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

ORDER PO-1922

Appeal PA-000280-1

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 the Attorney General (the Ministry) provided the following background, which I find is 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 revised request for the total dollar amount paid by the Ministry pursuant to the *Proceedings Against the Crown Act* for legal costs of parties who were not defendants in the criminal proceedings against [the accused] on charges of obstruction of justice and possession of child pornography. During the course of mediation, the Ministry agreed to create a record based on the 182 pages of documents in its possession which reflects this total amount. Access to the record 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 accused] was tried and acquitted of obstruction of justice and possession of child pornography after a lengthy and controversial trial. .... During the course of the preliminary inquiry, His Honour Judge ... of the Ontario Court of Justice granted an order permitting [Person A] to be represented by counsel at the prosecution of [the accused] in order to address issues involving solicitor client privilege and ordered the Ministry of the Attorney General to pay the costs of this representation. During the course of the same preliminary inquiry, His Honour also permitted [Person B], one of the witnesses, to be represented by counsel and ordered that the Crown bear the cost of this representation. Following the preliminary inquiry, the Honourable Mr. Justice ... of the Ontario Superior Court of Justice ordered the continued representation of [Persons A and B] by counsel at the trial of [the accused].
>
> In accordance with the court orders, counsel for [Persons A and B] submitted their statement of account to the Ministry for payment. These legal bills were paid by the Ministry pursuant to section 22 of the *Proceedings Against the Crown Act*. Section 22 of that Act provides that:
>
> 22. The Minister of Finance shall pay out of the Consolidated Revenue Fund the amount payable by the Crown,
>
> (a) under an order of a court that is final and not subject to appeal;
>
> (b) under a settlement of a proceeding in a court; or
>
> (c) under a settlement of a claim that is the subject of a notice of claim under section 7.

> The record at issue in this appeal reflects a sum that was paid for a number of invoices submitted by counsel who represented the two non-defendants at the preliminary inquiry and trial of [the accused]. The record was created by Crown counsel using information supplied directly from the solicitor's statements of accounts, which had been submitted for payment to the Ministry in accordance with the Court orders. ...

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 all records or documents relating to the legal costs paid to the lawyer representing Person A at the accused's preliminary hearing on charges of obstruction of justice.

The Ministry identified 210 pages of responsive records, and denied access to all of them. The exemptions contained in sections 19, 21, 13(1), 14(1)(f), 17(1)(b) and 18(1)(e) of the *Act* were relied on by the Ministry in withholding 182 pages, and the remaining 28 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. In her appeal letter, the appellant clarified that she was only interested in receiving the total amount paid by the Ministry for the costs of representing parties who were not defendants in the accused's proceedings.

During mediation, a number of events occurred:

- The appellant re-defined her request to be for the total amount paid by the Ministry pursuant to the *Proceedings Against the Crown Act* for legal costs of parties who were not defendants in the proceedings in respect to the prosecution of the accused on charges of obstruction of justice, including both preliminary inquiry and trial.

- The Ministry created a record which provided the information covered by the re-defined request, and claimed that this new record qualified for exemption under sections 19 and 21 of the *Act*.

- The Ministry withdrew the sections 13(1), 14(1)(f), 17(1)(b), 18(1)(e) and 22(a) exemption claims.

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 lawyers representing Persons A and B (Lawyers 1 and 2), setting out the facts and issues on appeal. The Ministry and Lawyer 2 provided representations in response. I then sent the Notice to Persons A and B, and received representations from Lawyers 1 and 2 on their behalf, objecting to the disclosure of the record. Although he did not respond to the first Notice, in responding on behalf of Person A, Lawyer 1 also responded on his own behalf, and objected to disclosure of the record on the basis of section 19 of the *Act*.

I decided that I did not have to receive representations from the appellant before making my decision.

RECORD:

The only record remaining at issue consists of a one-page document setting out the total amount paid by the Ministry to Lawyers 1 and 2 pursuant to the *Proceedings Against the Crown Act* for legal costs in representing Persons A and B during the prosecution of the accused on charges of obstruction of justice, including both the preliminary inquiry and the trial.

DISCUSSION:

ISSUES:

Personal Information

The section 21 personal privacy exemption only applies 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)).

The Ministry submits:

> It is the Ministry's position that the total amount paid to [Lawyers 1 and 2] 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. 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 [Persons A and B] in a specific criminal proceeding. Therefore, the responsive record is tied to identifiable individuals (i.e. lawyers). [Ministry's emphasis]

I do not accept the Ministry's submissions on this issue. No individual is identified on the only record that remains at issue in this appeal, nor is the dollar figure contained in this record itemized against any individual lawyer. Although different considerations may well apply to other records originally withheld by the Ministry, the remaining record simply includes a dollar figure which represent the total amount paid by the Ministry to both Lawyers 1 and 2 for legal costs in representing their clients at the preliminary inquiry and trial of the accused. I do not accept that the content of this record identifies the amount paid to any individual lawyer. The dollar amount is an aggregate of the payments made to two different lawyers, and there is no other information contained in this record that would permit this aggregate figure to be broken out between these two lawyers or to identify the amount any individual lawyer was paid by the Ministry. Accordingly, I find that the record does not contain information about any identifiable individual, and specifically does not contain "information relating to a financial transaction" in which either Lawyer 1 or Lawyer 2 was involved.

For the same reasons, I find that the record does not contain the personal information of either of Persons A or B, the two clients represented by Lawyers 1 and 2. These individuals are not identified by name on this record. Although their identities could perhaps be determined by other means, the actual record at issue in this appeal does not contain any information that can be linked specifically to either Person A or Person B, nor would its disclosure provide any increased likelihood that accurate inferences to be drawn in this regard. As stated earlier, the dollar figure contained in the record is an aggregate amount, and the content of the record does not permit the figure to be broken out so as to identify the breakdown of fees paid in relation to legal services provided to each of the two individual clients. Accordingly, I find that the record does not contain information about any identifiable individual, and specifically does not include any personal information of either Persons A or B.

Because I have found that the record does not contain "personal information" as defined in section 2(1) of the *Act*, the record cannot qualify for exemption under section 21.

Solicitor-Client Privilege

The Ministry submits that section 19 of the *Act* applies to exempt the record in its entirety. The affected persons who provided representations all 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 established 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).

This privilege has been described by the Supreme Court of Canada 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 refers to the Federal Court of Appeal case of *Stevens* v. *Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 in support of its position that a lawyer's statement of account is protected from disclosure by solicitor-client privilege. Lawyer 1 also makes reference to *Stevens* in his representations.

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 qualifies for solicitor-client communication privilege and is exempt from disclosure under section 19 (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 argues that the clients in this case have not waived the privilege. I have no evidence before me that the clients have waived privilege and, as such, I find that waiver is not an issue in this appeal.

Nevertheless, the record in this appeal is different from the records under consideration in Orders PO-1714, PO-1822 and in *Stevens*.

The record here is a one-page document prepared by the Ministry which reflects the total funding paid to Lawyers 1 and 2 in representing their clients in the criminal proceedings involving the accused. 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 records is protected as a confidential solicitor-client communication. The Ministry states:

> ... It is the Ministry's position that the information, which is clearly derived from documents clearly subject to solicitor client privilege, 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 it was billed by lawyers it hired, 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 accounts 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 his or her 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 for the purpose of this appeal, which is a summary of the 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, its an act of a third party to whom disclosure of the privileged information is compelled by court order. 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: any record held by the government which merely copies or repeats otherwise confidential or privileged

> information contained elsewhere could be disclosed. Furthermore, such an application in effect creates an unfair disparity between those who can afford their own lawyer (and whose total billings remain privileged) and those who can not 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). If a distinction were drawn between information which actually appears on a solicitor's statement of account and that same information when it is reproduced by an institution in some form for its own record or other purposes would also entail that accounts submitted to Legal Aid would be vulnerable to disclosure. Such a result would clearly undermine the core of the solicitor client relationship in countless cases where solicitor client privilege is intended to attach to solicitor's statements of accounts.
>
> 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. Unlike the keeping of trust ledgers by a solicitor, none of these record keeping practices involves 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 or other purposes. 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 Court orders requiring counsel to submit their accounts to the Ministry for payment. 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. [Ministry's emphasis]

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 (eg. 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 communications privilege. It is not a communication between a solicitor and a client, nor does its content reveal any prior 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 Lawyers 1 and 2 in consideration for the legal services provided to Persons A and B during the prosecution of the accused.

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 communications

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 does not contain any information normally contained in a statement of account. No itemizations of services are listed; no dates and times are included; 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 amount paid by the Ministry, in aggregate form, to two lawyers representing two different clients over a significant period of time in two separate proceedings. In the present circumstances, it is not necessary for me to determine whether different considerations would apply to records which might reveal the actual content of any statements of account, because the record at issue in this appeal clearly does not.

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. Had the record in this appeal contained personal information of any identifiable individual, a detailed consideration of the privacy implications of disclosure would have been required and, in my view, this would be adequate to address any privacy interests. Similarly, given the nature of the record at issue in this appeal, and the fact that it does not consist of or reveal the contents of any statement of account created by a lawyer and communicated to a client, 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.

I would also say that, in my view, there could be no reasonable expectation on the part of Persons A and B that the amount of legal fees paid to their lawyers to represent them in the context of proceedings against the accused would be treated confidentially as between them (the clients) and their lawyers (Lawyers 1 and 2). It was known to Persons A and B that their lawyers were appointed pursuant to the *Proceedings Against the Crown Act*, and that any fees and disbursements incurred by the lawyers would be paid by the Ministry. 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 clients or the lawyers.

Accordingly, for all of these reasons, I find that the record does not satisfy the requirements of solicitor-client communications privilege, and therefore does not qualify for exemption under section 19 of the *Act*.

ORDER:

1. I order the Ministry to disclose to the appellant a copy of the record by **August 22, 2001** but not before **August 17, 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.

July 17, 2001

Tom Mitchinson
Assistant Commissioner