

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4531

Appeal PA22-00245

William Osler Health System - Peel Memorial Hospital

July 17, 2024

Summary: The William Osler Health System – Peel Memorial Centre (the hospital) received a request under the *Act* for access to contracts, agreements, or fees paid to a named company. The hospital denied access to the responsive records under section 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator partially upholds the hospital's decision and orders the hospital to disclose additional information to the appellant.

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

Orders Considered: Order MO-2166.

OVERVIEW:

[1] This order determines the issue of access to records related to the relationship between the William Osler Health System – Peel Memorial Centre (the hospital), a law firm, and a named company, a professional services firm specializing in public relations (PR). The hospital received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Record of contracts, agreements or fees paid to [named company] by William Osler Health System between Sept 1, 2020 and April 29, 2022.

[2] The named company was retained by the hospital's legal counsel's law firm (law

firm) to provide professional services related to the law firm's provision of legal services to the hospital.

[3] The hospital denied access to the responsive records under section 19 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the hospital's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the hospital conducted an additional search that located further responsive records and provided the appellant with a revised index of records and an affidavit describing the records.

[6] The appellant narrowed his request to the following:

1. The timeframe during which [named company] worked to provide advice to the hospital; and
2. The total money the hospital directed to [named company] to cover the cost of this advice.

[7] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I began an inquiry and sought and received representations from both parties about the issues in this appeal.¹

[8] In this order, I partially uphold the hospital's decision. I find that the section 19 solicitor-client privilege exemption applies to exempt the records at issue from disclosure, except for the total amounts in records 1, 3, and 5.

RECORDS:

[9] The six records at issue are responsive to the appellant's narrowed request and they are described in the hospital's revised index of records as follows:

Record	Title/General Description
1	An invoice for services by the law firm to the hospital
2	An invoice for services by the named company to the law firm

¹ Portions of their representations were withheld from each other in accordance with the confidentiality criteria in the IPC's *Code of Procedure*. I have reviewed all the representations of the parties, but I will only outline the relevant non-confidential portions below.

3	A Request for Funds for services by the law firm to the hospital
4	An invoice for services by the named company to the law firm
5	A Request for Funds for services by the law firm to the hospital
6	An invoice for services by the named company to the law firm

DISCUSSION:

[10] The sole issue to be determined in this appeal is whether the discretionary solicitor-client privilege exemption at section 19 of the *Act* applies to the records.

[11] The hospital claims that all six records at issue are exempt from disclosure under section 19 of the *Act*, while the appellant argues that they are not. Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for the institution's legal counsel. Section 19 states:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege,
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation or
- (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.

[12] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[13] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*.

[14] The hospital must establish that at least one branch applies.

Branch 1: common law privilege

[15] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege; and

- litigation privilege.

[16] In this appeal, the hospital claims that common law solicitor-client communication privilege applies to the records.

Common law solicitor-client communication privilege

[17] 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.² 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.³ The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.⁴

[18] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice, including third party reports used by counsel in preparing the advice.⁵

[19] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a lawyer and a party on the other side of a transaction.⁷

Common law treatment of legal fees and billing information

[20] As some of the records at issue are legal invoices/request for funds, the IPC's and the courts' previous consideration of legal billing information is relevant here. Legal billing information is presumed to be privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.⁸

Branch 2: statutory privilege

[21] The hospital also claims section 19(c) applies to the records, which raises the branch 2 exemption.

² Orders PO-2441, MO-2166 and MO-1925.

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

⁴ *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.

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁸ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, 2007 CanLII 65615 (ONSCDC); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

[22] The branch 2 exemption is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[23] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice. For the purposes of this appeal, both privileges have similar scope, and I have considered both privileges in my review of the parties’ submissions and in my analysis thereof.

Representations of the hospital

[24] The hospital refused to provide the records to the IPC. However, it provided an affidavit from the hospital’s Director of Cybersecurity, Privacy and Health Information Management describing all six records at issue in this appeal and explaining how the section 19 exemption claim applies to them.

[25] The hospital submits that sections 19(a) and (c) apply to the six records at issue. The hospital submits that the named company is a professional services firm that was retained by the law firm and the named company rendered professional services in furtherance of the law firm’s provision of legal services to the hospital. The hospital notes that the named company provided these services to the hospital’s legal counsel in a matter unrelated to the appellant.

[26] In support of its position, the hospital provided the affidavit of a lawyer and partner at the law firm that provides legal advice to the hospital (the affidavit). The relevant portions of his affidavit state as follows:

- While advising the hospital in a particular matter, the law firm retained the named company. The retainer agreement for this engagement was entered into between the law firm and the named company.
- The named company provided the law firm with professional services in furtherance of the law firm's provision of legal services to the hospital.
- The named company remitted all invoices in connection with its professional services to the law firm and these invoices were paid by the law firm to the named company.

[27] With respect to the appellant’s narrowed request, the hospital submits that (1) the named company did not provide advice to the hospital at any time, and (2) the hospital never “directed” any money to the named company.

[28] The hospital submits that even if in his narrowed request the appellant had asked

for the time frame during which the named company provided advice to the law firm, or the amount of money paid by the law firm to the named company for advice, that information would be protected by solicitor-client privilege. The hospital submits that the affidavit indicates that the named company provided its services to the law firm in furtherance of the law firm's provision of legal services to the hospital. The hospital submits that solicitor-client privilege demands not only that privileged communications between a solicitor and client be kept confidential, but that all information connected to those communications also be kept confidential.

[29] The hospital submits that details about expert fees that a law firm pays to an outside expert constitute solicitor-client privilege information because these disbursements can reveal information about the legal advice itself. The hospital submits that everything related to the law firm's engagement with the named company, including timing, duration, purpose, subject matter, and magnitude in monetary terms, goes to the heart of the advice provided by the law firm to the hospital and the solicitor-client relationship between them, which is covered by section 19 of the *Act*.

[30] The hospital submits that an assiduous inquirer could take the time frame during which the named company was engaged by the law firm and the sums of money paid to the named company during that time frame and map them together to identify the types of incidents or issues for which the hospital was likely seeking legal advice from the law firm. The hospital submits that information lies at the core of the solicitor-client relationship and its confidentiality should be protected.

[31] The hospital acknowledges that there is legal support for the proposition that total amounts of money spent by an organization on legal services may be appropriate to disclose under the *Act* in certain circumstances. However, the hospital submits that this appeal is different than those situations in at least two respects.

[32] First, the hospital submits that what is sought in this appeal is not the disclosure of legal fees paid by an organization to its legal counsel, which is what the limited case law addresses, but the amount of money paid by the hospital's legal counsel to a third party professional services firm engaged by legal counsel in furtherance of their advice to the hospital. The hospital submits that there is no law in support of the proposition that fees paid out by legal counsel, in connection with professional services obtained by and rendered to legal counsel, are appropriately disclosed under the *Act*.

[33] Second, the hospital submits that what is sought in this appeal is not the disclosure of a global, aggregate sum of legal fees paid by an organization, which is what the limited case law on this point addresses, but a specific and granular piece of information about the fees associated with a particular element of the legal services provided to the hospital. The hospital submits that this very clearly falls within the scope of information protected by solicitor-client privilege. The hospital submits that this is akin to asking how much money was spent for advice drafting a specific document or addressing a specific legal question. The hospital submits that the information sought here is tied to the particulars

of legal advice rendered and there is no legal support for any view to the contrary.

[34] The hospital submits that the named company being a PR firm does not undermine the claim of solicitor-client privilege because the subject matter of the professional services provided by the named company is irrelevant. It submits that all that is relevant to the claim of solicitor-client privilege is the context in which and the purpose for which those professional services were provided. The hospital submits that the law firm engaged the named company to provide its expertise, through its professional services, to the law firm, and the named company provided expertise to the law firm in furtherance of the law firm's provision of privileged legal advice to the hospital. The hospital submits that in these circumstances, privilege properly applies to information relating to the services provided by the named company.

[35] The hospital submits that lawyers routinely engage outside experts whose spheres of expertise are unrelated to the law. It submits that in such expert engagements, it is the context and purpose underlying the expert retainer, whether the expert has been engaged by legal counsel, for the purpose of furthering counsel's provision of advice to a client, that drives the privilege analysis.

[36] The hospital submits that it is clear law that solicitor-client privilege can extend to third parties who act as experts, and the Supreme Court of Canada has observed that "Courts in Canada, Australia, the United Kingdom and the United States have all concluded that client communications with third party experts retained by counsel for the purpose of preparing their defence are protected by solicitor client privilege."⁹

[37] The hospital states that in Order MO-2166, the issue before the IPC was whether solicitor-client privilege applied to records created by a third party non-lawyer, who had been retained by a law firm in furtherance of the law firm's legal advice to the City of Hamilton about a particular project. The hospital notes that the IPC held that solicitor-client privilege applied to records generated by the third party in that appeal. The hospital submits that the same reasoning and principles apply to this appeal. The hospital submits that the named company, like the third party in Order MO-2166, was engaged by the law firm in furtherance of the law firm's advice to the hospital. The hospital submits that, contrary to what the appellant in his appeal suggests, in Order MO-2166, the IPC found that the fact that the third party was not a lawyer did not undermine the claim of privilege.

[38] The hospital rejects the appellant's assertion that the law firm "effectively sub-contracted" the named company because the retainer agreement was between the named company and the law firm, and the named company provided professional services to the law firm, not the hospital. The hospital reiterates that the services provided by the named company to the law firm was to assist the law firm in providing legal advice to the hospital and there was no "sub-contracting" involved.

⁹ *Smith v. Jones*, [1999] 1 S.C.R. 455; see also *Descoteaux v. Mierzwiniski*, [1982] 1 S.C.R. 860.

[39] The hospital also rejects the appellant's claim that it received advice directly from the named company.¹⁰ The hospital submits that even if the named company had provided advice directly to the hospital, which the hospital denies, if the law firm advised the hospital on that advice, then it would remain shielded by solicitor-client privilege because its disclosure would reveal information about the advice provided by the law firm to the hospital.

Representations of the appellant

[40] The appellant submits that the named company is not a law firm, but a "crisis Public Relations firm," and as such, it does not provide legal advice. The appellant submits that any advice and recommendations provided by the named company would revolve around PR and communications management of sensitive situations or crises. The appellant submits that the advice provided to the hospital by the named company, whether directly or indirectly through the law firm represents non-legal advice, and the advice provided by the named company helped the hospital, not the law firm, manage a PR situation. The appellant argues that solicitor-client privilege should only apply to legal advice, not PR advice.

[41] The appellant submits that the law firm effectively sub-contracted the named company on behalf of the hospital. The appellant submits that while he cannot comment with certainty as to why the named company was contracted by the law firm instead of directly by the hospital, he points out that this would clearly be an effective means of circumventing the Freedom of Information (FOI) process. The appellant submits that the named company was hired because the hospital needed PR advice around crisis situations and PR advice is not protected by solicitor-client privilege. The appellant further submits that by subcontracting the named company through the law firm, solicitor-client privilege can be claimed, which permits avoidance of any obligation under the *Act* to disclose the details of the costs and advice between the hospital and the named company.

[42] The appellant rejects the argument that the named company did not provide advice directly to the hospital. The appellant submits that the Chairman of the named company attended a meeting of the hospital's Board of Directors with respect to the termination of the hospital's previous Chief Executive Officer. The appellant submits that the Chairman of the named company's attendance, and presumably his in-meeting discussion with the hospital's senior leaders at the Board of Directors meeting, brings into question the claim that the named company only provided advice as part of the law firm's legal work and provided no direct advice to the hospital.

[43] The appellant submits that it is in the interest of the hospital, its Board of Directors, and its Senior Leadership Team to handle crisis PR situations in a discrete manner; it is in the law firm's interest to be able to aid the hospital and expand their range of services and advice by subcontracting other professional services beyond legal advice; and it is in

¹⁰ The hospital's confidential representations provide a detailed response to the appellant's assertions.

the named company's interest to be able to provide public institutions with advice and services without the risk of scrutiny under the *Act*. The appellant submits, however, that none of this is in the public's best interest and only serves to reduce transparency and accountability.

[44] The appellant submits that the hospital's primary argument is really one of accounting, and by subcontracting the named company through the law firm, it argues that all the named company's advice becomes part of the "catch-all" solicitor-client privilege. The appellant submits that the named company's services become a line on the invoice from the law firm which the hospital pays, but ultimately, it is the hospital paying for the advice provided by the named company via the law firm. The appellant submits that this sets a dangerous precedent for avoiding FOI accountability and future access to information surrounding government and public bodies, especially since the hospital has not provided the records to the IPC for review.

[45] The appellant submits that the hospital argues for a broad, near limitless interpretation of solicitor-client privilege, which should not be used to inappropriately limit reasonable access to information through the *Act*. The appellant submits that the hospital is implying that any firm retained by a law firm for any reason at all is restricted from the *Act* due to solicitor-client privilege regardless of indication or content. The appellant submits that this is an erroneous interpretation of the intention of the *Act* and Order MO-2166. The appellant submits that whether solicitor-client privilege applies should not be based on how a non-legal entity was hired or how the accounting was displayed, but rather the content of the advice provided and whether that contributes to legal advice.

[46] The appellant submits that in Order MO-2166, one of the four tests that must be satisfied to meet the threshold for solicitor-client privilege is the information "must be directly related to the seeking, formulating, or giving of legal advice." The appellant does not dispute that when experts are retained to help facilitate a legal opinion, their guidance remains confidential under solicitor-client privilege, but he submits that it is contrary to the intention of the *Act* when it becomes a loophole for non-legal advice. The appellant submits that having the named company's crisis-PR advice channelled through the law firm does not make their guidance part of the law firm's legal advice. The appellant submits that a PR firm would typically be engaged to manage the communication/information around a legal case but would not be for expertise pertaining to the actual legal advice.

[47] The appellant submits that it is difficult to see how a PR firm's expertise would be part of a legal decision rather than simply PR advice for an organization channelled through a law firm. The appellant submits, therefore, it is difficult to understand how the hospital believes the hiring of the named company by the law firm meets the tests outlined in Order MO-2166. The appellant submits that Order MO-2166 does not support the proposition that all advice is protected by solicitor-client privilege, despite the hospital's assertion that it does. The appellant submits that in Order MO-2166, the advice provided was considered part of the legal advice due to specific documentation which

was supportive of this argument.

[48] The appellant rejects the hospital's arguments that a decision in his favour would (1) represent a threat to our legal system, (2) excessively reveal solicitor-client privileged information unrelated to the named company and submits that these are "slippery slope" type arguments.

[49] With respect to the first argument, the appellant submits that the hospital appears to imply that release of the information at issue could reduce retention of experts by legal teams for fear of FOI accountability and that this might somehow reduce the willingness of future clients to seek legal advice at all. With respect to the second argument, the appellant submits that hiring a firm which does not fall within a reasonable threshold for seeking, formulating, or giving legal advice was a poor decision. The appellant further submits that if the law firm has put their client at risk through this guidance, they cannot then use this same argument to limit FOI, and offering poor legal advice is not a justification for excessively broadening the application of solicitor-client privilege.

[50] The appellant submits that the hospital has its priorities backwards and an inappropriately broad interpretation of solicitor-client privilege weakens FOI, a vital pillar of our democracy. The appellant submits that the issue in this appeal is not a threat to the sanctity of solicitor-client privilege, but whether hiring a PR firm to help guide an organization through a crisis constitutes legal advice simply because the outside firm was retained by a law firm on behalf of that organization. The appellant reiterates that upholding such "sub-contracting" will condone this type of FOI avoidance.

Analysis and findings

[51] Based on my review of the parties' representations, including the confidential portions and affidavits, I find that the information contained in the records at issue is solicitor-client communication privileged under either section 19(a) or (c) of the *Act*, except for the total amount of each invoice/request for funds in records 1, 3, and 5. My reasons follow.

Records 1, 3, and 5

[52] Record 1 is an invoice for legal services from the law firm to the hospital. Records 3 and 5 are "request for funds," which the hospital submits is similar in nature to an invoice for legal services and should be treated as such. I accept the hospital's submission and will treat records 3 and 5 as legal invoices for the purposes of this appeal.

[53] Based on the representations of the parties, I find that records 1, 3, and 5 contain legal billing information and their disclosure could reveal privileged communications. As noted above, legal billing information is presumed to be privileged unless the information

is “neutral” and does not directly or indirectly reveal privileged communications.¹¹ Information is considered “neutral” where:

1. There is no reasonable possibility that disclosure would directly or indirectly reveal any communication protected by the privilege; and
2. An “assiduous inquirer” (someone taking a very methodical and persistent approach), aware of background information, cannot use the information disclosed to deduce or otherwise acquire privileged communications.¹²

[54] The hospital submits, and I accept and find that disclosure of all the information contained in records 1, 3, and 5 could directly or indirectly reveal solicitor-client privileged information. I also find that an “assiduous inquirer” could use the information in these records, such as the dates or timeframe during which the law firm was engaged by the hospital, to deduce privileged communications. I make these findings based largely on the hospital’s confidential representations and affidavit.

[55] However, as the hospital acknowledges, previous IPC orders¹³ have held that total amounts of money spent by an institution on legal services may be appropriate to disclose under the *Act* in certain circumstances. I find that this is such a circumstance.

[56] The hospital has not established, and I find that there is no “reasonable possibility” that any confidential solicitor-client privileged communications could be directly or indirectly revealed, even to the most “assiduous inquirer,” by disclosing the total amount of each invoice/request for funds. I also find that these amounts cannot be combined with other available information to draw an accurate inference about any privileged communications. Without disclosure of other information contained in the records, I find that the total of each invoice/request for funds is “neutral,” and the presumption of privilege is rebutted in relation to it. This is consistent with previous IPC orders.¹⁴

[57] For the reasons above, I find that the total amount of each invoice/request for funds in records 1, 3, and 5 do not contain solicitor-client privileged communications. Accordingly, I find these amounts are not exempt from disclosure under sections 19(a) or (c), and I will order the hospital to disclose them.

Records 2, 4, and 6

[58] Records 2, 4, and 6 are invoices for services from the named company to the law

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

¹² See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹³ Orders PO-2484 and PO-2548.

¹⁴ Orders MO-2166, PO-2484, and PO-2548

firm.

[59] I am not persuaded by the appellant's argument that the law firm subcontracted the named company on behalf of the hospital. The hospital provided the language of the retainer agreement between the law firm and the named company, which clearly states who the client is and why the named company was retained. Based on my review of it, I am satisfied that the named company was not subcontracted by the law firm on behalf of the hospital.

[60] I am also not persuaded by the appellant's argument that solicitor-client privilege does not apply to the records because the named company is not a law firm and the named company provided PR advice, not legal advice. In Order MO-2166 cited by the hospital, the adjudicator found that solicitor-client privilege applied to records created by a third party non-lawyer, who had been retained by a law firm to support the law firm's legal advice to the City of Hamilton about a particular project. The adjudicator reviewed the jurisprudence on the agency approach for the application of solicitor-client privilege to third parties retained by a law firm and stated:

As noted above, the approach laid out in *General Accident v. Chrusz*, states that the determination of the extension of the solicitor-client privilege depends not on whether the third party is an agent, but on the third party's function. The Court goes on to explain that if the third party's retainer extends to a function that is essential to the existence or operation of the solicitor-client relationship, then the privilege should cover any communications that are in furtherance of that function and that meet the criteria for solicitor-client.

Based on the representations of the parties involved in this appeal, including the information about the affected party's retainer, I am persuaded that the law firm retained the affected party to act for the law firm, specifically acting under the direction of the lawyer responsible for the City's file, to assist in providing the most comprehensive and accurate legal advice to the City on the complicated matter that is the Red Hill Creek Expressway project. I find that her assistance and her specific expertise related to that which the lawyer was retained to advise upon and was essential to the operation of the solicitor-client relationship, namely the provision of legal advice to the City.

[61] I agree with the adjudicator's analysis in Order MO-2166 and adopt it in this appeal. Based on the evidence before me, I am satisfied that the named company was retained by the law firm to provide professional expertise in support of the law firm's legal advice to the hospital. I am also satisfied that the named company's specific expertise relates to the legal advice provided by the law firm to the hospital.

[62] I have considered the context the appellant provided in his confidential

representations about his access request. However, as noted above, whether solicitor-client privilege applies to third parties depends on the third party's function, not the type of advice they are providing or whether the third party is a lawyer. As the appellant has acknowledged, the law firm was providing the hospital legal advice while it was handling a PR matter. Therefore, it is logical that the named company, a PR firm, would be essential to the solicitor-client relationship between the law firm and the hospital and that the communications between the named company and the law firm would relate to the matter for which the law firm was retained to advise upon by the hospital. Therefore, I find that solicitor-client privilege applies to the information contained in records 2, 4, and 6. Accordingly, I find that section 19(a) applies to exempt records 2, 4, and 6 from disclosure.¹⁵

[63] For the reasons above, I find that solicitor-client privilege applies to the information contained in all six of the records, except for the total amounts in records 1, 3, and 5.

Exercise of discretion

[64] 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 properly exercise its discretion. On appeal, I may determine whether the hospital properly exercised this discretion.

[65] The hospital states that it properly exercised its discretion under section 19 to withhold the records at issue. The hospital submits that it considered relevant factors in weighing whether to claim the section 19 exemption, including the purpose of the *Act*, which is to provide a right of access to information controlled by institutions considering the principle that information should be publicly available and exemptions from the right of access limited and specific. The hospital acknowledges that these factors weigh in favour of disclosure. The hospital submits, however, that several factors weigh against disclosure of the records at issue:

- The purpose of the exemption, which is to protect the "fundamental right" of confidentiality of communications between solicitor and client to safeguard a client's ability to freely confide in their lawyer on a legal matter;
- The information sought relates to professional services rendered by the named company to the hospital's legal counsel in a matter unrelated to the appellant, so he is not seeking access to his own personal information;
- The appellant does not have a sympathetic or compelling need to receive the information nor does the information have any significance to him because the information is not about him;

¹⁵ Since I find that section 19(a) applies to these records, I do not need to consider whether section 19(c) also applies.

- The significance of the information to the hospital, recognizing that the information pertains to the hospital's communications with and advice from its legal counsel; and
- Historically, the hospital has consistently withheld information exempted under this provision.

[66] The hospital submits that, based on the factors above, it concluded that the factors weighing against disclosure outweighed those favouring disclosure of the records at issue and exercised its discretion not to disclose.

[67] The appellant's representations did not specifically address the hospital's exercise of discretion.

[68] After considering the representations before me and the circumstances of this appeal, I find that the hospital did not err in its exercise of discretion with respect to its decision to deny access to the records at issue under section 19 of the *Act*. I am satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of discretion. Accordingly, I find that the hospital exercised its discretion in an appropriate manner in this appeal, and I uphold it for the portions of the records that I find exempt from disclosure under section 19.

ORDER:

1. I order the hospital to disclose the total amounts in records 1, 3, and 5, to the appellant by **August 18, 2024**.
2. I uphold the hospital's decision to withhold the remaining information under section 19.
3. In order to verify compliance with order provision 1, I reserve the right to require the hospital to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____
Anna Truong
Adjudicator

July 17, 2024 _____