43] a decision of the B.C. Court of Appeal, and *Luu Bankruptcy (Re),*[44] a decision of the B.C. Supreme Court.

[120] In F20-30, the B.C. IPC concluded that the presumption that legal billing information was privileged had not been rebutted in relation to the total legal fees incurred by a municipality to respond to another B.C. IPC appeal involving the same appellant. The adjudicator in F20-30 was persuaded that because the requester had seen the materials submitted by the municipality in the particular appeal, disclosure of the total legal billings would allow the appellant to deduce the time and effort expended by the municipality in relation to a particular matter. In my view, these are conclusions that the adjudicator was able to make on the basis of the record before her, including the relative

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[42] *Ontario AG 2007,* cited above.
[43] 2020 BCCA 238.
[44] 2013 BCSC 1374 at para 43.

complexity of the inquiry at issue.

[121] The hospital submits that the timing of the request in relation to the lawsuit is a relevant consideration and that because the appellant seeks access to information for the time prior to the commencement of the lawsuit, there is a greater likelihood that disclosure would reveal privileged information. It points to Order PO-4008-I, in which an IPC adjudicator held that the total sum of legal invoices in combination with the first and last invoice date in relation to a widely-publicized defamation action against a former employee that spanned five years remained privileged. In my view, the approach taken in Order PO-4008-I is consistent with the approach outlined above and, like F20-30, the conclusion reached by the IPC adjudicator was dependent on the facts before the adjudicator.

[122] The hospital also points to *CCF*, in which the BC Court of Appeal observed that communications about litigation strategy are more likely to be confidential earlier in the lifespan of litigation. Although the hospital acknowledges that the lawsuit is at an end, it says that the analysis in *CCF* is nevertheless applicable because the lawsuit was settled prior to trial and that, therefore, the hospital's litigation strategy remained "largely undisclosed." It says that disclosure of the breakdown of fees would enable an assiduous inquirer, such as the appellant, to make inferences about the legal strategies pursued by the hospital that she might otherwise not be able to make.

[123] The hospital also submits that disclosure of even a "global total of fees" would reveal solicitor-client privileged communications. It refers again to Order PO-4008-I, in which the adjudicator stated that an appellant cannot rebut the presumption by simply stating that prior authorities have held that aggregate legal fees are neutral. Further regarding this point, the hospital submits that disclosure of the total amount of fees would reveal the level of activity carried out on behalf of a client, citing *Luu Bankruptcy (Re)*[45] and *CCF.*

[124] Regarding the nature of the onus to rebut the presumption, referring to *Ontario (AG) 2005,*[46] the hospital submits that the onus is on the appellant to rebut the presumption and to do so, it must be established that there is "no reasonable possibility" that disclosure of the amount paid will directly or indirectly reveal any communication protected by the privilege. The hospital says that the BC Court of Appeal decision in *CCF* is supportive of its position.

[125] While the Court in *CCF* indeed framed the onus as being exclusively 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.

[45] 2013 BCSC 1374 at para 43.
[46] Cited above.

Supreme Court below that "the onus is on CCF to establish through evidence *or argument* that there is no such reasonable possibility."[47]

[126] Regarding onus, 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*.

[127] The hospital says that the appellant is an "assiduous inquirer," pointing to the appellant's own published media articles about the lawsuit, other articles published by other media organizations and reporters and the appellant's own representations in the inquiry before me. The hospital explains that the reporting often attaches pleadings and court filings of the parties involved in the lawsuit that include details about the progress of the litigation through the courts – information that is also available, says the hospital, in the public court file.

[128] The appellant submits that it is not possible for any assiduous inquirer to "drill down" from the global fees payable in the lawsuit to any specific advice that was provided by the hospital's counsel or financial advisors. The appellant specifically disagrees that she would be able to "line up" the amounts paid with certain steps taken in the litigation and publicly know. However, she says that if she is wrong about that, "all that is needed to protect the privileged information is the redaction of dates/time frame in which the payment was made."

[129] The hospital provides examples of how it says disclosure of the breakdown would reveal solicitor-client privileged information when compared with publicly-available information. Toward this end, the hospital says that the lawsuit has been conducted on the public record, meaning that there is ample information available to the appellant and the public at large about the progress of the lawsuit, "year by year," rendering the appellant capable of deriving, indirectly or directly, communications protected by solicitor-client privilege.

[130] The appellant also says, based on public reporting, that it is already clear that the hospital dealt with each defendant in different ways, settling with some, initially bringing a motion, then settling the entire action. She says that as a result of the complexity, the amount of legal fees paid is not likely to be comparable to other litigation in a manner that disclosure of the global fees payable would reveal anything about the legal advice provided or strategy undertaken.

[131] Further, the appellant submits that the lawsuit was complex, involving several causes of actions and 11 corporate and individual defendants. She says that the number of defendants involved in the lawsuit makes it "rare" or "unique."

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[47] See *CCF,* cited above, at para 68 (quoting from *Central Coast,* cited above, at para 58).

[132] The appellant also argues that it is in the public interest that the costs incurred by the hospital in relation to the lawsuit are disclosed. These arguments are not relevant to the discussion about the possible application of the common law solicitor-client privilege set out in section 19(a).

[133] To recap, the information sought by the appellant is a breakdown of legal fees by year and firm over the course of a five-year period. The breakdown contains no information about any particular communication between the hospital and its legal counsel. Disclosure of the information at issue could not *directly* reveal any communication protected by solicitor-client communication privilege.

[134] The question is then whether the information *indirectly* reveals any protected communication. Answering this question requires me to consider whether an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications. Whether the appellant in this appeal is, in fact, an assiduous inquirer matters not. The question is whether any assiduous inquirer could make these conclusions. If the information is neutral, then the presumption is rebutted and the information is not solicitor-client communication privileged. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

[135] I conclude that the presumption has not been rebutted and that therefore the breakdown of the law firm fees remains solicitor-client communication privileged information. I am satisfied that disclosure of the breakdown, including the global total, would reveal more than neutral information. In this case, I am satisfied that disclosure of any component of the breakdown of law firm fees would reveal the cost incurred by the hospital at the point or points in time that it decided to settle the lawsuit. The global total in this case could also reveal information that would provide insight into the litigation and settlement strategy of the hospital.

[136] I acknowledge that the appellant denies that she could "drill down" from the global fees payable in the lawsuit to any specific advice that was provided by the hospital's counsel or financial advisors and that the lawsuit was complex. Respectfully, based on her own reporting, I find that the statement downplays the obvious abilities of the appellant to fact find and draw inferences. I tend to agree with the hospital that the appellant herself has demonstrated her ability to draw such connections in her representations in this inquiry. For example, the appellant refers to reported statements of reaction to the settlements from parties to the litigation and that these reactions shed light on the merits of the lawsuit at all. In my view, these kinds of inferences would only be aided with further disclosure of the global legal billing information.

[137] In any event, even if I was satisfied that the appellant herself could not deduce privileged information, I remain concerned about the situation of other assiduous observers, such as the parties to the lawsuit, who would be able to draw upon publicly-reported information as well as their own intimate knowledge of the lawsuit to draw

inferences about the hospital's solicitor-client privileged communications.

[138] The materials filed by the appellant and the hospital in this appeal make clear that there are individuals who have much more information about the circumstances and the lawsuit itself than the appellant, such as the other parties to the lawsuit. Taken together with the public reporting, I have a concern that these assiduous inquirers could reasonably deduce solicitor-client communication privileged information, such as the amount of effort exerted by the hospital, or more concerningly, the litigation or settlement strategy or approach taken by the hospital. For example, disclosure could reveal information about the amount of work undertaken (or not) to prepare for trial at the time of the settlement.

[139] In reaching this conclusion, I considered the impact of the fact that the lawsuit is at an end. Although this means that there are no procedural steps yet to come, a fact which could weigh in favour of rebutting the presumption, I am persuaded by the hospital that in the circumstances of this appeal, the fact that the lawsuit was settled increases the chances that an assiduous inquirer could deduce privileged information if the aggregate total was disclosed.

[140] I contrast the circumstances of this appeal to other IPC appeals where the request for legal billing information pertains to a variety of matters and activities.[48] In this appeal, there is one lawsuit at issue. This heightens the risk that disclosure of legal billing information could reveal solicitor-client information because it is known that the legal fees at issue are limited only to the lawsuit and not a variety of other matters.

[141] I also acknowledge that the appellant argues that because the lawsuit was so complex and unique, the *global fees* (if disclosed) would not be able to be compared with other more routine litigation in a way that would reveal anything about the legal advice provided to, or strategy undertaken by, the hospital. I find this argument compelling but it does not address my other concerns, above, about other assiduous inquirers, including the parties to the lawsuit itself.

[142] In sum, I find that the presumption that the legal billing information is privileged has not been rebutted and I therefore find that the breakdown of legal fees is solicitor-client communication privileged information.

[143] It is therefore not necessary for me to consider the hospital's alternative arguments that the information is litigation privileged or subject to either of the branch 2 statutory privileges.

[144] I will consider whether the hospital exercised its discretion to withhold the

[48] For example, Order MO-4019 (global amount spent on legal counsel for a variety of matters and investigations), and Order MO-3253-I (total amounts spent on specified legal opinions pertaining to a variety of matters over a 28 month period).

information at Issue E, below.

Issue D: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the settlement costs (Request 2)?

[145] As discussed in more detail above, the second branch of section 19, found in sections 19(b) and (c) ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by … a hospital") contains statutory privileges created by the *Act*.

[146] Regarding the settlement costs, the hospital says that they are "settlement privileged" and, it says, accordingly exempt under section 19(c) of the *Act,* the statutory privilege relating to litigation. The appellant accepts that the settlement costs are subject to the section 19(c) exemption.[49] In the brief discussion below, I explain why I agree with the parties that the settlement costs are exempt under section 19(c).

[147] This appeal deals with the terms of a negotiated settlement of the lawsuit. In *Liquor Control Board of Ontario v. Magnotta Winery Corporation* (*Magnotta*), the Ontario Court of Appeal held that the statutory privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[50] In contrast to the similar common law litigation privilege, termination of litigation does not end the statutory privilege in section 19.[51]

[148] There is no dispute that there was litigation and that it was settled. I accept that the amounts of the settlement costs (if any) are contained within settlement agreements and are therefore information that was prepared by or for counsel employed or retained by the hospital. Settlement costs contained within the settlements agreement are the very kind of information that the Court of Appeal held in *Magnotta* is exempt under the statutory communication or privilege at section 19(c) and is routinely-held to be exempt by IPC adjudicators, as noted by the hospital.[52]

[149] I find that the information responsive to Request 2 is exempt from disclosure under section 19 of the *Act*, subject to my findings regarding the hospital's exercise of discretion.

Issue E: Did the hospital exercise its discretion under section 19 in relation to the legal fees and settlements costs?

[150] The remaining issue in this appeal is whether I should uphold the hospital's discretion in deciding to withhold the information at issue. Before turning to that discussion, I want to address the relevance of the public interest override at section 23

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[49] The appellant continues to seek access to the settlement payments, however, claiming that the hospital has failed to exercise its discretion to disclose the settlement payments in accordance with the Act. I will discuss this at Issue D, below.

[50] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

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

[52] Most recently, see Orders MO-4174 and MO-4098.

of the *Act.*

[151] As indicated in the Overview section of this order, the appellant sought to rely on the public interest override at section 23 during the mediation stage of the appeal. This section is not discussed in this order because section 23 cannot be relied upon to override the application of section 19. It is limited only to section 13, 15, 15.1, 17, 18, 20 21 and 21.1[53] and would only therefore have been available if I had determined that the information was exempt under section 17.

[152] I will now turn to my review of the hospital's exercise of discretion.

[153] The section 19 exemption is discretionary, meaning that the hospital can decide to disclose information even if the information qualifies for exemption. The hospital must exercise its discretion.

[154] On appeal, I cannot substitute my own view for the hospital's,[54] but I may determine that the institution failed to exercise its discretion to consider disclosing information that it could have lawfully withheld under the Act.

[155] In addition, I may find that the institution erred in exercising its discretion where, for example it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[156] Some examples of relevant considerations are the purposes of the Act, the wording of the exemption and the interest it seeks to protect, whether disclosure will increase public confidence in the operation of the institution and the nature of the information.

[157] If I find that the hospital did not exercise its discretion or did so improperly, I may send the matter back to the hospital for an exercise of discretion based on proper considerations.[55]

Representations

Hospital

[158] The hospital says that it exercised its discretion properly when it decided to withhold the information at issue. It says that it considered only relevant factors in this exercise and did not consider irrelevant or improper factors, as well as acting in good faith. It says that it considered the appellant's interest in receiving the information, and

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[53] Section 23 states:

> 23. An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[54] Section 54(2).

[55] Order MO-1573.

the public interest in transparency, but weighed this against the need for confidentiality.

[159] The hospital says that it considered disclosing the information responsive to Request 1 (the fees) but considered that doing so may constitute a waiver of privilege, with serious consequences for its ability to obtain confidential legal advice and conduct the litigation in a "zone of privacy."

[160] Regarding the settlement costs, the hospital says that it acted properly and considered the impact that disclosure of the settlement costs (if any) would have on its ability to navigate future negotiations, as established and discussed by the Court of Appeal in *Magnotta Winery.*

[161] The hospital says that it determined that the potential harm from disclosure far outweighed any public interest in the release of the information at issue and that withholding the information was in the public interest.

The appellant

[162] The appellant says that the hospital has failed to exercise its discretion properly.

[163] First, the appellant points to the 2010 Supreme Court of Canada decision in *Criminal Lawyers' Association*,[56] and suggests that when an institution exercises its discretion to withhold information, it must demonstrate why non-disclosure is not outweighed by the public interest.

[164] The appellant says in justifying withholding the information under section 19, the hospital has "done little more than repeat the notional harms that have been cited in other cases," and it has not considered the specifics of the particular information at all.

[165] Regarding the legal fees, the appellant says that the hospital's concern about waiver is both over-stated and improper. She says that the Court has been clear that privileged material may be disclosed on a limited basis without waiving privilege of an entire file, citing *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*[57]

[166] Regarding the settlement costs, the appellant says that the hospital has restated its concerns but has not considered the unique features of this particular matter, which as I understand it has prompted a high amount of public scrutiny and interest.

[167] The appellant says that despite the public scrutiny, interest and public statements made by hospital officials, the police have never confirmed that an investigation was initiated, that any charges were laid and, she says, in fact some of the defendants have been reported to be "very happy" with the outcome of the lawsuit. The appellant argues

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[56] Cited above.
[57] (1996), 1995 CanLII 7258.

that because of these circumstances, the public is entitled to know whether the hospital engaged in a "fool's errand" by engaging in meritless litigation.

[168] Lastly, the appellant says that, in fact, some of the defendants continue to do business with the hospital, further underscoring the public interest in disclosure of the information at issue.

The hospital's reply

[169] Regarding the appellant's arguments about *Criminal Lawyers' Association,* the hospital submits that the test referenced by the appellant applies to the "public interest override" at section 23 of the *Act*, which it says does not apply to the question of whether an institution properly exercised its discretion to withhold a record pursuant to section 19 of the *Act*.

[170] Regarding the appellant's argument that the hospital's consideration of the risk of waiver of privilege was an irrelevant factor to consider, the hospital retorts that it was but one factor among many considered.

[171] The hospital says that the appellant's speculation that the lawsuit was a "fool's errand" is insufficient to displace its concern about disclosure of privileged information. It says that the courts have recognized the fundamental importance of solicitor-client privilege and that protecting it is also in the public interest.

Discussion

[172] To begin, the hospital is correct that *Criminal Lawyers' Association* discussed the operation of the public interest override at section 23; however, the appellant is also correct. The passage quoted by the appellant pertains to the general exercise of discretion applicable to all discretionary exemptions in the *Act.*

[173] I am satisfied that the hospital properly exercised its discretion, including consideration of relevant factors, as it pertains to the settlement payments. I accept that the hospital took into account the purposes of the Act and the importance of public confidence in the hospital and weighed these factors against the interests protected by the exemption and the special considerations associated with settlement of the litigation in question. I uphold the hospital's exercise of discretion in relation to the settlement costs.

[174] I also uphold the hospital's exercise of discretion in relation to the legal fees. I find that the hospital considered the purposes of the exemption and the impact that disclosure could have on the public interest. The hospital and appellant have different views about how disclosure of this information will impact on public confidence in the hospital: the hospital says it would harm public confidence; the appellant says the opposite. I am satisfied that the hospital considered the impact on public confidence of continuing to withhold this information. I am also satisfied that the hospital considered and weighed

the factors in good faith.

[175] Review of an institution's exercise of discretion is not an assessment of whether or not I agree with the outcome. What I must be satisfied of is that the institution considered and weighed relevant factors. I am.

[176] In reaching this conclusion, I considered and rejected the appellant's argument that it was improper for the hospital to consider the risk of waiver. It may well have been improper if the hospital had asserted that it was unable to disclose this information due to the risk of waiver;[58] however, I am satisfied that the hospital understood that it could choose to disclose this information, but that other factors prevailed.

ORDER:

1. I order the hospital to disclose the breakdown of accounting firm fees, broken down by firm and year to the appellant by **May 22, 2024**, but not before **May 17, 2024**.

2. I uphold the balance of the hospital's decision.

Original signed by: April 16, 2024

Valerie Jepson
Adjudicator

[58] See Order MO-3924-I for example.