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

ORDER PO-2484

Appeal PA-020180-1

Ministry of the Attorney General

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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 "… a record (or records) detailing the expenses billed to the Ministry of Health and Long Term Care in responding to [a named appeal heard by the Health Services Appeal and Review Board (HSARB)]. The HSARB appeal related to reimbursement for medical testing for a rare form of eye cancer.

The requester also specified that the records are "located at the Crown Law Office (Civil), at the Constitutional Law Branch, and possibly also at the Ministry's Controllership department", and that the time frame of the request was from January 1, 2001, to May 18, 2002. The requester also stated that the request should "… continue to have effect for two years hence with a new report scheduled every 90 days, or more often."

The requester also stated that "[a] cumulative total would be fine …", and went on to indicate that a statement of the Ministry's total expenditure on legal expenses in connection with the case during the identified period identified in the request would suffice.

At about the same time, the requester sent a similar request to the Ministry of Health and Long Term Care (MOHLTC) for records located at MOHLTC's Legal Services Branch or the Supply and Financial Services Branch. The MOHLTC transferred this request to the Ministry pursuant to section 25 of the *Act* and advised the requester that this was done because the Ministry has custody and control of the requested records.

The Ministry identified 9 records as responsive to the request and issued a decision letter to the requester. The decision advised that the records are "statements of account for fees and disbursements rendered by the Ministry to the [MOHLTC], including amounts already billed, as well as amounts to be billed". The Ministry claimed that all 9 responsive records are exempt under section 19 of the *Act* (solicitor-client privilege) because "[t]hey relate to ongoing litigation and contain information that the courts have acknowledged is of a private and confidential nature". The Ministry also advised that since access has been denied, there is no point in giving the request continuing effect.

The requester (now the appellant) appealed this decision. From that point on, the appellant has been represented by counsel in this appeal. Her counsel participated in mediation, and provided representations on her behalf when the appeal reached the adjudication stage. For the sake of clarity, I will simply refer to the representations and positions of "the appellant" in describing the history of this appeal.

The appeal was initially assigned to a mediator. During the course of mediation the Ministry clarified that some of the information was removed from the records as it was not responsive to the request. The mediator conveyed this information to the appellant, who in turn advised that she did not take issue with this. Accordingly, the issue of responsiveness of certain information within the records is not at issue in this appeal. The Ministry also confirmed that it continues to rely on the solicitor-client privilege exemption at section 19 of the *Act* to deny access to the responsive records. Accordingly, that exemption remains at issue in this appeal.

The appellant took the position that additional records should exist in response to the request. The issue of reasonableness of search has therefore been added as an issue in this appeal.

Finally, in response to the ongoing nature of the request, the Ministry agreed to search for documents every three months and deposit them with its Freedom of Information office. The details were to be worked out between the Ministry and the appellant. I will not address this issue in this order as any remaining issues with it were to be resolved between the parties.

Mediation did not resolve the remaining issues and the appeal moved on to the adjudication stage. This office initiated the adjudication by sending a Notice of Inquiry to the Ministry, inviting its representations. The Ministry responded with representations. This office then sent the Notice of Inquiry and a complete copy of the Ministry's representations to the appellant, inviting her to provide representations. In response, the appellant advised that she had made a new request to the MOHLTC and asked that the appeal be placed on hold until she received a decision on that request. This office ruled that there was no need to do so, and invited the appellant to indicate whether she wished to proceed with this appeal or abandon it. The appellant elected to proceed and provided representations in response to the Notice of Inquiry.

In her representations, the appellant advised that the MOHLTC had transferred the appellant's new request to the Ministry under section 25 of the *Act*, as it had done with the earlier request, and that she had filed an appeal of this transfer (Appeal PA-030037-1).

After receiving the appellant's representations, this office asked the Ministry to provide reply representations on the issue of reasonable search only, including affidavit evidence, and the Ministry did so.

This office subsequently invited both the Ministry and the appellant to submit representations on the impact of two court decisions on this appeal. The first of these was the Supreme Court of Canada's decision in *Maranda v. Richer*, [2003] 3 S.C.R. 193 ("*Maranda*"), which deals with solicitor-client privilege and the amount of legal fees charged in connection with a criminal law matter. The second case was the Ontario Divisional Court's decision in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779 ("*Attorney General # 1*"), in which the Court upheld two decisions of this office (Orders PO-1922 and PO-1952) which had found that the section 19 solicitor-client privilege exemption did not apply to specific records revealing amounts the Attorney General paid to lawyers for legal representation in a criminal law context.

Both the Ministry and the appellant provided representations on the impact of these two court decisions. After this office received these representations, the Ontario Court of Appeal granted the Ministry's motion for leave to appeal the Divisional Court's decision in *Attorney General # 1*. The access appeal under consideration in this order was then re-assigned to me to continue the inquiry. Because the subject matter of this access appeal is similar to the information at issue in *Attorney General # 1*, I placed this appeal on hold pending the Court of Appeal's decision in that case.

The Court of Appeal subsequently released its decision in *Attorney General # 1* (reported at *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.)), in which it upheld the Divisional Court decision. I then invited the Ministry to make additional representations on the issue of solicitor-client privilege in light of the Court of Appeal decision. The Ministry submitted representations. I then invited the Ministry to make further submissions on the interpretation of *Maranda*. The Ministry provided further representations.

I subsequently invited the appellant to provide further representations, and included three sets of representations by the Ministry, in full, namely: (1) the Ministry's first set of supplementary representations on the Supreme Court of Canada decision in *Maranda* and the Divisional Court judgment in *Attorney General # 1*; (2) the Ministry's representations on the impact of the Court of Appeal judgment in *Attorney General # 1*; and (3) the Ministry's further submissions on the interpretation of *Maranda*. The appellant provide representations in response.

To conclude the representations in this inquiry, I sent a copy of the appellant's further representations to the Ministry and invited its response. The Ministry provided additional representations.

These reasons are being issued concurrently with those in appeal PA-020158-1 (Order PO-2483), which deals with closely related issues.

RECORDS:

There are nine records at issue in this appeal totaling seventeen pages. They consist of legal accounts for fees and disbursements charged by the Ministry to the MOHLTC for legal representation concerning the litigation before the HSARB identified by the appellant in her request.

DISCUSSION:

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

According to the Mediator's Report, the appellant's position on this issue as outlined during mediation was that "… responsive information should exist in the Ministry's accounting records."

As noted above, the Ministry located nine responsive records, namely, its statements of account to the MOHLTC in relation to the matter identified by the appellant in her request. In its representations, the Ministry states:

> Searches for responsive records were carried out in the respective financial offices of CLOC [Crown Law Office, Civil] and CLB [Constitutional Law Branch] by the financial officers responsible for generating the accounts though which these offices bill MOHLTC for the litigation. Searches were also carried out in the financial office of the Legal Services Branch at MOHLTC to which these accounts are rendered. In addition, counsel in both the Ministry and the MOHLTC who are involved in the litigation were asked to review their files.
>
> … [B]ecause of the manner in which CLOC and CLB accounts are delivered and processed, there are no accounting records in the finance offices at the Ministry or MOHLTC that reflect any amount billed to MOHLTC for the litigation. As a result, the only records responsive to this request are the statements of account themselves.

As part of the exchange of representations described above under "Nature of the Appeal", these representations were provided to the appellant, who provided representations in response. In her representations, the appellant states that she:

> … seeks the records of payment by the [MOHLTC] of the accounts presented to it by the [Ministry]. The appellant's reasonable basis for concluding that records [exist] is based upon the basic accounting principle: for every debit there is a credit. Therefore, if the accounts were paid by the [MOHLTC], there must be *some* recorded evidence of that fact. Those are the records the appellant seeks.

The appellant's representations on this point go on to address the manner in which the MOHLTC searched for records, and express some doubt as to whether this issue can properly be addressed in this appeal, where the respondent institution is the Ministry rather than the MOHLTC. The appellant explains that it was for this reason that she filed a new request with MOHLTC and eventually appealed the decision to transfer that request to the Ministry, resulting in the opening of Appeal PA-030037-1.

Appeal PA-030037-1 was resolved by Order PO-2237, which addressed the searches conducted by the MOHLTC and found them to be adequate. Order PO-2237 summarizes the Ministry's billing process for legal services provided to its government clients:

> The [Ministry] generates the statements of account for individual files, but bills to the [MOHLTC] the fees and expenses on an aggregated – not on an individual file – basis for a period of time, for which a journal is prepared and attached by the [Ministry] for delivery to the [MOHLTC].

Order PO-2237 goes on to state:

> In support of its position the [MOHLTC] then refers to the affidavit sworn by the [Ministry's] Freedom of Information Co-ordinator. That affidavit identifies the usual process for the submission and payment of accounts by both the Crown Law Office – Civil (CLOC) and the Constitutional Law Branch (CLB) of [the Ministry] to [MOHLTC]. The affidavit identifies that the two [Ministry] offices bill the [MOHLTC] on a periodic basis for fees and disbursements incurred in cases in which they act for the [MOHLTC] (including those for which records were requested in this appeal). [The Ministry] identifies that the statements of account are generated for individual files by the [Ministry's] financial officers.
>
> However, the affidavit proceeds to identify that each of these offices separately groups all of their individual file statements of account for the [MOHLTC], and that the aggregate total is directed to the [MOHLTC] for payment. It is the aggregate total which forms the basis of subsequent processing by the [MOHLTC]. The affidavit identifies that, therefore, apart from the statement of accounts themselves, there are no records at the [MOHLTC] which reflect a billing to the [MOHLTC] for any individual file.

On this basis, the adjudicator in Order PO-2237 went on to find that MOHLTC had conducted a reasonable search for records, and Appeal MA-030037-1 was dismissed.

The appellant states, above, that the additional records she seeks are MOHTLC's records of paying the invoices in relation to the identified litigation. As the appellant acknowledges, this issue may not be properly before me in an appeal involving the Ministry, rather than the MOHLTC, but in any event, I have concluded that the aspect of the reasonable search issue involving MOHLTC was fully addressed in Order PO-2237 and is *res judicata*.

As regards any records of payment that the Ministry may possess, they would not relate to payments of specific amounts relating to the litigation identified in the request because, as explained in Order PO-2237, billings for various matters are aggregated, and payments do not reflect the amounts owing for particular matters.

The appellant's representations do not specifically address the adequacy of the Ministry's search for responsive records in its own custody or control (as opposed to the search conducted by MOHLTC). I note that the request is for a record or records revealing the amounts charged in relation to the HSARB litigation, and the Ministry located nine accounts that contain that information for the relevant time period. Having reviewed the Ministry's representations regarding the searches it conducted, I am satisfied that they were reasonable.

I therefore dismiss this aspect of the appeal.

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that section 19 of the *Act* applies to exempt all of the records in their entirety.

When the request and appeal in this matter were filed, section 19 stated as follows:

> 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 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the version I have just quoted therefore applies in this appeal. In any event, the amendments, which address the addition of universities to the body of "institutions" subject to the *Act*, have no bearing in this case.

Ambit of branches 1 and 2

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 19, which permits the Ministry to refuse to disclose "a record that is subject to solicitor-client privilege". Previous orders of this office have described this branch as encompassing both solicitor-client privilege and litigation privilege. This approach is no longer viable.

The first direct indication that it might not be correct for this agency to continue to include litigation privilege within the ambit of "solicitor-client privilege" came in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31 ("*Attorney General # 2*"). Justice Carthy, writing for the Court, stated (at paras. 10-11):

> The distinctions between the two types of privilege were thoroughly canvassed in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (C.A.). At pp. 330-31 O.R., the following summary appears:

R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Rationale for Litigation Privilege

Relating litigation privilege to the needs of the adversary process is

> necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect -- the adversary process -- among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.
>
> What is clear now, but perhaps [was] not so clear in 1987 [when the *Act* was under consideration by the Legislature], is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

Justice Carthy goes on to indicate that the words of branch 2 encompass "… the work product or litigation privilege which covers material going beyond solicitor-client confidences …" (para.12)

Referring to Justice Cathy's decision, in the *2005 Annotated Ontario Freedom of Information and Protection of Privacy Acts* by Colin H.H. McNairn and Christopher D. Woodbury (Toronto: Carswell, 2004) the authors comment as follows (at p. 166):

> … it would seem that the term "solicitor-client privilege" in the first part of section 19 should now be taken to embrace only solicitor-client communication privilege … but not litigation privilege …, a form of which is covered by the second part of section 19; see, particularly, [*Attorney General # 2*].

The views expressed by Justice Carthy in *Attorney General # 2* are further developed in *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) ("*Attorney General # 3*"). Justice Lane (writing for the Court) described section 19 as follows:

> This section is generally regarded as having two branches: the first is the exemption for documents covered by the well-known solicitor-client privilege; the second is the exemption created by all words following "privilege" and is similar to the common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief". [para. 4]
>
> [T]he second branch of section 19 is not the source of litigation or "work product" privilege in the Crown brief. Litigation privilege grew out of solicitor-client privilege, but has a different policy justification. It is not related to the confidences between solicitor and client, but to the needs of the adversary system. Counsel must be free to make full and timely investigations, including obtaining information from third parties, statements from witnesses, and the like, without having to share the results with the opponent. Crown counsel's litigation brief

enjoys the protection of this common law litigation privilege, subject to the over-riding constitutional obligation to make disclosure to the accused imposed by *Stinchcombe*. … [para. 26]

It is clear from [*Attorney General # 2*] that the second branch of section 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. This point was made by Carnwath J., for the Divisional Court, in [*Attorney General # 2*, cited as *Ontario (Attorney General) v. Big Canoe*, (2001) 208 D.L.R. (4th) 327 (Div. Ct.)] at paragraphs 31 and 32, where he said that while the extent of solicitor-client privilege in the first branch would vary as the common law evolved, the second branch was fixed by the words of the section. The language was clear and unambiguous: the head may refuse to disclose a record prepared as described in the statute. … [para. 27]

In my view, this comment shows that Carthy J.A. agreed that the second branch was not an importation of common law litigation privilege, but an enactment in its own right. His subsequent finding that, unlike litigation privilege, the statutory exemption did not terminate when the litigation terminated, is consistent with this view. [para. 28]

The decision of the Court of Appeal in [*Attorney General # 2*] was informed by a particular piece of legislative history, which the court concluded demonstrated that the intent of the legislation was that the branch 2 exemption should be permanent, as solicitor-client privilege is, and not die with the litigation as is the case with common-law litigation privilege. … [para. 29]

…[W]e must not commit the error of assuming that, because the documents described in the second branch would be privileged as work product at common law, all the law of litigation privilege applies … [para. 30]

If the statute does not import the common law of litigation privilege, what does it do? In my view, it creates, for FIPPA purposes only, an exemption: a statutory discretionary power in the head to withhold a certain class of document. … While, as noted earlier, this exemption is similar to the common law litigation privilege, they are not identical in origin, content or purpose. The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37, emphasis added.]

In my view, following the comments of the Ontario Court of Appeal in *Attorney General # 2* and, in particular, the further explanation and commentary by the Divisional Court in *Attorney General # 3*, it is no longer tenable to treat branch 1 as including not only common law "solicitor-client privilege" (sometimes also called "solicitor-client communication privilege"), as it clearly does, but also common law litigation privilege.

Accordingly, I have concluded that branch 1 must be treated as encompassing only solicitor-client privilege at common law, and *not* litigation privilege.

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Several decisions have excluded common law principles from limiting the scope of branch 2 (see *Attorney General # 2* and *Attorney General # 3* (both cited above)). However, decisions limiting branch 2 on the following common law grounds have been made or upheld by the Ontario courts:

- waiver of privilege (see *Ontario (Attorney General) v. Ontario (Big Canoe)*, [1997] O.J. No. 4495, upholding Order P-1342, which found that section 19 did not apply to certain records for which only branch 2 had been claimed – but see also the obiter comments of Lane J. at para. 34 of *Attorney General # 3*) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Attorney General # 3*).

Branch 1: common law solicitor-client 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]

As is apparent from the history of this matter, set out above under "Nature of the Appeal", the receipt of representations in this appeal proceeded over an extended period during which a number of relevant rulings were issued by the courts, necessitating invitations to the parties to provide further representations. In particular, the question of how solicitor-client privilege applies to information about legal invoices, and to legal fees and disbursements generally, has

been the subject of a number of recent cases including the judgments of the Quebec Court of Appeal and the Supreme Court of Canada in *Maranda*, and the judgments of Ontario's Divisional Court and Court of Appeal in *Attorney General # 1*. Given that the records at issue in this appeal are legal billings, the question of what standards apply in determining the issue of privilege in relation to lawyer's billing information is a significant one in assessing whether branch 1 of section 19 applies.

I will therefore discuss branch 1 of section 19 under the following main headings:

(1) What standards or criteria apply in the circumstances of this appeal to determine whether the records are subject to solicitor-client privilege and exempt under branch 1?

(2) Applying those standards to the records, are they subject to solicitor-client privilege and exempt under branch 1?

What standards or criteria apply in this appeal to determine whether the records are subject to solicitor-client privilege and exempt under branch 1?

Lavallee and Descoteaux

In its initial representations, the Ministry notes that in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". The Ministry also refers to the "framework" of the solicitor-client relationship, outlined in the passage just quoted from *Descoteaux v. Mierzwinsky* (cited above). In its supplementary representations, the Ministry reiterated this submission. I will be guided by the principles in *Lavallee* and *Descoteaux* in making this decision.

Maranda

Introduction

As noted previously, this office invited the parties to provide supplementary representations on the Supreme Court of Canada's decision in *Maranda* (which was decided subsequent to the Ministry's initial representations in this appeal) as well as the Divisional Court decision in *Attorney General # 1*, which discusses *Maranda*.

When this inquiry began, the Quebec Court of Appeal decision in *Maranda* (cited at (2001), 161 C.C.C. (3d) 64) had not yet been reversed by the Supreme Court of Canada. The Quebec Court of Appeal judgment applied a contextual approach to the question of privilege in lawyers' account and billing information, but that approach was rejected by the Supreme Court. Because this interpretation was essential to the parties' submissions on the Quebec Court of Appeal judgment, I will not reproduce or refer in detail to those submissions.

Maranda involved the search of a lawyer's office for documents relating to fees and disbursements charged to a client suspected of money laundering. The Supreme Court judgment in *Maranda* sets out a new approach for determining the application of privilege to lawyers' billing information. Unlike previous cases on this subject, the Supreme Court adopts the principle that information about lawyer's fees is presumptively privileged. The presumption of privilege is rebutted where the information is "neutral", i.e. does not disclose, either directly or inferentially, information that is subject to solicitor-client privilege.

In formulating this approach, the Supreme Court rejects the "facts" and "communications" distinction as the sole or primary basis for the rule in relation to privilege as applicable to lawyers' billing information. This distinction had been discussed in the context of legal billing information in *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.) ("*Stevens*", discussed in more detail below), and was also relied on by the Quebec Court of Appeal in that court's *Maranda* decision. The Supreme Court states (at paras. 30-33):

> The rule cannot be based on the distinction between facts and communication… The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence. It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communications…
>
> However, the *distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege.*
>
> *The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.*
>
> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum…. [emphases added]

The Ministry submits that in *Maranda*, the Supreme Court "… rejected the argument that the amount of the fees and disbursements was a 'fact'". I disagree with this view. The Court actually described "the bill itself and its payment" as a "fact", but found that this was not determinative because the rule about the application of privilege to legal fees and disbursements "… cannot be based on the distinction between facts and communications".

Does *Maranda* overrule *Stevens*?

The Ministry's initial representations refer to *Stevens* (cited above) in support of its position that a lawyer's statement of account is protected from disclosure by solicitor-client privilege. The Court in *Stevens* concluded that bills of account are privileged in their entirety, and the Ministry submits that this should apply in the present appeal.

Stevens predates both the Quebec Court of Appeal and the Supreme Court decisions in *Maranda*. In *Stevens*, the Federal Court of Appeal took a different approach to the "facts and communications" exception to privilege, in the context of a lawyer's account, than either the Quebec Court of Appeal or the Supreme Court in *Maranda*. The Federal Court states (at page 99 of *Stevens*):

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

Further on in the judgment (at page 108), the Court explains the "facts" and "communications" distinction:

> 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.

In Order PO-2483 (which, as noted above, is being issued concurrently with this decision) the Ministry had expressly argued that *Stevens* continued to apply to statements of account, while *Maranda* would apply to amounts billed. The records in the present appeal are internal statements, and although the Ministry's supplementary representations do not expressly argue that *Stevens* applies to them, I have decided to repeat my conclusions on this point as more fully addressed in Order PO-2483:

> The Ministry seeks to preserve the application of *Stevens* in relation to actual invoices by distinguishing *Maranda* on the basis that it only applies to "amounts", not "invoices", which are dealt with in *Stevens*:
>
> > [t]he bulk of the records at issue in this appeal are actual invoices. The *Maranda* decision, which is concerned only with the amount of fees and disbursements, does not affect the case law that confirms that privilege attaches to those direct communications (see *Stevens*, Order PO-1714).

This suggests that there is a straightforward and meaningful distinction to be drawn between bills of account and the "amount" of fees and disbursements paid. In my view, this distinction is not so easily drawn, nor is the potentially different treatment of similar information easy to explain or reconcile.

The difficulty of making such a distinction is illustrated by the following discussion of what was actually at issue in *Maranda* (at para. 24):

> … I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. I have some doubts on that point, however, after reading the list of documents sought. The documents and information sought, in particular concerning Mr. Maranda's disbursement accounts, might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. In any event, I shall examine the issue in the terms defined by the parties, who assume that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements billed by Mr. Maranda to his client, Mr. Charron.

In many instances, the source that reveals the amount of legal fees and disbursements would be a lawyers' invoice or bill of account.

Based on my review of *Maranda*, I am not persuaded that the Supreme Court endorsed a view of privilege that automatically protects solicitors' invoices in their entirety, including the amount of fees and disbursements, but applies the presumption/rebuttal approach to lawyers' fee and disbursement information in other kinds of records. A careful examination of the Court's discussion of the facts/communications distinction at paragraphs 30-33, which I have reproduced above, supports this view. The Court characterizes both "the bill of account and its payment" as a "fact" (para. 32). However, it says that the "fact" of the bill and its payment "cannot be separated from acts of communication", and then states the presumed privilege rule to deal with this type of information. In formulating the rule, the Court indicates that "[b]ecause of the difficulties inherent in determining the extent to which the information contained in *lawyers' bills of account* is neutral information, … recognizing a presumption that such information falls within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved." (para. 33, emphasis added) The Court's intention to include not only the amount of fees and disbursements actually paid in the presumptively privileged category, but also lawyers' bills of account, could not be more clearly stated.

> Though the Ministry has not abandoned the distinction between amounts paid and actual invoices, its final submissions suggest that what matters is the nature of the information and what it communicates:
>
> > … [the] protection of legal accounts is extended not simply because a record is labelled a "legal account" as opposed to some other kind of record. Indeed, the Supreme Court in *Maranda* rejected an approach based on whether information is labelled "a fact or an act". What is relevant is the nature of the information contained in the record, and whether it directly or indirectly would reveal information that is subject to solicitor-client privilege.
>
> I agree. In my view, a distinction in the treatment of information about legal fees and disbursements based on whether it appears in an invoice or some other kind of record is untenable. I find that the distinction drawn by the Ministry does not provide a sound basis to distinguish *Maranda* from *Stevens* and allow the latter to continue to govern the application of privilege to solicitors' invoices as the Ministry submits. For these reasons, I have concluded that the *Maranda* decision overrules *Stevens* regarding the application of privilege to information about legal fees and disbursements.

I adopt this approach for the purposes of this present appeal.

Does *Maranda* apply outside the criminal law context?

During the inquiry, I also invited the parties to provide representations about whether *Maranda* applies outside the criminal law context in which it was decided. This question arises from the following comments by the Supreme Court in *Maranda* (at paras. 27-29):

> The Court of Appeal [in *Maranda*] also relied on a decision, in which I wrote the reasons, where it had concluded that solicitor-client privilege, in Quebec law, did not protect the information contained in billings that did not contain any details concerning the nature of the services rendered (*Kruger Inc. v. Kruco Inc.*, [1988] R.J.Q. 2323 (C.A.)). …
>
> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.
>
> Because this Court is dealing with a criminal case, we must not overestimate the authority of *Kruco* or of other judgments that may have been rendered in civil or

> commercial cases. *Kruco*, for example, dealt with a completely different, commercial law matter, one that was governed by the law of evidence and the civil procedure of Quebec. It involved a dispute between two groups of shareholders who claimed to be entitled to complete financial information concerning the company's affairs, including information about the lawyer's fees that some of them had allegedly arranged to be paid by the company in which they all held an interest. An application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.

These reasons imply that the criminal law context of *Maranda* may have been an important influence on the approach adopted by the Court.

This issue was discussed in the judgments of the Divisional Court and the Court of Appeal on the judicial review of Orders PO-1922 and PO-1952 (*Attorney General # 1*). The Supreme Court judgment in *Maranda* was issued after Orders PO-1922 and PO-1952 themselves, but prior to the Divisional Court judgment, and was therefore discussed in some detail by the Divisional Court and Court of Appeal in *Attorney General # 1*.

As stated by Carnwath J. for the Divisional Court (at paras. 40 and 47 of the judgment):

> …excerpts from *Maranda* show that the Supreme Court of Canada was speaking of the protection of solicitor-client privilege within the context of an application for the issuance of a warrant for search and seizure of a lawyer's office in aid of a criminal prosecution. One must be wary of extrapolating from the judgment single sentences or paragraphs which would tend to support the proposition that the amount of a lawyer's fees and disbursements can never, under any circumstances, be disclosed in situations where the information is not sought for the purposes of a criminal prosecution. I conclude that the Commissioner's decisions in the two files must be viewed in their own context.
>
> It can be argued that the conclusions of LeBel J. in *Maranda* must be confined to situations where the information sought is as a result of an application for search and seizure by the Crown in pursuing a criminal prosecution. It can also be argued that LeBel J.'s conclusions extend to every instance where there is a solicitor-client relationship. However, in either instance, I find it open to the court to rebut the presumption identified by LeBel J. and to conclude, in certain circumstances, that the gross amount of a lawyer's account is neutral information not subject to solicitor-client privilege.

Confirming the decision of the Divisional Court, the Court of Appeal stated (at paras. 7-11):

> The IPC decided that information concerning the amounts paid for legal fees by the Attorney General pursuant to the court orders was not subject to client/solicitor privilege. In reaching that conclusion, he drew a distinction between facts which were not protected by the privilege and communications about facts which could be protected by the privilege. He placed the amount paid for legal fees by the Attorney General into the former category.
>
> Subsequent to the decision of the IPC, the Supreme Court of Canada released its reasons in *Maranda v. Richer*, [2003], 3 S.C.R. 193. Those reasons address the question of whether information as to the amount of fees paid is sheltered under the client/solicitor privilege. LeBel J., for the majority, eschewed the distinction between communications and facts. The Divisional Court had the benefit of *Maranda* in considering the application for judicial review from the decision of the IPC. The reasons of Carnwath J., dismissing the application, review the analysis in *Maranda* in some detail and apply that analysis to the information the IPC ordered disclosed.
>
> We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda*, supra, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.
>
> *Maranda* arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of the relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.
>
> While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

The Ministry argues that *Maranda* does not, in fact, suggest different approaches in different contexts. According to the Ministry, the Court refers to procedural rather than substantive aspects of criminal law, and that in *Attorney General # 1*, the Court of Appeal accepted that in the access-to-information context, the amount of fees is presumptively privileged. The Ministry relies on the possibility of repeated requests by "assiduous inquirers" as a particular basis for this view.

The appellant submits that *Maranda* was decided in the criminal law context, and that this case does not involve the criminal law or the rights of an accused person.

While I believe that a case could be made for applying the *Kruco* approach in the civil law context and the *Maranda* approach in the criminal law context, I have concluded that this is not an efficacious interpretation of the exemption. *Maranda* may be thought to offer a higher degree of protection than *Kruco* because of the presumption of privilege. But in either approach, neutral information (i.e. information that does not reveal anything in the nature of a privileged communication) will not be covered by solicitor-client privilege at common law.

To the extent that the *Maranda* presumption does offer higher protection, adopting that standard would also be consistent with the Supreme Court's dictum in *Lavallee* and other cases that intrusions on solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance, and that "minimal impairment" is the test by which the Courts will assess statutory incursions into privilege.

I have therefore decided that, rather than applying different case law as between the civil and criminal law contexts, it is best to follow the approach taken by the Court of Appeal in *Attorney General # 1*, i.e., "[a]ssuming that *Maranda* … holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege *in all contexts*." [at para. 10 of the judgment, emphasis added.] This does not mean, however, that context is not a potentially relevant factor in deciding that information is neutral in a particular case (as noted by the Court of Appeal in *Attorney General # 1* at para. 11, quoted above).

Attorney General # 1

As noted above, *Attorney General # 1* arose from the judicial reviews of Orders PO-1922 and PO-1952. These orders dealt with records created by the Ministry to reflect the requested information, including global fee and disbursement figures, which in some cases identify the law firms involved and the amounts they charged. Both the Divisional Court and the Court of Appeal upheld the determinations in these two orders that this information was not privileged. The Supreme Court had not articulated its *Maranda* criteria when Orders PO-1922 and PO-1952 were issued, but both the Divisional Court and the Court of Appeal applied these criteria, finding that the presumption of privilege was rebutted because the information was neutral.

The Court of Appeal explains the test for rebuttal of the presumption as follows (at para. 12):

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44

> (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire Act.

Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

In its supplementary representations on the impact of the Divisional Court decision in *Attorney General # 1*, the Ministry states that it "does not provide any guidance" in this case because both orders that were under review are distinguishable on the facts. The Ministry makes similar arguments about the Court of Appeal decision in the same case. I will refer to these arguments under my analysis on the question of whether the records are subject to privilege, below.

Legal Services Society cases and *Municipal Insurance Assn*.

The Ministry's representations also refer to two decisions of the British Columbia Supreme Court, *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 and *Municipal Insurance Assn. Of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134. *Legal Services Society* relates to the amount of legal aid fees and disbursements paid to a lawyer for defending two accused individuals in separate matters. *Municipal Insurance Assn.* relates to a lump sum amount of fees and disbursements paid to date on behalf of a municipality engaged in defending a lawsuit. Both cases conclude that the fee information is privileged. *Legal Services Society* essentially holds that any information about a retainer is privileged, and because information about legal fees charged and paid falls into that category, it is privileged. *Municipal Insurance Assn.* makes the same finding, and also concludes that information about the interim fees and disbursements paid on behalf of the municipality could reveal information about the state of readiness for trial, and other aspects of the retainer.

As well, the Ministry makes several references to the British Columbia Court of Appeal decision in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (2003), 226 D.L.R. (4th) 20. That case dealt with an access request for a list of the top five billing lawyers to the British Columbia Legal Services Society in criminal law and immigration law,

arranged by name and amount billed. The Society disclosed the amounts but not the lawyers' names, on the basis that privileged information (i.e., the fact that certain clients' retainers were funded by legal aid) could be revealed by disclosing the names. In reviewing the issue, the Court of Appeal stated:

> I accept that more than a mere fanciful or theoretical possibility of a breach of the privilege would have to exist before withholding the information could be justified. On the other hand, the importance of retaining the privilege in its full vigour suggests that [the Judge below] was correct in placing the focus not on the casual reader but on the "assiduous, vigorous seeker of information relation to clients".

The Court found that the information was privileged in that case because "[a]n assiduous reporter who is aware of long proceedings in the public courts could easily put this information together with the billing reports and deduce that particular clients were funded by legal aid". In assessing the impact of this case, it is important to bear in mind that dollar amounts had already been disclosed and were not at issue; the information at issue, consisting of counsels' names, was withheld because of the possibility that their disclosure could reveal that an individual's retainer was paid for by legal aid. As in *Municipal Insurance Assn.* and the first *Legal Services Society* case, therefore, the information was found to be privileged because it reveals details of the retainer. As well, this case demonstrates that the possibility of an "assiduous" information-seeker obtaining the information is a relevant factor in deciding whether a presumption of privilege has been rebutted.

In my view, however, the Supreme Court's decision in *Maranda* implicitly limits the impact of *Municipal Insurance Assn.* and the two *Legal Services Society* cases. One common thread in all three cases is that information about a retainer is privileged, and since the payment of fees relates to the retainer, information concerning that subject is privileged. The Supreme Court could have applied this approach in *Maranda*, but did not do so. Instead, it set up a rebuttable presumption of privilege and with it, the inherent possibility that records relating to lawyers' billing information may *not*, in fact, be privileged. Therefore, in my view, it would not be appropriate to simply apply these cases to the facts before me and conclude here, as well, that the information relates to the retainer and is automatically privileged for that reason. Instead, I will apply the approach in *Maranda*, also taken by the Ontario Court of Appeal in *Attorney General # 1*. This entails asking whether the presumption of privilege has been rebutted. In my view, the principal aspect of these decisions that remains pertinent is the discussion, in both *Municipal Insurance Assn.* and the British Columbia Court of Appeal's *Legal Services Society* decision, about the "assiduous" requester.

Accounting Records vs. Invoices

In it initial representations, the Ministry argues against an approach that makes a distinction between accounting records and invoices, as was done in Order MO-1465. The Ministry is concerned here with an approach that could see invoices as privileged, but not accounting

records. In my view, *Maranda* resolves this issue. The distinction relied upon by the Ministry derives from the different treatment accorded to "facts" and "communications" under the law of privilege. As noted previously, in *Maranda* the Supreme Court decided that the distinction between facts and communications is not the sole or primary factor to consider in formulating a rule about privilege in relation to lawyers' billing information. Accordingly, in my view, based on this same principle, the decision in Order MO-1465 should no longer be relied upon.

As expressed above, *Maranda* overrules *Stevens* and is not limited to the criminal law context, and it limits the applicability of the three British Columbia cases referred to above. Accordingly, *Maranda* and its interpretation in *Attorney General # 1* represent the most authoritative law with respect to whether the amount paid for legal services, including actual invoices, is privileged.

Applying the Maranda Presumption-Rebuttal Approach in this Appeal

Because the records do not simply contain an aggregate figure, and could reveal other aspects of the solicitor-client relationship, the Ministry submits that it is "not necessary" to conduct the presumption-rebuttal analysis. I disagree. The records are not typical solicitor's bills. They provide only minimal detail and breakdown of services, and the Ministry has already removed any description of services provided as non-responsive. Moreover, the Ministry's approach fails to take into account that the records could be severed under section 10(2), and that, for example, disclosure of partial information could be a situation in which the presumption would be rebutted. Accordingly, I will conduct the presumption-rebuttal analysis later in this order.

Onus to prove rebuttal of the Presumption

The Ministry argues that the onus is on the appellant to rebut the presumption and that the appellant has not done so.

The appellant submits that in *Attorney General # 1*, the Divisional Court decided that it was "open to" it to conclude that portions of the account are neutral information that is not privileged.

I considered a similar issue in Order PO-2483. In that appeal, unlike the one before me here, the appellant did not provide representations. My conclusion on that point was as follows:

> … while the Court of Appeal did indicate in *Attorney General # 1* that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. The entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the

> requester. (In fact, in one of the orders under review in *Attorney General # 1*, the requester had not provided representations at all – see Order PO-1922.) This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner.

In my view, similar considerations apply where the appellant has provided representations on the issue, but the records themselves are a source of important information. Even if the appellant participates in the appeal, as in this case, his or her ability to provide the necessary evidence and argument to rebut the presumption is hampered by not having seen the records. In this situation, in my view, the Commissioner must review the records and consider the evidence they provide on this point, just as the Court of Appeal did in *Attorney General # 1*. Any other approach would be unfair to the appellant.

Conclusion

As previously stated, I have concluded that *Maranda* and its interpretation in *Attorney General # 1* represent the most authoritative law with respect to whether the amount paid for legal services, including actual invoices, is privileged. In determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

Applying those standards to the records, are they subject to solicitor-client privilege and exempt under branch 1?

Nature of the Records

In her initial representations, the appellant states that her appeal is "confined to disputing the denial of access to … a single amount expressed by a number, representing the legal fees expended by [MOHLTC] …" as well as the reasonable search issue addressed earlier in this order. The appellant forthrightly states that she "… does not appeal the denial of access to copies of the lawyers' statement of accounts, description of the legal services rendered or time of their delivery, or to any … so-called narrative portions of the legal accounts. The [a]ppellant accepts the Ministry's argument that records thus far identified contain some information covered by … section 19, in accordance with … Order MO-1465."

The appellant also argues that the question is whether the records can be severed to disclose non-privileged information, or whether a new record can be created to show just the dollar amount.

In her final representations, the appellant repeats that she seeks only a single figure, i.e., a total of all legal costs, and therefore no details which might be privileged would be discernible.

Unlike the situation in Order PO-2483, in this appeal the Ministry did not create a record to set out the requested information. As noted in many previous decisions of this office, institutions are not required to create responsive records where none exist at the time of a request (see Orders 50, MO-1396, MO-1989). No pre-existing record containing a total dollar figure has been identified in this appeal, but I note that the records at issue, taken together, would permit the appellant to calculate the "single amount" to which she refers. Accordingly, I will adjudicate the issue of whether the responsive parts of the records are exempt in whole or in part under section 19 as the Ministry claims. As noted under "Nature of the Appeal", above, the Ministry has identified parts of the records other than amounts billed as non-responsive, and since this decision was accepted by the appellant during mediation, the non-responsive parts are not at issue.

Is the information neutral?

The Ministry argues that the *Maranda* presumption applies and has not been rebutted. In particular, the Ministry submits that:

> … where, as here, the fees and disbursements information
>
> - relates to the representation of a single client, Ontario, in what amounts to a single proceeding before the HSARB,
>
> - relates to a single proceeding, and
>
> - appears to be sought by the opposing party or opposing counsel in the proceeding,
>
> the presumption is not and cannot be rebutted.

Regarding the approach taken by the Divisional Court in *Attorney General # 1*, the Ministry seeks to distinguish that case from the present appeal based on the nature of the records at issue. The Ministry states:

> In contrast to the orders considered in that decision, this case does not involve a global figure. Rather, the records at issue
>
> - are statements of account, rather than a summary of fees and disbursements,

- relate to the representation of Ontario in what amounts to a single proceeding,

- involve an ongoing, rather than a completed proceeding

and the request appears to come from the opposing counsel or counsel in the legal proceeding.

In its later representations on the Court of Appeal decision upholding the Divisional Court in *Attorney General # 1*, the Ministry makes similar points. The Ministry submits that the records in this appeal are distinguishable from those in *Attorney General # 1* because they are "detailed legal accounts" and that their disclosure during ongoing litigation would reveal privileged information. The Ministry describes the records in *Attorney General # 1* as "derivative/edited records [containing] aggregate account information" created during mediation of access appeals. The Ministry reiterates its original submission to the effect that disclosure would permit inferences to be drawn about instructions given and strategies employed or considered.

The Ministry's initial representations also refer to *Municipal Insurance Assn.* (cited above). The record at issue in that case is described by the Ministry as "a lump sum interim bill incurred in defending a lawsuit in which the legal services rendered to the client were not described". As discussed earlier, the Ministry refers to the Court's conclusion that the lump sum billing was privileged because knowledgeable counsel (i.e., an "assiduous" requester), apprised of the opponent's legal costs, could "reach some reasonably educated conclusions as to the details of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated." Information which the Court felt could be discerned from the lump sum included the state of preparation and information about whether experts had been retained. The Ministry argues that the same kind of information could be discerned here.

In supplementary representations, the Ministry refers to the concept of repetitious requests, and argues that the appellant's representative in this case, being opposing counsel, should be considered an "assiduous inquirer aware of background information". According to the Ministry, the records would reveal the state or preparation by a party for trial, whether the expense of expert opinion had been incurred, and whether the amount of fees is minimal, showing an expectation of compromise or capitulation. The Ministry points out that the requester is aware of the history of the litigation, and presents as a hypothetical example the possibility of a large disbursement leading to "an educated guess that the Ministry had been instructed to retain the assistance of an expert in preparing their case".

The appellant's representations seek to draw an analogy between this case and one of the orders under judicial review in *Attorney General # 1*, namely Order PO-1922. The appellant describes the situation in Order PO-1922 as follows:

- the record is not being sought for the purposes of a criminal proceeding;

- the record sought is the total amount of public funds spent by the Ministry on legal fees in the identified litigation;

- the record sought is a global figure, without itemization or particulars.

As the Court of Appeal notes in *Attorney General # 1*, "… we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege" – i.e., whether the presumption of privilege is rebutted. In other words, the question of whether the fees relate to a criminal proceeding or some other legal matter may have an impact on whether the presumption is rebutted in a given case. This is because the inferences that may be drawn from similar billing information (e.g. amounts charged, with or without associated billing dates) may differ depending on the kind of legal problem involved.

As, noted previously, the record the appellant describes above, i.e. a single global figure, has not been located or created by the Ministry. The records are therefore not, in fact, a "single figure". Nevertheless, as discussed above, the records could be used to create an aggregate figure. The appellant has repeatedly stated that this is what she is looking for. I note that this information could be calculated even if the only information disclosed were the total amount of fees and disbursements charged in each invoice, with all other information severed.

In her final representations, the appellant submits that:

- the litigation mentioned in the request is now concluded, so it is not a factor in regard to possible repeated requests (a reference to the "assiduous inquirer" argument);

- the hearing in this matter, which the appellant describes as the "last legal activity", took place over 2 ½ years ago;

- a single number is not "normally" subject to privilege, and in this case there is no longer (if there ever was) any strategic or policy reason to consider the requested information privileged, and any presumption that may have applied is rebutted.

I note that the HSARB decision, which the appellant provided, was issued in February 2006, although the hearing apparently took place in the time frame identified by the appellant. Also, although several of the cases cited have found single global fee figures not to be privileged, the appellant cites no authority for the proposition that a single number is not "normally" subject to privilege, nor am I aware of any authority for that particular conclusion. The question of whether the presumption of privilege is rebutted depends on each particular fact situation. And in any event, there is no "single figure" at issue here.

The Ministry was given an opportunity to reply to these submissions by the appellant. In addition to noting that the records are not as described by the appellant, the Ministry states that the termination of litigation is not determinative because, even at common law, solicitor-client privilege is permanent. I agree with the Ministry on this point.

In that regard, seeking to draw an analogy with this case, the Ministry argues that in *Maranda*, the presumption of privilege was not rebutted even though the proceedings were concluded. I note, however, that the Supreme Court describes the appeal in *Maranda* as "moot", even by the time it had reached the Quebec Court of Appeal. The Supreme Court explains that "[g]iven the serious consequences of the Superior Court's judgment, however, the [Court of Appeal] thought it necessary to hear the appeal and examine the legal issues that had been raised at trial." In my view, therefore, the termination of the litigation was irrelevant to the analysis of the issues in *Maranda*, which was undertaken, in effect, as if the proceedings were ongoing, in order to address the serious issues raised.

Also, while comparisons to other cases may be instructive, and even persuasive, they are not ultimately determinative. The question is whether disclosure would reveal privileged information, and in particular, whether the presumption of privilege is rebutted. The answer to that depends on the circumstances of each unique situation, and cannot be based on mechanical comparisons with another case. In the present appeal, we are not dealing with a situation where access to billing information is sought for the purpose of proving a crime, as in *Maranda*; rather, the records relate to the cost of government legal services in relation to litigation before the HSARB. In *Maranda*, it appears that if a high volume of fees had been paid, an inference could be drawn regarding the fruits of criminal activity. No such inference can be drawn here.

In further argument regarding the impact of the termination of the litigation, the Ministry says this does not prevent repeated requests for this information covering various time periods during the litigation. As well, the Ministry argues that the Crown is not an ordinary litigant because it is the subject of recurrent lawsuits of a similar nature, and the disclosure of privileged information from one matter (possibly including the Crown's litigation strategy) could prejudice another case. The Ministry points out that in this case the HSARB declined jurisdiction, and states further that:

> [t]here are other avenues which may be pursued by the appellants before the Board. Further, others in the same circumstances as the appellant before the Board may pursue the same or similar issues. Those other proceedings might include an appeal of the Board's decision, a judicial review of the Board's decision, or even a civil action.

In my view, the Ministry is correct when it submits that if the records were disclosed in full, minus non-responsive information, they would still provide the appellant with an opportunity to infer privileged information. For example, disclosing the dates covered by each of the nine invoices, particularly accompanied by the number of hours spent by counsel during each period, would allow some inferences to be drawn about the nature of the activities and/or strategies during the period, particularly if that information is combined with detailed knowledge of the history of the case. As the Ministry points out, the appellant's counsel was involved in the litigation before the HSARB referred to in the request. In my view, the ability to draw inferences from the records is unaffected by the fact that, as the appellant points out, the

litigation has concluded. I therefore find that the presumption of privilege is not rebutted with respect to the dates or other information in the records, other than the total dollar figure being charged in each invoice.

However, if the only information to be disclosed is the total dollar figure on each invoice, and nothing else (which is the closest thing before me to the information the appellant has repeatedly said she wants), the situation is different. With dates and number of hours severed, I am unable to conclude that the appellant could infer privileged information.

I reached a similar conclusion about the "summary record" at issue in Order PO-2483. I stated:

> This record sets out the global "legal costs" total figure, including both fees and disbursements, billed by several identified law firms in fiscal 00/01, and the same information regarding the same three firms plus an additional identified firm, in fiscal 01/02. An overall total for the two years, including all the firms, is also given. This record does not provide a breakdown by invoice or billing date (beyond identifying the fiscal year in question). No separate dollar amounts are provided for fees and disbursements; only one all-inclusive figure is shown for each firm in each of the two fiscal years.
>
> …
>
> I also note that in *Attorney General # 1* (cited above), the Court of Appeal found that a similar record was not privileged. That particular record disclosed information arguably more detailed than what is contained in the summary record in the appeal before me, since it includes a series of payments and their dates. As noted previously, although results in similar cases are not determinative, they can provide a helpful framework for the analysis. In reaching its conclusion, the Court of Appeal stated:
>
> > [w]e see no reasonable possibility that any client/solicitor communication would be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it could do so in this case. For example, having regard to the information ordered disclosed by Order PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

> In my view, this analysis is also apt in the particular circumstances of the appeal before me with respect to the summary record. Based on the evidence, I am satisfied that there is no reasonable possibility that disclosing the summary record in this case would reveal anything about communications between the various lawyers and their clients concerning the inquiry. Again, this points to a conclusion that the presumption is rebutted with respect to this record.
>
> …
>
> … I have concluded that there is no reasonable possibility that privileged information could be revealed by disclosing the summary record in the circumstances of this appeal. I find that, based on the evidence before me, the summary record consists of neutral information and the presumption of privilege is therefore rebutted as regards that record. For that reason, it is not exempt under branch 1.

Although the summary record in Order PO-2483 is somewhat different than the information under consideration here (i.e. the total dollar figure in each invoice), it has a similar degree of specificity. If anything, the summary record arguably provides more detail because it breaks the fees down by fiscal year and law firm.

In Order PO-2483 I also found that the presumption was rebutted for the total of each invoice, its date and the firm name:

> The statements of account in the records at issue in this appeal contain narrative descriptions of services rendered and identify particular activities, who performed them and how much time was spent on each. The Ministry and several of the affected party law firms submit that this information could directly or indirectly disclose privileged communications between the Ministry and the solicitors retained. I agree. There is no doubt that disclosing these records in their entirety would reveal privileged information.
>
> However, I have also concluded in this instance that severing all but the firm name, date and the combined total for fees and disbursements in each invoice would protect confidential privileged information and avoid disclosures that could allow even an "assiduous requester" to gain access to privileged communications (such as, for example, instructions given by the client). As noted previously, most of the firm names have already been disclosed and, in any event, the identity of one's lawyer is generally not privileged. The government's extensive participation is well known. The dates of the Walkerton Inquiry hearings, and their outcome, are in the public domain and can be ascertained from the published report. As the Court of Appeal found in *Attorney General # 1*, there is, in my view, no "reasonable possibility" that any confidential solicitor-client

> communication could be revealed (even to the most "assiduous" requester) by disclosing the firm names, dates and global figures billed, nor could this information be connected with other available information order to draw an accurate inference about any such privileged communication. Accordingly, this information is "neutral" and the presumption of privilege is rebutted in relation to it.

However, as stated above, each case must be determined on its own facts. In reaching my conclusion in this appeal, I have considered the unique circumstance of the role of the appellant's representative in the litigation, as already discussed. As I have already determined, there is a reasonable possibility that, given the involvement of the appellant's counsel in the HSARB proceedings, he has knowledge that, combined with the dates and amounts of invoices, could reveal privileged information, and I find this to be a very significant factor justifying a more restrictive approach in this case than the disposition I arrived at in Order PO-2483. However, if the dates are removed from the records at issue here, and only the total amount from each invoice is disclosed, the result is different. Although I did order disclosure of the dates in Order PO-2483, severance of this information is necessary here because of the appellant's counsel's familiarity with the history of the litigation. By contrast, disclosure of the dollar amounts alone does not, in my view, give rise to any reasonable possibility that privileged information such as the nature or content of any solicitor-client communication could be revealed or deduced, even when combined with other information that may already be known to the appellant's counsel.

Accordingly, based on the nature of the information before me, and all the evidence, I find that the records are exempt under branch 1 of section 19, except for the total figure in each of the nine invoices, which I find to be neutral information. The presumption of privilege is therefore rebutted as regards the total figures, and this information is not exempt under branch 1.

Before leaving this subject, there is one point to clarify. As regards record 7, and attached pages 7-1, 7-2 and 7-3, only the total dollar figure on record 7 is not exempt under branch 1. It summarizes and totals information on pages 7-1, 7-2 and 7-3.

Branch 2 - statutory privilege

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. It arises from the last part of section 19, which refers to records "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

The Ministry submits that:

> … there is no reference in Branch 2 to common-law principles of solicitor-client privilege. Equally, there is no requirement that the record be prepared for the 'dominant' purpose of litigation. The only question to be asked is whether the

> records at issue were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Further, the Ministry submits that:

> …the records at issue in this appeal were prepared for Crown counsel to assist in giving legal advice or for use in litigation. Without litigation, these records would not have been created. Without the creation of these records and the resultant funding that they provide, counsel would not be able to give advice, or carry out litigation. In Order P-1551, which was decided prior to the Divisional Court's clarification of the scope of Branch 2, Inquiry Officer Holly Big Canoe stated that the litigation privilege includes "documents generated internally by the solicitor or the client… where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation". It is submitted that this statement captures the records at issue in this appeal on any interpretation of Branch 2 of s. 19.

The appellant responded to this submission by stating that invoices are ancillary, and not integral, to the process of giving legal advice. To demonstrate the ancillary nature of these invoices, the appellant points out that the Ministry did not create them prior to 1995, but nevertheless provided legal services to government ministries.

While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.

This conclusion is reinforced by my decision in Order MO-2024-I. In that case, I had to determine whether similar information was excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)1 of that statute, on the basis that the records were collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution. The record at issue was a two-page document containing payments made to a law firm on a series of dates, including a total amount, with respect to an action against the City by a former employee. Based on the nature of the request, however, only the total figure was at issue. I stated:

> The question I must decide … is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".
>
> …

> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared *to be used in* actual or contemplated litigation. In my view, they were not.

I find that branch 2 does not apply to any part of the records.

Exercise of Discretion

With regard to the information I have found exempt under branch 1, I am satisfied that the Ministry appropriately exercised its discretion to withhold it, given the importance of protecting solicitor-client confidences as underlined in *Lavallee, Descoteaux* and other cases.

Conclusion

Having found that branch 1 applies to the records except for the total dollar amounts, and that branch 2 does not apply, I will order the total dollar amounts disclosed. As noted, with respect to record 7, and attached pages 7-1, 7-2 and 7-3, only the total dollar figure on record 7 is not exempt under branch 1.

MANNER OF DISCLOSURE:

If accomplished by conventional severance methods, the disclosure of the parts of the records that I have found not to be exempt could involve disparate pieces of information that are isolated on large sheets of paper. This would likely not be convenient for the Ministry or straightforward for the appellant to digest. The Ministry may, if it so chooses, disclose the information from the

records by creating a composite record that shows the non-exempt information from each invoice, rather than severing all of them.

ORDER:

1. I dismiss the appellant's reasonable search appeal.

2. I order the Ministry to disclose the total dollar figure from each of the nine invoices (not including the figures on pages 7-1, 7-1 and 7-3, but including the total figure on Record 7 itself) by sending copies of the records to the appellant on or before **August 8, 2006**. If it is more convenient, the Ministry may choose to assemble these figures on a single sheet of paper rather than disclosing severed versions of the nine invoices.

3. I uphold the Ministry's decision to withhold the remaining parts of the records.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: July 17, 2006
John Higgins
Senior Adjudicator