Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-1952

## Appeal PA-000277-1

## Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

## BACKGROUND:

The Ministry of Attorney General (the Ministry) provided the following background that I find useful for the purposes of the discussion which follows in this order.

> This appeal arises from the Ministry of the Attorney General's (the "Ministry") decision denying the Appellant's request for "the total dollar amount of legal fees paid to lawyers retained by [the affected person] in his appeal of his 1995 convictions for first degree murder." Access to the records was denied by the Ministry pursuant to sections 19 and 21 of the *Freedom of Information and Protection of Privacy Act* (the "*Act"*).
>
> It is well known and a matter of public record that [the affected person] was convicted, after a lengthy trail of two counts of first degree murder and several related serious offences. … [The affected person] filed a prisoner's notice of appeal and applied for legal aid under s. 14 of the *Legal Aid Act*, R.S.O. 1990, chap. L.9. [The affected person] was denied legal aid and subsequently brought a motion before a panel of the Court of Appeal to have counsel appointed under section 684(1) of the *Criminal Code*. Section 684 of the *Criminal Code* provides:
>
> > (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.
> >
> > (2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.
> >
> > (3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.
>
> Ultimately, the Court of Appeal granted [the affected person's] motion and appointed counsel to act on his behalf pursuant to section 684(1) of the *Criminal Code*.
>
> In accordance with section 684(2) of the *Criminal Code*, where legal aid is not granted to the accused, the fees and disbursements of counsel appointed by the Court of Appeal are paid by the Ministry. The record [that remains] at issue in this appeal is a summary of a number of invoices paid as legal fees and

> disbursements to counsel representing [the affected person] on his appeal. This record includes the date, invoice number and amount of several invoices as well as a sum total of the amount paid between May 26th, 1997 and February 8th, 2000. The record was created by Crown counsel using information supplied directly from the solicitor's statements of accounts, which had been submitted to Crown counsel in accordance with section 684(2) of the *Criminal Code* for payment.

## NATURE OF THE APPEAL:

The Ministry received a request from a member of the media under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records that reflect the total cost as well as the breakdown of fees paid by the Ministry to lawyers representing the affected person on the appeal of his conviction for first degree murder.

The Ministry identified 610 pages of responsive records, and denied access to all of them. The exemptions contained in sections 19, 21, 13(1), 17(1)(b) and 18(1)(e) of the *Act* were originally relied on by the Ministry in withholding 338 pages, and the remaining 272 pages were denied on the basis that they qualified for exemption under section 22(a) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to deny access.

During mediation, a number of events occurred:

- The appellant accepted the Ministry's section 22(a) exemption claim, thereby removing 272 pages of records from the scope of the appeal.

- The appellant agreed to remove 140 pages of duplicate records from the scope of the appeal.

- The appellant withdrew the aspect of his request pertaining to the breakdown of legal fees billed by each lawyer, and narrowed his request to include only the total dollar amount of legal fees billed by the four lawyers. The only record responsive to the narrowed request is Page 1.

- The Ministry narrowed the exemption claims for Page 1 to only sections 19 and 21 of the *Act*.

- The appellant raised the possible application of the public interest override contained in section 23 of the *Act*.

Mediation was not successful in resolving the remaining issues, and the appeal was transferred to the adjudication stage. I sent a Notice of Inquiry initially to the Ministry setting out the facts and issues on appeal. The Ministry provided representations in response. I then sent the Notice to four lawyers who had represented the affected person in his criminal appeal, whose interests

might be affected by the outcome of this appeal (the affected lawyers). I received representations from one affected lawyer (affected lawyer #1), objecting to disclosure of any information relating to him on the basis of both section 19 and section 21 of the *Act*. I then sent the Notice to the affected person and received representations from a different affected lawyer (affected lawyer #2) on his behalf. Affected lawyer #2 subsequently provided additional representations on behalf of the affected person and all four affected lawyers, identifying a number of court decisions he feels support his position that Page 1 qualifies for exemption under section 19 of the *Act*.

I then sent a copy of the Notice of Inquiry to the appellant, together with a complete copy of the Ministry's representations. The appellant provided representations in response.

**RECORD:**

The only record remaining at issue consists of a one-page chart containing two columns. One column lists various dates, and the second column lists a corresponding dollar figure. The various dollar figures are totaled at the bottom of the chart.

Contrary to the statement made by the Ministry, the record does not contain any reference to an invoice number.

## DISCUSSION:

### Solicitor-Client Privilege

The Ministry submits that section 19 of the *Act* applies to exempt the record in its entirety. The two affected lawyers who provided representations support the Ministry's position. Section 19 reads:

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

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.

#### *Solicitor-Client Communication Privilege*

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The Supreme Court of Canada has described this privilege as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The Ministry and the two affected lawyers refer to the Federal Court of Appeal case of *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 in support of their submission that a lawyer's statement of account is protected from disclosure by solicitor-client privilege.

Affected lawyer #2 also refers me to three other cases, but makes no detailed arguments as to their relevance. I have reviewed these three cases and, in the absence of specific submissions from affected lawyer #2, I find that either their facts clearly distinguish them from the present appeal, or they do not assist me in determining whether solicitor-client communication privilege applies to the specific type of record that remains at issue in this appeal.

Affected lawyer #1 submits that "a bill or account is a privileged communication, and that a summary of several accounts is a privileged communication, derived from the original documents". He makes other submissions relating to litigation privilege, which I will address later in this order.

This Office has found in previous appeals that a solicitor's Statement of Account can be characterized as a confidential written communication and as such is exempt under solicitor-client communication privilege (Orders PO-1714 and PO-1822). In Order PO-1714, Adjudicator Holly Big Canoe stated:

> Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption.

The Ministry and the affected lawyers submit that the affected person has not waived solicitor-client privilege. I have no evidence before me that the affected person has waived his privilege to the solicitor-client communication privilege in the Statements of Account submitted by the various lawyers. As such I find that waiver is not an issue in this appeal.

Nevertheless, the record at issue in this appeal is different from the records that were at issue in Orders PO-1714, PO-1822 and in *Stevens*.

The record here is a one-page chart prepared by the Ministry, which, in the Ministry's words is "...a summary of a number of invoices paid as legal fees and disbursements to counsel representing [the affected person] on his appeal." The records at issue in Orders PO-1714, PO-1822 and in *Stevens* were all actual Statements of Account which were characterized as

confidential written communications between solicitors and clients. The Ministry submits that the format of the record in this appeal should not change the fact that the information contained in the record is protected as a solicitor-client communication. The Ministry states:

> It is the Ministry's position that the information in the record was derived directly from solicitor's statements of accounts, the information remains privileged regardless of the format it is in. It was suggested in Order PO-1714 that if the institution does not waive privilege and chooses not to disclose the total amount billed by the lawyers that this information could be requested from other sources, such as the institution's accounting records. This suggestion was based in part on the distinction at common law between communications which are protected by solicitor client privilege and acts of counsel or statements of fact, which are not protected by solicitor client privilege. As discussed in *Stevens*, the latter category includes trust account ledgers and other such financial records kept by the solicitor. These are excluded from solicitor client privilege because they constitute acts of the solicitor rather than communications between a solicitor and a client.
>
> It is respectfully submitted that it is inappropriate to draw a distinction between the actual solicitor's statements of accounts, which are clearly subject to solicitor client privilege, and the record created in this case by Crown counsel, which is a summary of amounts billed in those accounts. Drawing such a distinction in this case is fundamentally flawed for several reasons. First, the creation of the record in this case is not an act of the solicitor. Rather, it's an act of a third party to whom disclosure of the privileged information is compelled by statute. Second, if such a distinction were applied in the circumstances of this case, it would create the potential for a massive invasion of personal privacy under the guise of access to governmental information. Furthermore, such an application in effect creates an unfair disparity between those who can afford their own lawyer and have one appointed by the court (whose billings are then processed through the Ministry's accounting departments, necessarily leaving a record).
>
> As a result of the statements of accounts having been submitted to the Ministry for payment, any number of accounting and record keeping practices are triggered. In this case, a summary of invoices and the totals billed and paid was prepared. Unlike the keeping of trust ledgers by a solicitor, none of these record keeping practices involve an act of the solicitor. As a matter of principle, it is inappropriate to distinguish information which appears on the actual solicitor's statements of accounts as submitted to the Ministry and information which is then reproduced from these statements of accounts in some form by the Ministry for its own record keeping purposes while processing the payment. It is the information communicated in the statements of accounts which is privileged. Providing the information to the Ministry in these circumstances does not diminish its privilege regardless of what the Ministry then does with it. It must be recalled that the Ministry would not have access to these records but for the provision of the

> *Criminal Code* requiring counsel to submit their accounts to the Ministry for payments. It is respectfully submitted that in these circumstances, solicitor client privilege applies to the solicitor's statements of accounts and the record derived or created from these statements of accounts by the Ministry in the process of paying the accounts.

In *Stevens*, the Court discusses the historical context of solicitor-client communication privilege and its present-day application. It then goes on to cite what it describes as exceptions to the privilege as follows, at page 93:

> It will be seen that Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. One exception ... is for communications which are themselves criminal or which counsel a criminal act (e.g. Where a lawyer advises a client to conceal evidence). The second exception ... relates to that **information which is not a communication but is rather evidence of an act done by counsel or is a mere statement of fact.** ... [my emphasis]

Further on in the judgement (at page 99), the Court makes it clear that:

> Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.

After citing several decisions to the effect that lawyers' statements of account are privileged in their entirety, the Court proceeds to distinguish them from cases dealing with "facts" and/or "acts of counsel" as reflected in trust ledgers, etc., at page 104:

> These [previously referenced] cases are in sharp distinction to those which find that trust account ledgers and other financial records of that type are not privileged. None of these cases deals specifically with bills of account, and so cannot be relied on without understanding the nature of the material which was sought to be disclosed. Ultimately, these cases can be distinguished because acts of counsel or statements of fact are not privileged. In *Re Romeo's Place Victoria Ltd. and The Queen* [(1981), 128 D.L.R. (3d) 279 (F.C.T.D.)] for example, a client was being investigated and the trust account ledgers of the client's solicitor were ordered to be disclosed. Collier J. held that it was the record of the lawyer, and not of the client and, therefore, not subject to privilege. However, other cases have found such items to be outside the ambit of the privilege on the more substantive ground that they do not disclose communications, but only acts. In *Re Ontario Securities Commission and Greymac Credit Corp.*, [(1983), 41 O.R. (2d) 328, 146 D.L.R. (3d) 73 (Div. Ct.).] the question of privilege arose in the context of a solicitor's activities with respect to money held in trust for the client. Southey J. held that the privilege did not attach to this activity. He stated [at page 337]:

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged ...

The accounts were examined and those things revealing privileged communications were severed. This decision might, at first glance, appear to be in conflict with Southey J.'s decision in *Mutual Life Assurance Co. of Canada.* However, as discussed *infra*, this decision is merely the proverbial exception that makes the rule -- it deals with acts of counsel and not communications.

In *Law Society of Prince Edward Island v. Prince Edward Island (Attorney General),* [(1994), 382 A.P.R. 217 (P.E.I.S.C.)] the R.C.M.P. attempted to seize documents in the possession of a lawyer relating to trust ledgers, general ledgers and bank reconciliation ledgers which pertained to the dealings of a number of the lawyer's clients. MacDonald C.J.T.D. determined [at p. 221]:

> It is the communications between the client and his lawyer that are privileged. The trust ledgers, general ledgers and bank reconciliation ledgers are not communications between the solicitor and the client. These documents form part of the solicitor's records and are reports of acts, not communications. Privilege does not attach to these documents.

Thus, the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of the privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of fact are not protected. This is an important balancing mechanism which, along with the prohibition against protecting communications which are themselves criminal, takes into account the public interest inherent in the proper administration of justice.

I find that the record at issue in this appeal does not fall within the scope of solicitor-client communication privilege. It is not a communication between a solicitor and a client, nor does its content reveal any communication of this nature. Rather, the record contains the type of information identified by the Court in *Stevens* as an exception to solicitor-client privilege - a "statement of fact". Specifically, the record is a factual statement of the amount of public funds paid by the Ministry to four lawyers in consideration for the legal services provided to the affected person in the appeal of certain criminal convictions.

I also disagree with the Ministry's representations in a number of respects.

First, the Ministry appears to suggest that the exception to solicitor-client communication privilege outlined in *Stevens* is restricted to records "kept by the solicitor". This interpretation is not supportable. The Court in *Stevens* uses the phrase "an act done by counsel **or** a mere statement of fact" [my emphasis]. The record at issue in this appeal consists of a statement of fact, which is sufficient to bring it within the scope of the exception regardless of whether it is a record created by or kept by a solicitor.

Second, I do not accept the Ministry's position that it is inappropriate to draw a distinction between an actual solicitor's statement of account and the record created by the Ministry in the context of this appeal. On the contrary, a distinction of this nature is both appropriate and determinative of the issue. I accept that, consistent with the direction of the Court in *Stevens*, any statement of account created by a lawyer and provided to a client is protected in its entirety by solicitor-client communication privilege. However, I do not accept the Ministry's position that the record in this appeal fits this definition. It was not created by a lawyer and furthermore there are no itemizations of services listed; no billing rates are contained in the record; no individual account total is reflected in the record; nor is it possible to ascertain any specific account billing from the content of the record. The record reflects the total amounts paid by the Ministry, in aggregate form, to four lawyers over a three-year period. In the present circumstances, it is not necessary for me to determine whether different considerations would apply to records that might reveal the actual content of any statements of account, because the record at issue in this appeal clearly does not. The record does not consist of or reveal the contents of any statement of account created by a lawyer and communicated to a client, and any decision ordering the disclosure of this record would have no impact on the application of section 19 of the *Act* to statements of account held by public institutions in other contexts.

Finally, I also do not accept the Ministry's assertion that disclosure of the record would result in a "massive invasion of personal privacy", or that it would create an unfair disparity between clients paying privately for legal services and those accessing services through legal aid or court appointed lawyers. Both assertions extend the implications of my decisions in this appeal too far. Although information held by the Ministry in its accounting records is subject to the *Act*, it is important to recognize that the *Act* provides a comprehensive scheme for protecting privacy, including a mandatory exemption claim designed to prohibit disclosure of personal information unless a specific exception to this prohibition has been established. The privacy issues will be discussed in detail later in this order.

I would also say that, in my view there could be no reasonable expectation on the part of the affected person that the amount of legal fees paid to his lawyers to represent him in the context of his appeals would be treated confidentially as between him (the client) and his lawyers (the solicitors). It was known to the affected person that his lawyers were appointed pursuant to section 684(1) of the *Criminal Code*, and that the Ministry would pay any fees and disbursements incurred by the lawyers. To effect payment, the lawyers would be required to submit their accounts to the Ministry which, in my view, would be inconsistent with any reasonable expectation of confidentiality on the part of either the client or the lawyers. However,

even if the affected person had an expectation of confidentiality, that is not sufficient to bring the Page 1 record at issue in this appeal within the scope of solicitor-client communication privilege because, as noted above, this record is not a "communication" within the meaning of section 19 of the *Act*.

Accordingly, for all of these reasons, I find that the Page 1 record does not satisfy the requirements of solicitor-client communication privilege.

***Litigation privilege***

Affected lawyer #1 also makes submissions relating to litigation privilege:

> We want to emphasize our point: the case law which discusses litigation privilege does not abridge or limit the privilege that pertains to communications between the lawyer and the clients. [emphasis in original]

The leading Ontario case on litigation privilege is *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]. I discussed this case in detail in Order MO-1337-I, where I found that in order to qualify for litigation privilege under section 19 of the *Act* a record must satisfy the following:

1. The record must have been created with existing or contemplated litigation in mind.

2. The record must have been created for the dominant purpose of existing or contemplated litigation.

3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

I also noted in Order MO-1337-I:

> In applying this test, it is necessary to bear in mind the time sensitive nature of this type of privilege, and the fact that, even if the dominant purpose for creating a record was contemplated litigation, privilege only lasts as long as there is reasonably contemplated or actual litigation.

It is clear that all litigation involving the affected person has been completed. Accordingly, any record that may have at one time met the requirements for litigation privilege as outlined in *General Accident* and Order MO-1337-I, no longer qualifies for this type of privilege. (See also Orders P-1551, P-1624 and PO-1710).

While I agree with affected lawyer #1 that confidential communications between a lawyer and client are not limited by the rules and tests applicable to litigation privilege, I have considered

the application of solicitor-client communication privilege to the Page 1 record at issue in this appeal and found that it does not qualify for the reasons outlined.

Therefore, I find that the only remaining record at issue in this appeal does not qualify for either of the heads of privilege contained in section 19 of the *Act*.

**PERSONAL INFORMATION**

The section 21 personal privacy exemption applies only to personal information. Section 2(1) of the *Act* defines "personal information", in part, to mean recorded information about an identifiable individual, including information relating to financial transactions in which the individual has been involved (paragraph (b)).

***Affected Lawyers***

The Ministry submits.

> It is the Ministry's position that the total amount paid to the lawyers who represented [the affected person] at his appeal qualifies as personal information under section 2 of the *Act*. Specifically, the amounts paid to these lawyers is information relating to financial transactions in which they, as individuals, were involved. As such, this information is information about their income and qualifies as their personal information ...
>
> Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. While the names of the lawyers to whom money was paid do not appear on the record in question, the individuals to whom the amounts were paid are readily identifiable given the nature of the request and the public nature of their identity. The request is for the total dollar amount paid "to the lawyers who represented [the affected person]" on his appeal. Therefore, the responsive record is tied to identifiable individuals (i.e. [the affected person's] lawyers). As discussed in paragraph 4, the identity of the lawyers who represented [the affected person] is readily ascertainable. [Ministry's emphasis].

In paragraph 4 of its representations, the Ministry states:

> The names of the lawyers to whom the payments were made are not disclosed in the [Page 1] record. However, the names of the lawyers who represented [the affected person] at his appeal are well known and are a matter of public record. In light of the notoriety of [the affected person's] case, including his appeal, there exists first hand knowledge amongst the media and the public as to who represented [the affected person] on that

> occasion. Members of the media and members of the general public were present, in large numbers, at the actual hearing of the appeal. In addition, in accordance with the usual practice in the Court of Appeal, the names of the lawyers acting for both the Appellant and the Respondent and any other parties appears at the commencement of the decision of the Court.

Affected lawyer #1 submits:

> We submit that the information sought is … personal information about the lawyers who represented the individual litigant in the Court of Appeal and were paid by the Ministry pursuant to the Order of the Court of Appeal.
>
> … we refer to the general definition of "personal information" as "recorded information about an identifiable individual". We also refer to the fact that the "Page One record" contains a purported summary of a financial transaction in which the lawyers were paid, and to paragraph (b) in the definition of personal information. We further refer to paragraph 21(3)(f) of the Act, and particularly the references to income, assets, finances and financial history. We suggest that a document disclosing payments sought or made for services rendered clearly communicates personal information.
>
> …
>
> … the lawyers' role was that of professional advocates on behalf of a litigant in the courts. The decision to grant funding to the individual litigant had already been made by the Court (on the basis of an application that is on the public record in the Court). The lawyers submitted accounts to the Ministry for their own services, in order to be paid personally. At this stage, the lawyers were not making submissions to the Ministry for funding on behalf of anyone; they were simply presenting accounts to requisition payment under the terms of the Court's Order.

I accept the Ministry's position that the four affected lawyers are identifiable, and that even if the names of these lawyers do not appear on the Page 1 record, it is possible to ascertain who these individuals are. However, in my view, it does not necessarily follow that the information **in this record** relates to an identifiable individual, as required in order to fall within the scope of the definition of "personal information" in section 2(1). As the Ministry acknowledges, no individual is identified on the Page 1 record, nor are the dollar figures contained in the record itemized against any individual lawyer. Although different considerations might apply to other records originally withheld by the Ministry, the one record that remains at issue in this appeal simply includes dates and total dollar figures representing the total amount either billed or paid by the Ministry (it is not clear which) to all four affected lawyers for legal services in representing the affected person on his appeal. I do not accept that the content of this record

identifies the amount billed or paid to any individual lawyer. The numbers in the chart are aggregate amounts relating to four different lawyers, and there is no other information contained in this record that would permit this aggregate figure to be broken out among the four lawyers in a way that would identify the amount billed or paid to any individual lawyer by the Ministry. Furthermore, absent evidence or argument from the Ministry or the affected lawyers, there is no basis for me to conclude that information in the Page 1 record could be used in conjunction with other information in order to identify the amount billed or paid to any individual lawyer. Accordingly, I find that the Page 1 record does not contain information about any identifiable lawyer, and specifically does not contain "information relating to a financial transaction" in which any of the affected lawyers was involved.

***Affected Person***

Neither the Ministry nor affected lawyer #2 (who provided representations on behalf of the affected person) submit that the Page 1 record contains the personal information of the affected person.

Affected lawyer #1 submits:

> We submit that the information sought is personal information about the individual litigant in the appeal. It is information about a financial benefit - funding for counsel - received by him pursuant to a court Order, on the basis that he could not afford counsel to present his own appeal to the Court of Appeal.
>
> We refer to the general definition of "personal information" as "recorded information about an identifiable individual". We also refer to the fact that "Page One" record contains a purported summary of a financial transaction in which the litigant received a benefit, and to paragraph (b) in the definition of personal information ...

I do not accept that the Page 1 record contains information relating to a financial transaction involving the affected person. Although the affected lawyers provided legal services to the affected person, any financial transactions that formed the basis of the figures contained on the Page 1 record (assuming that the figure represents payments and not simply billings) were between the Ministry and the individual lawyers, not between the Ministry and the affected person. That being said, I do accept that the Page 1 record contains information about the affected person in a more general sense. The affected person's identity is known to the appellant and others, and the aggregate figures reflected on the record relate to various billings or payments made by the Ministry to his lawyers over a period of time. In my view, this is information "about an identifiable individual", the affected person, and falls within the scope of the introductory wording of the definition of "personal information" in section 2(1) of the *Act*.

**Unjustified Invasion of Privacy**

Where a requester seeks the personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception with potential application in the circumstances of this appeal is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Ministry's submissions on the section 21 exemption claim relate to the affected lawyers, not the affected person. This is also the case for affected lawyer #2. Most of affected lawyer #1's submissions on section 21 were made on the assumption that the Page 1 record contains the personal information of the affected lawyers, which it does not.

As far as the affected person's personal information is concerned, affected lawyer #1submits that the presumptions in sections 21(3)(c) and (f) apply. These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels
> >
> > (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

Affected lawyer #1 maintains that the Page 1 record "is financial information about [the affected person], reflecting benefits received by him under Court Order."

I have already determined that the Page 1 record does not contain information relating to a financial transaction involving the affected person. Applying the same reasoning, I find that the record also does not describe the affected person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. Any aspects of the Page 1 record that concern finances relate to the affected lawyers, and not to the affected person.

As far as section 21(3)(c) is concerned, its application is narrowly restricted to social service or welfare benefits, which have no relevance in the context of this appeal.

Accordingly, I find that none of the section 21(3) presumptions apply to the personal information of the affected person contained in the Page 1 record.

The representations provided by the Ministry and the two affected lawyers concerning the relevance of the various factors contained in section 21(2) of the *Act* all apply to the affected lawyers, and not to the affected person.

I have reviewed all of the listed factors in section 21(2) that favour privacy protection, and find that none apply in the circumstances. The fact that the affected person received legal services from the affected lawyers is a matter of public record and widely known. This information is accurate and reliable (paragraph (g)); neither confidential nor highly sensitive (paragraphs (f) and (h)); and does not have the capacity to expose the affected person unfairly to pecuniary or other harm or to unfairly damage his reputation (paragraphs (e) and (i)). I find that disclosing the aggregate amounts billed by or paid to the four affected lawyers by the Ministry for these legal services, in accordance with the Order of the Court of Appeal, does not render any of these factors relevant. In my view, having applied to the Court for representation under section 684(1) of the *Criminal Code*, it is not reasonable for the affected person to then assume that the amount paid by the Ministry for these services would be treated confidentially, or that this information would be characterized as "highly sensitive". Although there may be some ambiguity as to whether the aggregate figures represent billed or paid amounts, as long as that ambiguity is identified, they are reasonably considered to be an accurate and reliable representation of the charges for the affected person's legal services. Finally, given the notoriety of the affected person's case and the fact that he is presently serving a sentence for first degree murder, it is not reasonable to conclude that disclosing the aggregate amounts paid to or billed by his lawyers for representing him on his appeal would expose him unfairly to pecuniary or other harm, or would damage his reputation.

The appellant states in his representations that, as a member of the media, his job is "to be a watchdog, to scrutinize public institutions and to make sure the taxpayers' money is well spent", and that his request relates to the discharge of these functions. The appellant goes on to make arguments regarding public interest considerations under section 23 of the *Act*, some of which I find are also relevant to the factor favouring disclosure of personal information found in section 21(1)(a) - subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

In this regard, the appellant submits:

- The information involves the expenditure of public money. I would argue the taxpayers of Ontario are always interested in knowing how their money is spent…

- The ministry states the information sought does not serve a purpose in informing taxpayers about the activities of their government or contribute to help the public express an opinion. I vehemently disagree. The expenditure in this case was approved by an unelected public official, a judge. The justice system is a publicly funded institution that is ultimately accountable to taxpayers. Members of the public could raise a number of questions about the court case from which [this appeal] arises. Some examples:

    - Members of the public unfamiliar with the justice system might question the number of years it took to get the case to appeal court as well as the number of lawyers involved in the appeal. That might raise the question of whether the accused received special treatment from the justice system because of the notoriety of the case.

    - The appeal court justices also dismissed the case immediately without hearing from the prosecution. Although this perhaps would not raise the eyebrows of lawyers, it would in my view could leave questions in the minds of some taxpayers about the validity of the grounds for appeal and whether the public's money was well spent.

- I personally take no position on the above issues, I only raise them to suggest a dollar figure would be an important yardstick to help taxpayers determine if their public institutions are functioning as they should. Getting some idea of the cost in a case that all taxpayers are familiar with would help them conclude whether the cost was reasonable or excessive. But it would be impossible for them to formulate any opinion if they don't have all the pieces of the puzzle.

- The ministry also argues the information is unlikely to contribute to any meaningful public debate because the public won't know the value of the work or what was actually paid for. In my view this point is without merit and you should reject it as most members of the public are generally aware the kind of work lawyers perform.

The appellant then submits:

> Commissioner, I believe the sole reason for the ministry's opposition to the request lies in [paragraph 27 of the Ministry's representations] where it makes reference to defence lawyers who fall victim to unwarranted public criticism. However the dollar figure should not remain confidential merely because the lawyers may face criticism.

> They weren't compelled to take the case and they had to know from the outset that they could be subject to criticism given the publicity attached to it. And …despite all of this unwarranted criticism the ministry talks about, there is no evidence that lawyers have been deterred from representing clients charged with unsavoury crimes.

In order for section 21(2)(a) to apply in the circumstances of an appeal, it must be established through evidence provided by the appellant, and following a review of the relevant records, that disclosure of the personal information found in these records is desirable for the purpose of subjecting the activities of the institution to public scrutiny. (See Order P-828).

The affected person in this appeal was convicted of first degree murder after a very highly publicized and controversial trial. He applied for and was granted the right to have counsel appointed under section 684(1) of the *Criminal Code* to represent him on the appeal of his conviction. His successful application under section 684(1) and the subsequent appeal were also the subject of significant media and public attention. It is not necessary to provide a detailed description of events in order for me to conclude that the level of public interest in criminal matters involving this particular affected person is virtually without parallel in the province. In my view, the provision of public funds in order to represent the affected person on appeal is one component of the broader public interest in these matters. Although I do not necessarily accept all of the reasoning put forward by the appellant, given the unique circumstances of this appeal, I accept his basic position that disclosing the aggregate figures reflecting the costs or charges for legal services in the affected person's appeal is desirable for the purpose of subjecting the Ministry to public scrutiny. Accordingly, I find that the factor in section 21(2)(a) of the *Act* is a relevant consideration, although I would give this factor only moderate weight in the circumstances.

In conclusion, I have found that there are no relevant factors favouring privacy protection, and one factor favouring disclosure of the personal information of the affected person contained in the record. Although I have assigned this one factor only moderate weight, in my view, it is sufficient to outweigh any inherent privacy considerations in the circumstances, and I find that disclosure of the Page 1 record would not constitute an unjustified invasion of the affected person's privacy.

Therefore, I find that the Page 1 record does not qualify under either of the exemption claims raised by the Ministry, and it should be disclosed to the appellant.

## ORDER:

1. I order the Ministry to provide the appellant a copy of the Page 1 record by **October 26, 2001** but not before **October 31, 2001**.

2. I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: September 27, 2001
Tom Mitchinson
Assistant Commissioner