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

ORDER PO-2128

Appeal PA-020162-1

Management Board Secretariat

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> "…records of the legal cost as of February 28th, 2002, of the defense of all Government officials, including the Premier, from actual or potential legal actions arising from the death of [a named individual] at Ipperwash Provincial Park. I am seeking the costs paid both by the Government of Ontario, and by the Government's insurer."

The Ministry responded as follows:

> …we wish to advise you that Management Board Secretariat may have custody and control of records relating to the costs paid by the Government's insurer in the defense of Government officials, including the Premier, from actual or potential legal actions arising from the death of [a named individual]at Ipperwash Provincial Park.
>
> Therefore, pursuant to section 25 of the *Act,* we have forwarded this portion of your request to … Management Board Secretariat.

Management Board Secretariat (MBS) issued a decision in response to the transferred request. MBS advised the requester that it had located one responsive record that contained a figure representing the legal costs, including disbursements, paid by the government's insurer in the lawsuit identified by the requester for the period September 7, 1995 to October 10, 2001. MBS also stated that it had been unable to obtain supplementary information from the insurer for the period October 11, 2001 to February 28, 2002 (the date of the request) because the insurer refused to provide this information to MBS. MBS denied access to the record, claiming that it qualified for exemption under section 17(1)(b) (third party information) and section 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed MBS' decision.

During the course of mediation, MBS clarified its position. MBS stated that it was unable to obtain the missing information from the insurer because records containing this information were not in its custody or under its control. As far as the existing record was concerned, MBS maintained that only some of its content was responsive to the request. The appellant objected to both of these positions, so "custody or control" and "responsiveness" were added as issues in the appeal.

Mediation was not successful, so the appeal was transferred to the adjudication stage. I sent a Notice of Inquiry initially to MBS, as well as the insurer and an insurance adjuster (who I will refer to collectively as "the insurer"). The Notice outlined the facts and issues in the appeal and requested written representations. The insurer was asked to address only the section 17(1)(b) and the "custody or control" issues. I received representations from MBS and the insurer.

In its representations, the insurer states that the "custody or control" issue is now resolved because, after receiving the Notice of Inquiry, it provided MBS with the information previously withheld. The insurer also pointed out that some of the entries in the record initially identified by MBS were incorrectly designated or posted, and attached a new replacement record. Its counsel explains:

> We have reviewed the [revised] claims documents with our clients at great length to ensure that all costs and disbursements paid have been included in the revised document. Accordingly, we would ask you to replace the claims print-out previously forwarded with this new claims summary, which has been confirmed as accurate by [the insurer].

On the basis of this information provided by the insurer, I concluded that the "custody or control" question was no longer at issue, and that the responsive record is now the revised claims summary document submitted to MBS and to me by the insurer. I provided the appellant with a copy of the letter from the insurer that explains the relationship between the originally identified record and the new record. He did not dispute my conclusion that the "custody or control" issue is resolved, and I will not address it further in this order.

The insurer also refers in its representations to sections 17(1)(a) and (c), not originally identified by MBS. Because section 17 is a mandatory exemption, I added these two sections to the Notice of Inquiry.

I then sent the revised Notice of Inquiry to the appellant, together with a copy of the representations submitted by MBS and the insurer. The appellant provided representations in response, which identified the possible application of the public interest override in section 23 of the *Act*.

I then provided MBS and the insurer with a copy of the appellant's representations and an opportunity to reply. MBS initially advised me that it would not be submitting reply representations. The insurer did provide reply representations, which were shared with the appellant. The appellant provided a final set of representations in response. MBS subsequently provided submissions on the appellant's section 23 arguments. However, in light of my findings in this order, it is not necessary for these submissions to be considered or shared with the appellant.

RECORD:

The record at issue in this appeal, as clarified by the insurer during the course of the inquiry, is a 9-page claims summary document. It lists a number of "vendors" and costs paid by the insurer for various services associated with the identified legal action up to February 28, 2002 (the date of the request). The total cost figure appears on page 9 of the record.

DISCUSSION:

SCOPE OF THE REQUEST

MBS takes the position that only the total cost figure appearing on page 9 of the record is responsive to the appellant's request. The insurer supports MBS' position on this issue.

MBS submits:

> The remaining information contained in the record [other than the total cost figure] is essentially a list of amounts paid to particular named vendors together with dates and check numbers. The requester did not seek this other remaining information; only the cost of the defence was requested. When added together, the individual legal costs equal the total cost that MBS submits is responsive to the request. Since the names of the lawyers representing the defendants in the action are publicly known, extending this request to amounts paid to named law firms, for example, over a particular period of time goes well beyond the request for the 'cost' *simpliciter*. This information is qualitatively different than the compilation of the legal cost and extends well beyond the plain words of the request. The requester did not seek the names of the vendors or the itemization of the costs.
>
> In addition, in his letter, the appellant provided specific directions to MBS that indicated what information he expected to receive:
>
> > I would ask that in fulfilling this request, that the Cabinet Office refer to FOI Appeals No. PA-000103-1 (Request #000005) to find acceptable search methods (financial rather than legal) to avoid having access to these records denied under section 19 of the *Act*.
>
> MBS consulted with Cabinet Office in respect of the appeal identified by the appellant. Cabinet Office informed the Ministry that the appeal referred to by the appellant had been resolved when Cabinet Office disclosed one amount reflecting the *total cost* relating to the [former] Premier's defense in the same action. In that case the request was for 'legal cost' incurred to date; therefore, MBS is entitled to accept the requester's direction and interpret the request in the same fashion.
>
> The appellant set out his request very carefully. He did not seek an itemization of legal costs; rather, the appellant clearly requested the legal cost paid by the government's insurer in a particular action. Any other information contained in the record would exceed the appellant's request; it would not reflect his request for what the government's insurer had paid up to the date indicated for the action. Under the *Act*, MBS is entitled to rely on the plain wording of the request where, as here, it is unambiguous.
>
> On May 3, 2002 MBS provided the appellant with a decision letter in which it clearly

described the responsive record at issue. The letter stated that MBS [sic]:

> We understood that you are requesting the total legal costs paid by the government's insurer during the specified time frame.
>
> The requester did not contact MBS after receiving the decision letter to advise that he was requesting an itemization of the costs. Had he done so, MBS could have addressed the issue in a timely fashion. Indeed, to date the appellant has not advised MBS that he disagrees with MBS' interpretation of his request.
>
> It is respectfully submitted that it is unfair to institutions to allow requesters to effectively extend the purview of a request in appeal months after they have received a decision letter which clearly describes the institution's reasonable and credible interpretation of the request. The appellant is not without options; he may submit a new request for the information he now believes he would like to obtain. In contrast, to require the ministry to extend the purview of the request at the appeal stage significantly prejudices the ministry because this "new" request may require that the ministry notify numerous affected parties in order to satisfy its obligations under the *Act*. Moreover, since the additional records include legal account information, the ministry may want to claim exemptions like the ones claimed for the total amount, as well as others.

In responding to MBS' representations on this issue, the appellant made the following brief submissions:

> I believe that it is clear that my intention in my request was to encourage MBS to use all means possible to find the information that I was seeking. In that decision that was referenced, FOI Appeal No. PA-000103-1 (Request #000005), Cabinet Office agreed that it was acceptable for the disclosure of the figure sought, if the documents were obtained in accounting records, instead of in legal documents.
>
> Since I have no reason to expect that the total legal cost is going to be available in a single figure, I believe it should be possible for institutions to be required at times to submit a series of figures that will provide an indication of the total cost.

The appellant makes it clear in his representations that he wants access to information comparable to the information he received through mediation with Cabinet Office in his previous similar appeal. As far as I can determine, the information provided in that case was the total cost figure covering all legal services provided by the government in relation to the former Premier's defence in the same legal action that is the subject of the current appeal. At the time of submitting his request, the appellant, quite understandably, was not in a position to know whether there was one record that contained the total cost figure for insured legal services. However, based on the wording of the request and the appellant's representations in response to MBS' submissions during this inquiry, it is reasonable to conclude that if a record did include this total cost figure, that figure would equate to the type of information provided to the appellant in Appeal PA-000103-1, and would satisfy his request. In my view, the other statements by the

appellant were made simply to cover the possibility that a total cost figure did not appear in any responsive record, and that a series of individual cost figures would have to be provided in order to respond to his request for the "total cost".

Having considered the positions of the parties, I find that the figure on page 9 of the record, which represents the total cost of legal services provided by the insurer for the time frame covered by the appellant's request, is the only responsive portion of the record.

THIRD PARTY COMMERCIAL INFORMATION

The relevant portions of section 17 of the *Act* read as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of person, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), MBS and/or the insurer must satisfy each part of the following three-part test:

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

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

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

(Orders 36, P-373, M-29 and M-37)

Part 1: Type of Information

Past orders have defined "commercial" and "financial" information as follows:

> ***Commercial Information***
>
> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. (Order P-493)
>
> ***Financial Information***
>
> The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

The insurer submits that the record contains both commercial and financial information. MBS agrees, and submits:

> The information at issue is, on its face, financial and commercial information which reflects the cost of the legal services rendered by legal counsel to the government's insurer. The record reveals the total amount the insurer has paid for legal services provided by counsel retained by the insurer in respect of the government's defence in the [named individual] action. As the information relates directly to the purchase of services, it falls within the scope of either financial or commercial information, as defined by [the Commissioner].

The appellant's representations do not address Part 1.

I accept MBS' position, and find that the total cost figure on page 9 of the record qualifies as both commercial information and financial information, thereby satisfying the first part of the section 17(1) test.

Part 2: Supplied in Confidence

Supplied

The insurer and MBS both submit that the information was supplied to MBS. MBS explains:

> … MBS obtained the information by accessing a financial database created and maintained by the government's insurer and insurance adjuster. The information so obtained was not altered in any way by the insurance adjuster; therefore, the information at issue in the record was actually supplied by the insurer. Furthermore, the fact that MBS obtained the record by accessing the insurance

> adjuster's database does not mean the record was not "supplied". This fact situation is unlike situations where an institution gathers the information itself, as in PO-1983. In this case, the Ministry was provided electronic access to the database as an administrative convenience; rather than receiving the information contained in the database in printed form.

The insurer elaborates:

> The Province played no role in the gathering of the information. This was contained in communications between the law firms retained in the defence of the civil action and the client, the Insurer.
>
> …
>
> … [the insurer and insurance adjuster] allowed the Crown to access claims information, which was downloaded from databases or reports in the [insurance adjuster's] database. …

The appellant disagrees, and submits:

> The provisions in the *Act* are meant to protect the rights of a true third party, but in this situation the insurer is an agent of the government, so the third party protection should not apply. Information about the litigation in which they are involved belongs as much to the government - if not more - than to the insurer.
>
> In my view, the information at issue should not qualify for the Section 17 exemption, as it was not strictly supplied to the government, according to the *Act*.

In response to this point, the insurer submits:

> The Insurer submits that the suggestion that it is an "agent" of the government and "not a true third party" are patently absurd. The Insurer does not have the right or the power to act on behalf of the Crown in a binding capacity. The relationship between the Insurer and the Crown is a purely contractual one and subject to specified terms and conditions that are stipulated in the Policy of Insurance.

The question of whether the total cost figure appearing on page 9 of the record was "supplied" is a straightforward issue in the particularly circumstances of this appeal. There can be no dispute that the figure appears on a hardcopy record that was provided to both MBS and to me during the course of this inquiry. In my view, that is sufficient to establish that it was "supplied" by the insurer for the purposes of Part 2 of the section 17 test. The fact that MBS and the insurer may have an arrangement that permits MBS staff to electronically access information stored on the insurer's billings and claims database has no bearing on a determination of the "supplied" issue in this appeal. It is also not necessary for me to decide whether the insurer is acting as an agent of MBS, as suggested by the appellant.

In Confidence

In order to establish the confidentiality component of Part 2, MBS and the insurer must demonstrate a reasonable expectation of confidentiality on the part of the insurer at the time the information was supplied. It is not sufficient that the insurer have an expectation of confidentiality; the expectation must have been reasonable, and must have an objective basis (Order M-169).

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all relevant circumstances, including whether the information was:

> (1) Communicated to MBS on the basis that it was confidential and that it was to be kept confidential.
>
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the insurer prior to being communicated to MBS.
>
> 3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

The insurer submits:

> … The Crown was allowed access to the database on the basis that the claims data was confidential and was to be kept confidential. Access was strictly limited to the Insurance Risk Management Dept., (including MBS) and insurance managers and buyers for the Government of Ontario.
>
> The purpose of accessing this information was for the Ministry's budgeting purposes, estimating future premium costs, negotiating policies, etc. This was obviously a purpose that would not entail disclosure to the public.
>
> Within [the insurer], access to the database was limited to senior claims staff and strictly password protected. This would have amounted to less than ten senior claims examiners and executives. The separate branches of [the insurer] were unable to gain access and only direct account handles and very few support staff (all of which were monitored closely through a password system) were allowed access.
>
> The Insurer respectfully submits that the information was never disclosed or available from any sources to which the public has access and was, in fact, treated as commercial and financial information of the highest sensitivity.

> The Insurer further submits that it had a reasonable expectation of confidentiality in providing the information. It would not have allowed MBS or any other Crown office access to the data if there were any possibility of its disclosure to a third party, pursuant to a request under [the *Act*].
>
> The objective basis of this belief is the fact that disclosure of the data would undermine the commercial and financial interests of both the Insurer and the Crown.

MBS supports the insurer on this issue:

> The information in the record was clearly supplied in confidence to MBS. The fact that MBS treats this information as solicitor-client privileged information informs the analysis as to the intention to keep the information confidential. Access to the database is restricted to the insurer, the insurance adjuster and the government of Ontario. The insurer has advised MBS that the cost information reflected in this record is confidential financial information belonging to the insurer. Furthermore, MBS has consistently treated the information in a confidential manner as it considers the information to be subject to solicitor-client privilege: MBS has restricted access to the information within the Ministry to a small group of employees who require the information in order to perform their job duties.

Again, in my view, the submissions provided by the insurer and MBS do not speak to the particular circumstance of this appeal, which involves a hardcopy record supplied to MBS by the insurer. As noted earlier, during the course of this inquiry the insurer provided me with a letter attaching an amended record. These documents were also provided to MBS. The insurer states in the letter that the record is being provided "in strictest confidence and must not be disclosed", and goes on to explain that:

> It is [the insurer's] position that this information was provided to the Management Board Secretariat in the strictest of confidence and subject to solicitor-client privilege. It was [the insurer's] clear understanding that this data would be protected by the exemptions contained in Section 17 and 19 of [the *Act*].

Based on the contents of this letter, and given the arrangements outlined in the representations provided by both MBS and the insurer for the sharing of other similar information through the insurer's billings and claims database, I accept that MBS and the insurer had a reasonable and objectively held expectation that the total cost figure on page 9 of the record would be received and treated by MBS on a confidential basis.

Accordingly, I find that the total cost figure on page 9 of the record was supplied to MBS in confidence, thereby satisfying Part 2 of the section 17(1) test.

Part 3: Harms

Introduction

To discharge the burden of proof under Part 3, the parties resisting disclosure (MBS and the insurer in this case) must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure, the parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, upheld by the Ontario Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.)).

(See also Orders PO-1745 and PO-1747)

Section 17(1)(a): Prejudice to competitive position

MBS' only representation on section 17(1)(a) consists of a statement accepting and adopting the insurer's position.

The insurer submits that:

> … allowing public disclosure of gross figures based on its financial information relating to claims experience would essentially give third parties tendering on provincial insurance contracts "insider information" that would undermine the contractual negotiating process.
>
> In addition, its disclosure would potentially impact on the sale of insurance products by [the insurer], specifically if it appears that the Insurer is unable to maintain the confidentiality of client's claims data.

In my view, the insurer has failed to provide the type of detailed and convincing evidence necessary to establish a reasonable expectation of significant prejudice to its competitive position should the total cost figure on page 9 of the record be disclosed. Although different considerations might apply to the disclosure of more detailed information contained in the insurer's billing and claims database, I am only dealing here with the single aggregate figure on page 9. This figure reflects total costs associated with a number of different clients and their counsel in a particular case and is simply too general in nature and too far removed from the actual claims experience to create any reasonable probability that its disclosure could

significantly prejudice competition for future government contracts or other insurance business offered by the insurer.

Therefore, I find that the total cost figure on page 9 of the record does not satisfy the third requirement of section 17(1)(a). Because all three requirements must be established, I find that the total cost figure does not qualify for exemption under section 17(1)(a).

Section 17(1)(b): Similar information no longer supplied

MBS takes the position that disclosure of the total cost figure on page 9 of the record could reasonably be expected to result in similar information no longer being supplied to MBS by the insurer. In support of this position, MBS submits:

> The insurer has also communicated to MBS and [the Commissioner] that, should the information contained in the record be disclosed, it can no longer continue to provide similar information to MBS in the future.
>
> MBS submits that it is in the public interest that it continue to receive the insurer's claims management information. MBS requires the information in order to manage its insurance and risk management program. The detailed loss experience outlined in the information is necessary for three reasons. Firstly, it allows the province to accurately identify significant liability exposures and thereby develop and maintain appropriate risk control programs. Secondly, it assists the province to estimate and assess the appropriateness of future insurance premiums and programs. Thirdly, it also allows the province to track any limits on its insurance coverage, thereby allowing the province to plan for future cost pressures.
>
> MBS respectfully submits that if the Crown were to be denied access to claims management information, it would prevent the government from promptly identifying liability exposures as they emerge, thereby delaying the government's development of risk control programs. MBS submits that the province must, in the public interest, develop comprehensive risk management strategies in order to minimize lawsuits against the Crown and the circumstances that give rise to lawsuits. In this regard, the public interest is served in two ways: effective risk control programs prevent harm before it happens and assist the province to negotiate lower insurance premiums with prospective insurers.
>
> MBS also submits that when it seeks to renew its insurance policies, the government must have detailed knowledge of its claims loss history in order to assess the appropriateness of premiums quoted by prospective insurers. Without this background information, the Crown would be at a significant disadvantage during negotiations, and could pay higher premiums than are warranted by past loss experience. Further, the Ministry must also be able to demonstrate to prospective insurers that it has put into place an effective risk management program. Prospective insurers will require the Crown to demonstrate how we

> have identified and addressed previous significant claims. If the government were to be unable to provide prospective insurance companies with this information, MBS submits that insurers would decline to provide quotes on future government insurance business. In addition, since there are few insurers in the marketplace that can service the Province's insurance needs, any reduction in the number of insurers willing to quote on required insurance is of serious concern to the Province. MBS submits that it must, if it is to serve the interests of the taxpayers of Ontario, obtain as many competitive quotes as possible in any future insurance tender.
>
> In the scenarios referred to above, MBS submits that it is clear that MBS requires the detailed claims loss information supplied by the insurer to make sound business decisions. For this reason, MRS respectfully refers the Assistant Commissioner to Order PO-1645. In this case, the Ontario Casino Corporation submitted that disclosure of confidential information it received from one of its contracted casino managers would result in similar information no longer being supplied. The adjudicator determined that it was necessary and in the public interest for the Ontario Casino Corporation to receive as much information as possible from casino managers about the operation of its casinos in order to make sound business decisions.
>
> MBS understands that the Commissioner has asked the insurer to provide submissions in this appeal. MBS accepts the submissions of the insurer as to whether, if this exemption is not applicable, it would not provide the information to MBS in future. Factually, here, the insurer was originally not willing to provide the information that was responsive to a four month period of this request simply based on the access request. Though it has since determined that the information could be provided in order to allow for a determination as to accessibility, if it were determined that the information was available to the public, it would cease providing it to the Crown with the detrimental results as noted above….

MBS also includes an affidavit sworn by the Manager, Risk Control and Advisory Services, outlining the services provided by that office and its operational need to have ongoing access to the claims loss history contained in the insurer's database in order to effectively manage the government's risk management and control program.

The insurer supports MBS on this issue. It submits:

> If the legal defence accounts and claims data relating to specific litigation were ordered produced pursuant to [the *Act*], it is highly unlikely that any insurer would provide the Management Board Secretariat with this very sensitive commercial information in the future.

> It is the position of the Insurer that access to [the insurer's] database has been cut off to MBS and will remain unavailable if there is any issue that the Insurer's commercial information is not subject to the s. 17 exemption.
>
> If the Management Board Secretariat were unable to access the data generated by legal defence counsel, the Insurer respectfully submits that it would hinder the government in identifying and quantifying liability exposures and undermine its ability to monitor risk control programs.
>
> It is the Insurer's submission that it is in the public interest that the Province be able to undertake effective risk control programs and to be able to negotiate with private insurers for the best and most economical insurance programs.

The insurer also includes an affidavit with its representations, sworn by the Claims Supervisor with its risk management department who has responsibility for the Province of Ontario account. The Supervisor describes the services provided by the insurer, and the protocols and procedures put in place to allow MBS staff to access the billings and claims database. He swears in his affidavit that the insurer had a reasonable expectation of confidentiality in providing MBS with access to the data from the database, and that access would not have been permitted if there was any possibility of its disclosure under the *Act*. The Supervisor also states his opinion that this type of information would be considered highly sensitive and commercially valuable by the insurance industry and its clients.

The appellant disagrees, and submits:

> After reviewing the submissions of MBS and [the insurer], I do not feel that they provided enough information to say conclusively that the disclosure of this information would result in one of the harms listed in this section of the *Act*.
>
> As well, since the information regarding the litigation involving the Government should belong to the Government, I cannot see how the information would no longer be supplied to the institution. Instead, it would [be] a decision of the institution as to whether or not it would choose to collect this information.

Despite taking the position that only the total cost figure on page 9 of the record is responsive to the appellant's request, both MBS and the insurer provide detailed submissions in an effort to establish the need for MBS to have ongoing access to information from the insurer's billing and claims information database. In my view, these submissions are not particularly helpful in determining the application of section 17(1)(b) to the specific information at issue in this appeal: the total cost figure for legal services provided by the insurer in relation to certain defendants in the civil lawsuit identified in the appellant's request, which appears on page 9 of the record.

Based on the representations of MBS and the insurer, it is clear that these two parties have established an arrangement for sharing information relating to the services provided by the insurer under its contract with the government. It also seems clear that there is a public interest that information of this nature continues to be supplied to MBS in the context of discharging its

contract management responsibilities. I am not privy to the contract entered into by MBS and the insurer, but it would seem logical that rights and responsibilities of this nature would be addressed in that document. Even if they aren't at present, in my view, being supplied with the necessary information to ensure the appropriate risk management services outlined by MBS in both its representations and accompanying affidavit would be both prudent and presumably a reasonable expectation of any insurance provider engaged by the government to provide services of this nature. MBS has made a compelling case for the need to have access to certain claims and billing related information and, in my view, it has the ability to ensure that this information continues to be supplied, where it is in the public interest to do so.

As far as the insurer is concerned, in my view, its arguments are framed in a way that exaggerates the impact of disclosing the particular information at issue in this appeal. The appellant is not seeking access to detailed billing and claims information contained in the insurer's database. He simply wants to know one fact: the total cost paid by the insurer for legal services in the civil lawsuit. He has no interest in how this information is provided by the insurer to MBS in the context of responding to his request under the *Act*, nor does he appear to have any intention of interfering with the manner in which MBS and the insurer share and exchange information for the purposes of the administration of their contract. In my view, any legitimate concerns the insurer might have regarding the integrity or confidentiality of the information contained in its database were removed when it decided to provide MBS and me with a hardcopy record listing only specific information relating to the lawsuit identified by the appellant, and by my subsequent finding that only the total cost figure that appears on page 9 of the record is at issue in this appeal.

Although different considerations might apply to a request for access to more detailed information contained in the insurer's billing and claims database, I am not persuaded, based on the evidence and argument provided by MBS and the insurer, that disclosing the single aggregate figure on page 9 that reflects total costs associated with an undetermined number of different clients and their counsel in a particular case could reasonably be expected to result in similar information no longer being supplied to MBS, through ongoing on-line access by MBS to the insurer's database or through other means.

Therefore, I find that the total cost figure on page 9 of the record does not satisfy the third requirement of section 17(1)(b). Because all three requirements must be established, I find that the total cost figure does not qualify for exemption under section 17(1)(b).

Section 17(1)(c): Undue loss or gain

MBS' only representation on section 17(1)(c) consists of a statement accepting and adopting the insurer's position.

The insurer points out that its account with the Province of Ontario is unique because of its size and complexity, and submits:

> In the present insurance market, it is the Insurer's respectful submission that disclosure of confidential claims information would undermine both the insurance

> company underwriting insurance for the Province and the operations of Management Board Secretariat.
>
> Disclosure would essentially amount to a competitive penalty to the Insurer because of the fact that it participated in the Government of Ontario insurance program. The Insurer submits that this would amount to an undue loss to [the insurer] as well as the Management Board Secretariat.
>
> The Insurer further submits that if the claims data requested was disclosed, that it would have a chilling effect on the ability of both the Insurer and the Province to negotiate insurance coverage, and that a substantial number of insurers that would otherwise offer tenders would refrain on the basis of policy.

For the same reasons outlined above regarding section 17(1)(a), I find that the insurer has failed to provide the type of detailed and convincing evidence necessary to establish a reasonable expectation of undue loss to the insurer if the total cost figure on page 9 of the record is disclosed. Again, different considerations might apply to the disclosure of more detailed information contained in the insurer's billing and claims database but, in my view, the single aggregate figure on page 9 that reflects total costs associated with an undetermined number of different clients and their counsel in a particular case is simply too general in nature and too far removed from the actual claims experience to create any reasonable probability that its disclosure could result in undue loss to the insurer.

Therefore, I find that the total cost figure on page 9 of the record does not satisfy the third requirement of section 17(1)(c). Because all three requirements must be established, I find that the total cost figure does not qualify for exemption under section 17(1)(c).

In summary, I find that the total cost figure does not qualify for exemption any of sections 17(1)(a), (b) or (c) of the *Act*.

Because I have determined that the total cost figure on page 9 of the record does not qualify for exemption under section 17(1), it is not necessary for me to consider section 23 of the *Act*.

SOLICITOR-CLIENT PRIVILEGE:

Introduction

MBS claims that the information at issue is exempt under section 19 of the *Act*.

Section 19 states:

> 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, MBS must establish that one or both of these heads of privilege apply.

MBS submits that the information is subject to solicitor-client communication privilege and also argues that the "legislative" privilege for Crown Counsel (sometimes called "Branch 2" of the exemption) applies in this case.

Solicitor-Client Communication Privilege

Introduction

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.]

Orders of this office dealing with records revealing amounts paid to lawyers

This office has addressed the application of solicitor-client communication privilege to various records revealing the amounts paid to lawyers, including lawyers' bills of account.

In Order PO-1714, Adjudicator Holly Big Canoe found that bills of account sent by a law firm to its client, an institution under the *Act*, were subject to solicitor-client communication privilege under section 19. She relied on the treatment of this issue by the Federal Court of Appeal in *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85:

> . . . the Court [at pages 107-108] describes the privilege applicable to legal bills of account as a "blanket" privilege:
>
> > In the case at bar, though the appellant contends that the information which he seeks relates only to acts of counsel and therefore should not be privileged, I am satisfied that the narrative portions of the bills of account are indeed communications. This is not analogous to a situation where a lawyer sells a piece of property for the client or otherwise acts on the client's behalf. The research of a subject or the writing of an opinion or any other matter of that type is directly related to the giving of advice.

> Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. In those circumstances the lawyer is not merely a witness to an objective state of affairs, but is in the process of forming a legal opinion. This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Court further drives home its conclusion that lawyers' bills of account are privileged in their entirety by means of the following commentary on the fact that severed copies had already been disclosed (at page 109):

> I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information than was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients.
>
> . . . . .
>
> Accordingly, despite the complexity of the issues, the bottom line in *Stevens* is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law . . .

Former Adjudicator Katherine Laird followed a similar approach in Order PO-1822 in relation to statements of account generated by legal counsel at the Office of the Public Guardian and Trustee.

By contrast, in Order PO-1922, I found that the solicitor-client communication privilege did not apply to the total dollar amount paid by the Ministry of the Attorney General for legal costs of two parties involved in a criminal trial:

> . . . 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.
>
> . . . . .
>
> 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.
>
> . . . . .
>
> 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.

I followed a similar approach in Order PO-1952. Orders PO-1922 and PO-1952 are both the subject of ongoing judicial review applications by the Ministry of the Attorney General (Divisional Court Toronto Docs. 545/01 and 677/01).

Representations

MBS refers to the Supreme Court of Canada's decision in *Descôteaux*, which indicates (at page 618) that privilege attaches to "all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps", and that privilege applies to "all information which a person must provide in order to obtain legal advice" even if the communications "deal with matters of an administrative nature such as financial means", and even where they are made to employees of the lawyer rather than directly to counsel.

MBS relies on *Stevens* as authority for the proposition that solicitors' accounts are subject to "blanket" privilege, and quotes the following passage from the judgment (at page 100):

> In my view, the terms and **amounts** of the retainer; the arrangements with respect to payment; the types of services rendered and their cost - all of these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion [MBS' emphasis].

MBS also cites a case of the British Columbia Supreme Court, *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134, and states:

> Like the amount contained in the record at issue in this appeal, the *Municipal Insurance* case concerned an access request for legal bills issued to the government in respect of particular litigation. The British Columbia Information and Privacy Commissioner had determined that the amount[s] contained in the bills were not privileged because the record in question did not describe the actual legal services rendered to the client. However, the B.C. Supreme Court rejected this restrictive interpretation of the privilege as it applies to legal accounts, and stated:
>
> > Communications of course **need not contain legal advice to attract** privilege, suffice it that **they relate to** obtaining advice of a lawyer and are made in confidence . . . The privilege includes . . . financial arrangements between the solicitor and the client . . . [MBS' emphasis] (p. 139).

Relying on *Stevens* and *Municipal Insurance*, MBS submits that "the number alone is privileged because it reflects the financial arrangement between the insurer/insured and their counsel." In my view, this is a fundamental aspect of MBS' position on solicitor-client communication privilege, and I will address it in detail below. MBS goes on to argue that even an aggregate figure, such as the one at issue here, attracts privilege based on *Municipal Insurance*, where the record was a one-page lump sum invoice for litigation costs to date. MBS states that the Court in *Municipal Insurance* rejected the idea that legal fees were "mere accounting information" and quotes the Court's analysis of how cost information could be an integral advice component, especially where litigation is ongoing:

> [Disclosing] the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail in relation to its retainer and [would] prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit . . . Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

> Some examples . . . which might be reasonably discerned from knowledge . . . of the interim legal fees to date in a lawsuit, could include:
>
> - the state of preparation of a party for trial;
> - whether the expense of expert opinion evidence had been incurred;
> - whether trial preparation was done with or without substantial time involvement and assistance of senior counsel . . .
> - what future costs to the party in the action might reasonably be predicted prior to conclusion by trial (pages 142-143)

MBS further submits that ". . . the Court's reasoning and conclusion applies equally to the record at issue in this appeal. Furthermore, MBS submits that a knowledgeable reader could discern the type of information described above from the record at issue."

MBS goes on to argue that an accounting record is privileged if it would reveal privileged information. In support of its position, MBS engages in a lengthy analysis of the cases that distinguish lawyers' bills from their accounting records and find that, while the former may be privileged, the latter are not because they represent "acts" of counsel and thus fall into the "facts and acts" exception to solicitor-client communication privilege. The insurer makes a similar argument. However, the insurer created the record at issue in this appeal, and it is clearly not a lawyer's accounting record. For this reason, in my view, cases that distinguish lawyers' accounting records from the contents of legal bills sent to clients by counsel are not relevant here. That being said, I agree that unless an exception such as waiver applies, records prepared by a client that reveal privileged communications with their lawyer are exempt under section 19 (see Orders PO-2087 and PO-2115).

On the question of exceptions to privilege, MBS submits that:

> - information "normally" regarded as privileged may be regarded as not privileged when an "administration of justice" interest outweighs the importance of protecting privilege, i.e. communications which are themselves criminal or counsel a criminal act, and information which is not a communication but evidence of an act done by counsel or a mere statement of fact; and
>
> - only an "administration of justice" exception can outweigh the purpose of privilege.

MBS also refers to *R. v. Charron* (2001), 161 C.C.C. (3d) 64 (Que. C.A.), leave to appeal granted [2001] C.S.C.R. no. 615 (S.C.C.), also known as *Maranda c. Canada (Gendarmerie royale)* (*Maranda*) and argues that this case does not change the law in any way, and that it supports its claim for solicitor-client communication privilege. *Maranda* dealt with a document containing the lump sum total legal fees paid by a client in relation to a number of matters. The Quebec Court of Appeal reversed the finding of the Quebec Superior Court that this information

was privileged. The Court of Appeal applied a contextual approach, indicating that the amount of fees paid would only attract privilege if it would reveal a privileged communication, rather than a "fact" or an "act of the solicitor". The Court stated that "the amount of fees paid cannot *per se* be elevated into a principle and qualified as a communication attracting privilege", and then indicated that it would have remitted the matter to the Superior Court for a new finding on the facts, but for the application of the "criminal acts" exception.

As regards the contextual approach generally, MBS submits:

> In *Maranda*, the Quebec Court of Appeal determined that a lawyer's bill of account may attract solicitor-client privilege if it relates to or reveals a communication made in confidence between a solicitor and client. In particular, a lawyer's bill of account could be subject to privilege if it discloses the nature of the advice given.
>
> Although the Quebec Court of Appeal posited that amounts paid to a lawyer do not, per se, constitute a "communication" subject to privilege, it refused to "fall into the trap of absolute reasoning and [conclude] that the payment of fees can *never* constitute a privileged confidential communication" (p. 87). The Court said it could not "state as an absolute proposition that the amount of fees and disbursements can never be qualified as privileged communications" (p.91).
>
> In this regard, the court acknowledged, as had the trial judge, that there are scenarios where the "amount paid could not always be dissociated from the consultation and as a result may attract privilege" (p. 91).
>
> . . . . .
>
> The Court insists that the assessment of a claim for solicitor-client privilege must be "contextual", and that the only "relevant" question is, as noted above, whether the disclosure of payment is "related to the content of the privileged confidential communication" (p. 87). Therefore, the assessment must be made on a case-by-case basis, and the outcome will depend on the particular facts surrounding the fee statement at issue. MBS submits, therefore, that the contextual analysis described by the Quebec Court of Appeal can be applied to the factual circumstances surrounding the record at issue in this appeal to support the Ministry's exemption claim.
>
> In the present case, MBS submits that the legal fees paid by the insurer in the action herein raise a substantially different fact situation than that addressed by the Court in *Maranda*. The facts referred to in the lower court decision [in] *Maranda* . . . indicate that the legal bills at issue reflected several payments to a lawyer between 1990 and 1996 for several different criminal matters that were no longer ongoing. The Court determined that disclosure of the amounts paid would not give rise to the disclosure of confidential information concerning the nature of services rendered, advice or consultations.

MBS goes on to submit that:

> . . . disclosure of the record at issue in the appeal would reveal the substance of privileged solicitor-client communications and would significantly prejudice the interests of government defendants in the ongoing civil action. Indeed, if the record were to be disclosed, the amount of legal work performed on behalf of the government defendants could be ascertained.
>
> This would in turn enable a reader to infer the defendants' state of preparation for trial, the nature of the work completed by counsel and, in a general way, the nature of legal advice given. A reader would also be able to project the future costs of the insurer in the action which could influence the litigation strategy of opposing counsel, and would place the insurer at a disadvantage in future settlement negotiations should such ensue. Indeed, MBS submits that if the record were to be disclosed, opposing counsel, for example, could make repeated access requests under the *Act* for the government defendant's ongoing legal costs. This would enable opposing counsel to very accurately determine the nature of the work performed (for example, if an expert witness has been retained) and would allow opposing counsel to discern the government defendants' litigation strategy as it develops.

MBS also points out that the legal action here is ongoing, and that this may be a factor in determining whether billing information attracts privilege. In this regard, MBS again relies on *Municipal Insurance*, stating:

> The court specifically outlined the prejudice to a litigant that would result from the disclosure of interim legal costs in an ongoing legal matter:
>
> > . . . a knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to the detail of the retainer, questions or matters of instruction to counsel, or the strategies employed or contemplated (p. 143).

MBS also submits that the facts in *Maranda* are distinguishable from the present case because "[t]he Ipperwash action is ongoing, the record at issue relates to only one action, and the status of the action currently before the court is well known."

The appellant disputes MBS' view that "the information I am seeking relates to the seeking, formulating or giving of legal advice." He also relies on the statement in Order P-624 that "a record will not automatically attract the section 19 exemption simply because it is characterized as a legal account."

Although not solicited in the Notice of Inquiry, the insurer also provided representations on the possible application of section 19. The insurer adopts the submissions of MBS regarding the section 19 exemption. It reiterates many of the points made by MBS, referring to the decisions

in *Descôteaux*, *Stevens* and *Municipal Insurance*. It argues that communications need not contain legal advice to attract privilege as long as they relate to obtaining the advice of a lawyer and are made in confidence. In the particular context of this case, the insurer submits that ". . . release of this sort of information amounts to a breach of privilege if it reveals the terms of the retainer." On the question of whether there was a confidential communication in this case, the insurer submits that "defence counsel and legal vendors affected submitted their bills on the implicit understanding that the claims totals would be subject to solicitor-client privilege and held in strict confidence . . ."

The insurer also raises the possible application of litigation privilege, taking the position that the record was prepared for the dominant purpose of litigation. I will address this argument under the heading, "Litigation Privilege", below.

Analysis

Before conducting my analysis of the main issues in this case, I want to briefly touch on the portion of MBS' representations that deals with the exceptions to solicitor-client communication privilege. MBS takes the position that information that would otherwise qualify for privilege may only be regarded as non-privileged when an "administration of justice" interest outweighs the importance of protecting the privilege. In MBS' view, this "administration of justice" exception is present where communications are themselves criminal or counsel a criminal act; or where the information is not a "communication" because it is evidence of an act done by counsel or a mere statement of fact.

I do not agree with MBS' characterization of the so-called "facts and acts" exception. In my view, this exception has been fashioned by the courts to take into account the general interests of the administration of justice in ascertaining the truth in litigation. It does not assume that information "normally regarded as privileged" loses that status because of an administration of justice interest arising in a specific case. Rather, it recognizes that, as a general proposition, the administration of justice does not countenance hiding non-privileged facts behind the veil of privilege merely because they are also found in a privileged communication.

In my view, if it can be established that information constitutes an independently ascertainable fact, then no further balancing is required in order to determine if an administration of justice interest warrants disclosure in a particular case; the "fact" is always disclosable and discoverable, and cannot fall within the scope of solicitor-client communication privilege. My view is supported by the Federal Court of Appeal decision in *Stevens*, as well as the seminal solicitor-client privilege case of *Susan Hosiery Ltd v. Ministry of National Revenue*, [1969] 2 Ex. C.R. 27. It is also consistent with the United States Supreme Court decision in *National Labor Relations Board. v. Sears, Roebuck & Co.*, 421 U.S. 132 [1975], 41, which dealt with a claim of privilege as the basis for denying access under the United States federal *Freedom of Information Act*.

Turning to the main issues, it is arguable that *Stevens* suggests a "blanket" approach to the question of whether solicitor-client communication privilege applies to the cost figure at issue, while *Maranda* suggests a different, "contextual" approach. However, the two approaches may not in fact be inconsistent. As stated in *Maranda* (at pages 87-88):

> In *Kruger Inc. v. Kruco Inc.*, [1988] R.J.Q. 2323, Justice LeBel (as he then was), speaking on behalf of this Court, recognized that in certain cases, and I insist on this aspect which raises the contextual approach, solicitors' accounts may be privileged when the production of an account provides particulars of the date and nature of services rendered (p. 2326). However, in the case before us, where the accounts under consideration only contain "a simple accounting entry", "providing no particulars with respect to services rendered" and "which are not likely to lead the Court to examine advice given and professional services rendered by solicitors" (p. 2326), the Court concluded that "in the context, the questions raised do not imperil the confidential nature of the professional relationship" between the lawyers concerned (p. 2326). More specifically, added the Court, "it is a question of identification of solicitors, verification of amounts paid and determination of the identity of the client represented, which in this case does not fall within the scope of solicitor-client privilege" (p. 2326).
>
> These same principles were applied in *Stevens* . . ., in the written judgment of Justice Linden, speaking on behalf of the Federal Court of Appeal. In this matter, the production of solicitors' accounts would have forced disclosure of communications between the solicitor and client which were directly linked with consultations, advice and legal services provided.
>
> It is in this sense that Justice Linden, in a remarkable opinion, concluded that "bills of account" were protected by privilege. It is interesting to note that Justice Linden relied on the same case law and doctrine as Justice LeBel in *Kruger Inc.*, *supra*. In substance, and this was the sole issue to decide in the opinion of Justice Linden, the "bills of account" were protected by privilege because, in the case before the Court, "the narrative portions of the bills of account are indeed communications" (p. 119, para. [49]). I agree with this statement, which moreover, in my view, appears to be entirely compatible with the *Kruger Inc.* matter. **Thus, this judgment does not support the proposition that merely the cost of services rendered makes a bill of account privileged**.
>
> In my view, these cases confirm the importance of analyzing these questions within their particular context. In *Kruger Inc.*, the bills of account did not contain information which was in the nature of privileged information, whereas in *Stevens* the contrary was true. In my view, this approach allows us to reconcile decisions in the case law concerning trust accounts which may appear to be contradictory [my emphasis].

I agree with this analysis. The differences in the factual underpinning between the two cases are highly significant, in particular, the fact that:

- *Stevens* dealt with narrative portions of the bills of account, which clearly qualify as "communications";

- the comments in *Stevens* that numerical information need not have been disclosed were *obiter*; and
- the information at issue in *Maranda* was a lump sum that aggregated several different sets of legal services rendered, and the court consistently describes this figure as "fees paid by the client".

Although MBS tries to distinguish the present appeal from *Maranda* on its facts, in my view, the situation in *Maranda* more closely resembles the facts in this appeal than any other judgment of a Canadian appellate court that has come to my attention, since the record before me here is an aggregate amount paid by the insurer for various legal services. Although I acknowledge that the manner in which fees are "aggregated" in this case differs from *Maranda* in the sense that there is only one action, and services were performed for a number of different clients, as opposed to one client in several different actions, in my view, the parallel to *Maranda* is much closer than *Stevens*, where only the narrative portions of actual bills of account were at issue.

In *Maranda*, the Court framed and stated the fundamental question as follows (at page 87):

> In my view, the fact of payment is not inherently a client communication. The relevant question should therefore be formulated as follows. Is disclosure of payment per se related to the content of communications or does it give rise to the disclosure of confidential elements of the solicitor-client communication? Does the payment remain a fact, the existence of which is independent from confidential disclosure made by the client?

The Court had earlier stated the following general principle from Supreme Court of Canada jurisprudence (at page 81):

> . . . the subject matter of privilege is restricted to "communications" in any form; solicitor-client privilege is based on the belief that a person should be able to speak openly and frankly to his lawyer. Provided the aforementioned conditions are fulfilled, this form of communication attracts privilege [citations omitted].
>
> Privilege protects the content of communication and not knowledge independently acquired of facts which may have been disclosed.

The Court in *Maranda* went on to find that the amount paid to a lawyer is a "fact", not a "communication", and that this "fact" does not, on its own, reveal confidential information arising from the solicitor-client relationship. In the Court's view, barring unusual circumstances, disclosing the amount paid to a lawyer would not undermine the purpose of solicitor-client communication privilege by creating a chilling effect on solicitor-client communications. However, the Court did leave open the possibility that privilege might attach to certain payment information, depending upon the context in which it is found. The Court stated (at pages 90-91):

> I do not see how, *a priori*, the amount paid can be interpreted as a "communication". Nor do I see how the amount paid can be equated with communications "where legal advice of any kind is sought" (Wigmore cited in

> *Descôteaux* [p. 872]) or yet again "related to the establishment of the professional relationship" (*Descôteaux*). Nor can I see how solely this information with respect to the amount paid gives rise to the disclosure of confidential information concerning the nature of services rendered, advice or consultations. The mere disclosure of payment *per se* does not breach privilege. As it is considered a "fact" and not a "communication", the payment of fees *per se* can be dissociated with all that is inherently part of the solicitor-client relationship and which is therefore privileged. Payment is usually accessory to the solicitor-client relationship.
>
> In substance, I am of the view that the amount paid does not *per se* constitute a "communication". Even if presumed a communication, it does not meet the definition of a privileged communication. Its disclosure does not compromise the raison d'être underlying privilege. In other words, I am of the view that the client who learns that the amount of fees paid to his solicitor may be disclosed will not be prevented thereby from freely confiding in his solicitor for the purposes of his defence nor from enjoying the other benefits of the confidential relationship. Contrary to claims by the intervening associations, what is claimed is limited to the amount of fees paid. I do not see how one can fear that this will also reveal "steps" taken by the solicitor in the performance of his duties which is in the nature of privileged information. There is no suggestion that access should be allowed to documents which contain information relating to the nature and quality of a solicitor's instructions.
>
> Until now, I have specified that my position is purely one of principle concerning the payment of fees which, at first glance, is not in the nature of a "communication" and in any event does not meet the conditions necessary to attract privilege. As in the case of the identity of the client, this fact does not in itself attract privilege.
>
> However, if we apply the contextual approach, particularly as defined by the Supreme Court of Canada in *Campbell* and this Court in *Kruger Inc*., *supra*, I cannot state as an absolute proposition that the amount of fees and disbursements can never be qualified as privileged communications. I can nevertheless state with certainty that, in the matter before this Court, the amount is not privileged.
>
> In his judgment, the trial judge referred to certain scenarios, some of which were advanced by the Barreau du Québec, where the amount paid could not always be dissociated from the consultation and as a result may attract privilege, just as the identity of the client may attract privilege according to the context.

In view of the similarity between the facts in *Maranda* and the facts in the present appeal, and in particular the fact that the Court in *Maranda* was dealing with a lump sum figure that had been paid to the lawyer, as opposed to the narrative portions of solicitor's invoices (containing privileged information) that were at issue in *Stevens*, I have concluded that it is appropriate to

apply the contextual approach taken in *Maranda* in deciding whether the total cost figure attracts solicitor-client communication privilege.

As noted previously, *Maranda* proposes the following question to determine whether this type of information is privileged: Is disclosure of payment *per se* related to the content of communications or does it give rise to the disclosure of confidential elements of the solicitor-client communication? Or does the payment remain a fact, the existence of which is independent from confidential disclosure made by the client?

In my view, the examples cited in *Municipal Insurance* of privileged information that might be inferred from the amounts billed provide assistance in applying the contextual analysis. These examples, which the Court indicated are not exhaustive, include:

- details of the retainer;
- questions or matters of instruction to counsel, or the strategies being employed or contemplated;
- the state of preparation of a party for trial;
- whether the expense of expert opinion evidence had been incurred;
- whether the amount of fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
- where co-defendants are involved whether it appears one might be relying on the other to carry the defence burden;
- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
- whether legal accounts were paid on an interim basis and whether payments were relatively current;
- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.

As discussed previously, MBS asserts that the following could be inferred from the aggregate figure at issue in this appeal:

- the amount of legal work performed on behalf of the government defendants;
- the defendants' state of preparation for trial;
- the nature of the work completed by counsel;
- in a general way, the nature of legal advice given; and
- the future costs of the insurer in the action.

In my view, the circumstances of this case provide a strong contextual basis for concluding that the total cost figure on page 9 does not attract solicitor-client communication privilege. The figure represents aggregated payments to more than one law firm, as well as direct payments for disbursements, throughout the history of the identified litigation. The payments represent services on behalf of an unspecified number of government defendants, though the style of cause suggests that they relate to at least three defendants, and possibly more, not including former Premier Harris. This makes it difficult, if not impossible, to infer information about the "nature of the retainer" or other particulars of the relationship between the various government

defendants and their counsel. MBS has not explained these relationships, and even if I consult the complete record, rather than just the total cost figure on page 9, I am unable to determine:

- how many defendants are represented by counsel paid by the insurer;
- which defendants were represented by which law firms;
- which counsel within these firms might have represented particular defendants;
- the number of hours devoted by any counsel to the defence of a particular defendant, or the nature of the work completed by counsel, or the state of preparedness for trial;
- even in a general way, the nature of the advice given.

In these circumstances, it is also not possible to project future costs in relation to any individual defendant. Moreover, as in any lawsuit with more than one defendant, the circumstances or instructions of the various defendants may change over time, and this also makes it difficult, if not impossible, to infer the total future costs based on the total cost figure contained in the record at issue here.

Therefore, I am not persuaded that it is reasonable to expect that any meaningful information about the solicitor-client relationships can be inferred from the total cost figure. The ability to infer that type of information was the basis of the *Municipal Insurance* decision, which dealt with one action, and the legal costs of defending one defendant. Accordingly, in my view, the *Municipal Insurance* case is distinguishable from this appeal because of their different facts and circumstances.

MBS also suggests that disclosing the total cost figure could influence the litigation strategy of opposing counsel, place the insurer at a disadvantage in any future settlement negotiations, and potentially lead to a flood of access requests allowing opposing counsel to keep track of when experts are hired, etc. In my view, these suggestions are highly speculative and, without more explanation, do not advance MBS' argument that the total cost figure on page 9 qualifies for solicitor-client communication privilege.

Therefore, I find that, in this case, as articulated in *Maranda*, "[t]he mere disclosure of payment *per se* does not breach privilege. As it is considered a 'fact' and not a 'communication', the payment of fees *per se* can be dissociated from all that is inherently part of the solicitor-client relationship and which is therefore privileged", and "its disclosure does not compromise the raison d'être underlying privilege", namely the protection of confidential communications between solicitor and client that relate to the seeking, formulating, or giving of legal advice.

I am also satisfied that, in the circumstances of this case, the fact that the total cost figure on page 9 has been paid by the insurer on behalf of the government defendants in the litigation is independently ascertainable from the insurer's own accounting records, and therefore is a fact "the existence of which is independent from confidential disclosure made by the client".

Conclusion

For all of these reasons, I find that MBS has failed to establish that disclosing the total cost figure on page 9 of the record would reveal any information that is subject to solicitor-client communication privilege.

Litigation Privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation (Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)).

MBS does not raise litigation privilege.

The insurer submits that the total cost figure qualifies for litigation privilege because it is included in a record that was created for the dominant purpose of existing or contemplated litigation. In support of its position, the insurer cites *General Accident Assurance Co.* Justice Carthy, who wrote the majority reasons on this point, quotes with approval from the English case of *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), in which the Court stated:

> It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose, would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly . . .

In *Waugh*, the Court found that although litigation may have been one of the purposes for the preparation of the record at issue in that case, it was not the dominant purpose and was therefore not subject to litigation privilege.

The insurer's representations indicate that the record provided to MBS and to me in this appeal was prepared "for the purpose of monitoring claims data arising from the ongoing litigation." This is entirely consistent with the record itself. Moreover, given the nature of the information in the record, I am not satisfied that it was prepared to assist the insurer, its insureds or any of their counsel in relation to the conduct of the litigation, including any issue or fact to be proven in the litigation. Therefore, I find that the dominant purpose for the preparation of the claims summary record in this appeal was not litigation or contemplated litigation, and litigation privilege does not apply.

The "Branch 2" or "legislative" privilege

MBS submits that disclosure of the information at issue "would reveal information prepared by Crown Counsel for use in giving legal advice and for use in litigation". MBS does not make specific submissions in support of this position, but relies on its submissions regarding solicitor-client communication privilege.

MBS does not appear to be arguing that the total cost figure itself was to be used in giving legal advice or in litigation, but rather that its disclosure would reveal this type of information. For the reasons I have already outlined in my discussion of solicitor-client communication privilege, I am not persuaded that information prepared by Crown Counsel for use in giving legal advice or for use in litigation could be inferred from the total cost figure on page 9 of the record.

Waiver

MBS also makes submissions as to why waiver or privilege does not apply in this case. Since I have found that the record at issue in the appeal does not qualify for solicitor client communication privilege or litigation privilege under section 19, it is not necessary for me to make a finding on whether MBS may have waived any privilege.

Conclusion

In conclusion, I find that the total cost figure on page 9 of the record does not qualify for exemption under section 19 of the *Act*.

SUMMARY

In summary, I find that the total cost figure on page 9 of the record, which is the only portion responsive to the appellant's request, does not qualify for exemption under any of sections 17(1)(a), (b) or (c) or section 19 of the *Act*, and should be disclosed to the appellant.

ORDER:

1. I order MBS to disclose the total cost figure that appears on page 9 of the record to the appellant by **April 22, 2003** but not before **April 17, 2003**.

2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant in accordance with Provision 1.

Original signed by: March 18, 2003
Tom Mitchinson
Assistant Commissioner