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

# ORDER PO-2568

## Appeal PA-040236-1

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

A journalist filed a request with the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> … the total financial amount paid by the Province of Ontario for fees and disbursements of counsel representing [a named individual] from October, 2001 to April, 2004.

By way of background, the individual named in the journalist's request is a former financial planner from Sudbury. On April 14, 2004, this individual pleaded guilty in criminal court to charges of fraud and theft relating to more than $5.3 million that was stolen from 128 investors. This high profile case generated significant media coverage both in Sudbury and elsewhere in Ontario.

In his request, the journalist indicates that in an earlier proceeding, a judge of the Ontario Superior Court of Justice had ordered that the Ontario government "be responsible for payment of fees and disbursements" for two lawyers who had represented the former financial planner. The journalist further states that the judge directed the government to cover the lawyers' fees and disbursements retroactively, from October 2001 onward.

The Ministry located records responsive to the journalist's request. They consist of two letters sent from the Ministry's Crown Law Office – Criminal to one of the former financial planner's lawyers. The letters refer to the dollar amounts of two enclosed cheques.

The Ministry did not locate any similar responsive records that relate to the former financial planner's other lawyer. In response to an inquiry from this office as to why no such records were located, a freedom of information analyst at the Ministry stated that no payments were made to cover any fees and disbursements of the other lawyer for the time period specified in the journalist's request.

The Ministry issued a decision letter to the appellant denying access to the records it located pursuant to the discretionary exemption in section 19 (solicitor-client privilege) and the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision. In his appeal letter, the appellant stated that his request was for "disclosure of the total financial amount of the fees and disbursements of legal counsel who represented [the named individual] in his criminal case." He emphasized that he was requesting disclosure strictly of the dollar figure, and not any other information.

The appellant also contended that there were "significant public interests to warrant disclosure of this information, given the circumstances and high profile of this criminal case and the fact that taxpayers financed the entire costs in question." This raises the possible application of the public interest override provision in section 23 of the *Act*.

This office appointed a mediator to assist in resolving the issues in this appeal. At the outset, the mediator advised the parties that this file was being placed "on hold" because the issues in this appeal were similar to issues that would be addressed by the Ontario Court of Appeal in an appeal by the Ministry of an Ontario Divisional Court decision that had upheld two orders of this office.

In Orders PO-1922 and PO-1952, this office had ordered the Ministry to disclose records revealing amounts the Attorney General had paid to lawyers who had represented clients in specific criminal proceedings identified in the original requests. The Ministry filed judicial review applications of these orders with the Divisional Court. However, in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779, the Divisional Court upheld these two orders.

The Court of Appeal subsequently dismissed the Ministry's appeal of the Divisional Court's decision (reported at *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.)). In other words, Orders PO-1922 and PO-1952 were also upheld by the Court of Appeal.

Following the completion of these proceedings, the mediator advised the parties that the present file would be reactivated. The Ministry told the mediator that it was continuing to deny access to the records and rely on section 19 and section 21(1), in conjunction with section 21(3)(f) of the *Act*. The appellant advised the mediator that he wished to continue pursuing his appeal.

This appeal was not resolved in mediation and was transferred to the adjudication stage of the appeal process. Initially, this office issued a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, which submitted representations in response.

The former financial planner's lawyer was identified as an affected party in this appeal. Consequently, a Notice of Inquiry and a copy of the Ministry's representations were sent to him. This office did not have any contact information for the lawyer's client (the former financial planner), who is also an affected party. Consequently, it sent the former financial planner the same Notice of Inquiry and a copy of the Ministry's representations through his lawyer's office. The lawyer submitted representations on behalf of both himself and his client.

In their representations, neither the Ministry nor the lawyer and his client addressed whether the exception in section 21(4)(b) of the *Act* might apply in the circumstances of this appeal. This provision stipulates that a disclosure of personal information does not constitute an unjustified invasion of personal privacy if it discloses financial or other details of a "contract for personal services" between an individual and an institution.

This office invited these three parties to provide representations on whether section 21(4)(b) of the *Act* has any application in the circumstances of this appeal. They were also provided with a copy of the Supreme Court of Nova Scotia's decision in *Doctors Nova Scotia v. Nova Scotia (Department of Health)* [2005] N.S.J. No. 351 and asked to comment on whether this decision has any application in the circumstances of this appeal. This decision dealt with a similar

provision to section 21(4)(b) in Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

Both the Ministry and the former financial planner's lawyer provided representations on the possible application of section 21(4)(b) of the *Act* and the above case. The lawyer also stated that he would contact his client, "who may have further input." However, no further representations were received.

This office then issued a Notice of Inquiry to the appellant, together with the complete representations of the Ministry and the former financial planner's lawyer. The appellant did not submit any representations to this office.

## RECORDS

The records at issue consist of two letters sent from the Ministry's Crown Law Office – Criminal to one of the former financial planner's lawyers that refer to two payments made by the Ministry:

- The first letter, dated January 28, 2004, refers to the specific amount of an enclosed cheque and indicates that this payment is the total of three smaller amounts, which are also listed in the letter.

- The second letter, dated April 22, 2004, simply refers to the specific amount of an enclosed cheque.

The Ministry did not provide this office with copies of the two cheques referred to in the letters. Consequently, this office contacted the Ministry to determine whether the cheques were made out to the lawyer or to his law firm. A freedom of information analyst at the Ministry confirmed that the cheques were made out to the law firm.

Each letter also includes the name of the lawyer; the name and address of his law firm; the reference number of each of the two cheques that was issued by the Ministry; and the name, signature and phone number of the Ministry staff person who sent the letters. The subject heading of each letter also includes the style of cause (i.e., case name) of the proceeding that led to the court order directing the Ontario government to pay the legal fees and disbursements of the two lawyers, and the legislation under which this order was apparently made.

As noted above, the appellant's request states that he is seeking "the total financial amount" that the Ontario government paid for fees and disbursements of counsel representing the former financial planner. In his appeal letter, he emphasized that he is requesting disclosure "strictly of the dollar figure," and not any other information.

In my view, the *only* information in the records at issue that is responsive to the appellant's request is the dollar amounts of the two cheques that the Ministry issued to the law firm of one of the lawyers who represented the former financial planner in criminal proceedings.

The remaining information in the records is not responsive to the appellant's request, and it must be severed on that basis. This includes the name of the lawyer; the name and address of his law firm; the reference number of each of the two cheques that was issued by the Ministry; the name, signature and phone number of the Ministry staff person who sent the letters; the subject heading of each letter; and the breakdown of the total payment in the letter of January 28, 2004 into three smaller amounts. This information is *not* at issue in this appeal.

## DISCUSSION:

### SOLICITOR-CLIENT PRIVILEGE

#### General principles

When the appellant filed his request with the Ministry, 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 original version (reproduced above) applies in this appeal.

Section 19 contains two branches:

- Branch 1 gives an institution the discretion to refuse to disclose a record that is subject to solicitor-client privilege or litigation privilege at common law.

- Branch 2 gives an institution the discretion to refuse to disclose a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

The institution must establish that one or both branches apply.

#### Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

##### *(i) Solicitor-client communication privilege*

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or

giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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 privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

***(ii) 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.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

**Branch 2: statutory privileges**

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

**Analysis and findings**

***Branch 1: common law privilege***

*(i) Solicitor-client communication privilege*

The information at issue in this appeal is the dollar amounts of the two cheques that the Ministry issued to the law firm of one of the lawyers who represented the former financial planner in criminal proceedings.

The question of whether legal fees are subject to solicitor-client privilege at common law has been the subject of many recent judicial decisions. The Supreme Court of Canada dealt with the issue in *Maranda v. Richer,* [2003] 3 S.C.R. 193, which found information about legal fees to be presumptively privileged unless the information is "neutral."

In *Ontario (Attorney General),* the Court of Appeal upheld Orders PO-1922 and PO-1952, in which the information at issue was also the amount of legal fees that the Attorney General paid to lawyers who had represented clients in criminal proceedings. The Court of Appeal stated that although *Maranda* held that information relating to the amount of a lawyer's fees is presumptively sheltered under solicitor-client privilege, *Maranda* also "clearly accepts" that this presumption can be rebutted:

> 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.

In Order PO-2483, Senior Adjudicator John Higgins summarized the above-noted approach as follows:

> 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.

For the purpose of the present appeal, I will follow the principles enunciated by the Supreme Court of Canada in *Maranda* and the Court of Appeal in *Ontario (Attorney General)*.

In its representations, the Ministry states that there is "no issue" that information as to the amount of a lawyer's fees is presumptively sheltered under solicitor-client privilege. It cites both the Supreme Court of Canada's decision in *Maranda* and the Ontario Court of Appeal's decision in *Ontario (Attorney General)* to support its position.

The Ministry further states that in the present appeal, the appellant has provided no information to rebut the presumption of solicitor-client privilege. Consequently, it submits that the presumption that the information as to the amount of the lawyer's fees is protected by solicitor-client privilege should apply.

The Ministry also submits, more generally, that the courts have repeatedly emphasized the importance of being rigorous in protecting solicitor-client privilege. It points to the British Columbia Court of Appeal's decision in *Legal Services Society* (which was cited by the Ontario Court of Appeal in *Ontario (Attorney General)*) and cites a passage from that decision which stated that the objective of the solicitor-client exemption in British Columbia's *Freedom of Information and Protection of Privacy Act* "is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly."

The Ministry further cites the Federal Court of Canada's decision in *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85, and asserts that the Court in that case held that access to information legislation does not give a requester any more right to disclosure of privileged information than any other citizen. It cites a passage from the Court's decision stating that although the expenses of government bodies, pertaining to legal fees or otherwise, are always of interest to the public, "the incorporation of the common law doctrine of solicitor-client privilege indicates that it was meant to be excluded from the operation of the Act."

In his representations, the former financial planner's lawyer states that he objects to the disclosure of the information at issue and supports the Ministry's position that the amount of his fees and disbursements are protected by solicitor-client privilege.

He further states that his client expressed concerns about the maintenance of solicitor-client privilege:

> You should be aware that [my client] was quite concerned about the solicitor/client privilege being breached by way of communication with the Crown Attorney because both the Crown and the payor are under the umbrella of the Ministry of the Attorney General. The Crown respected and understood the privilege and in no way was the privilege breached, it being my understanding. My point is that it is so confidential that it must be kept separate and apart from other departments under the umbrella of the Ministry of the Attorney General.

The former financial planner's lawyer also submits that his client supports his position on this issue.

As noted above, the appellant did not submit any representations in this appeal.

I have carefully considered the representations of the parties and reviewed the information at issue. In my view, this information does not qualify for exemption under branch 1 of section 19 of the *Act*, for the following reasons.

The information at issue in this appeal is the dollar amounts of the two cheques that the Ministry issued to the law firm of one of the lawyers who represented the former financial planner in criminal proceedings. In accordance with the principles set down by the Supreme Court of Canada in *Maranda*, I find that that this information is presumed to be subject to solicitor-client privilege.

The appellant did not provide any representations in this appeal. However, I am not persuaded by the Ministry's submission that the section 19 exemption claim must be upheld solely because the appellant has provided no information to rebut the presumption of solicitor-client privilege. In Order PO-2483, Senior Adjudicator Higgins addressed the same argument from the Ministry in the following way:

> [W]hile the Court of Appeal did indicate in [*Ontario (Attorney General)*] 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 … (In fact, in one of the orders under review in [*Ontario (Attorney General*], 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.

I agree with Senior Adjudicator Higgins' reasoning and find that the fact that the appellant did not submit representations in this appeal does not remove the possibility that the presumption can be rebutted based on the totality of the evidence before me, including the records themselves.

The information relating to legal fees ordered disclosed in Orders PO-1922 and PO-1952, both of which were upheld by both the Divisional Court and the Court of Appeal, is substantially similar to the information relating to legal fees at issue in this appeal. Order PO-1922 required the Ministry to disclose the total amount of legal fees paid by the Attorney General to two lawyers who had acted for two intervenors in a criminal proceeding. Order PO-1952 required the Ministry to disclose the amounts of payments made by the Attorney General to four lawyers who had acted for Paul Bernardo on the appeal from his murder convictions.

The Court of Appeal found that the evidence before it rebutted the presumption that the information at issue in Orders PO-1922 and PO-1952 was privileged:

> We 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.

The journalist in the appeal before me is undoubtedly an "assiduous" requester. He followed the former financial planner's criminal trial closely and wrote numerous articles about this individual. In my view, however, there is no reasonable possibility that the disclosure of the dollar amounts of the two payments made by the Ministry would somehow reveal communications between the lawyer and his client, such as instructions or strategies that the client may have communicated to his lawyer.

The only thing that the appellant or any other assiduous reader could glean from the information at issue would be a rough estimate of the number of hours spent by the lawyer on behalf of his client. As noted by the Court of Appeal, in some circumstances, this information might somehow reveal communications between a lawyer and his or her client. However, in the circumstances of this appeal, I see no possibility that an educated guess as to the number of hours that the lawyer spent on his client's criminal case could somehow reveal anything about the communications that passed between the lawyer and his client, such as instructions or strategies that the client may have communicated to his lawyer.

I conclude that the dollar amounts of the two cheques are "neutral" information, and the presumption that this information is subject to solicitor-client communication privilege is, therefore, rebutted in the circumstances of this appeal.

*(ii) Litigation privilege*

As noted above, branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. I have already found that the information at issue is not covered by solicitor-client communication privilege. I will now address whether it is protected by litigation privilege.

None of the parties has claimed that the information in the records at issue is protected by the litigation privilege aspect of branch 1 of section 19.

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.); see also *Blank* (cited above)].

The Ministry created the records at issue in this appeal for the purpose of complying with an order of the Ontario Superior Court of Justice that the Ontario government "be responsible for payment of fees and disbursements" for two lawyers who had represented the former financial planner. These records are simply cover letters enclosing cheques that the Ministry issued to the law firm of one of the lawyers who represented the former financial planner in criminal proceedings. They were not created for the dominant purpose of existing or reasonably contemplated litigation. Consequently, the information in these records is not protected by litigation privilege.

***Conclusion – Branch 1***

I find that the information at issue does not qualify for exemption under branch 1 of section 19 of the *Act*.

**Branch 2: statutory privileges**

Branch 2 of the section 19 exemption gives an institution the discretion to refuse to disclose a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

None of the parties has claimed that the information in the records at issue is protected by branch 2.

These records consist of two letters sent from a lawyer in the Ministry's Crown Law Office – Criminal to one of the former financial planner's lawyers that contain the dollar amounts of two cheques that the Ministry issued to the lawyer's firm. These records were prepared by Crown counsel for the purpose of complying with a court order that the Ontario government pay the legal fees and disbursements for the two lawyers who had represented the former financial

planner in criminal proceedings. The records were not prepared by Crown counsel for use in giving legal advice or in contemplation of or for use in litigation, as required by branch 2 of section 19.

I find, therefore, that the information at issue do not qualify for exemption under branch 2 of section 19 of the *Act*.

## PERSONAL INFORMATION

### General principles

The Ministry submits that the personal privacy exemption in section 21(1) of the *Act* applies to the information at issue. The section 21(1) exemption only applies to information that qualifies as "personal information," which is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the

> name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Neither the Ministry nor the affected parties (the lawyer and his client) provided detailed representations as to whether the dollar amounts of the two cheques that the Ministry issued to the lawyer's firm qualifies as "personal information," as that term is defined in section 2(1) of the *Act*. The Ministry simply asserts that the records contain "personal information" and then goes on to assert that the presumption in section 21(3)(f) applies in the circumstances of this appeal. Neither the lawyer nor his client made any submissions as to whether the information at issue is their "personal information."

At the outset, I would emphasize that the *only* information at issue in this appeal is the dollar amounts of the two cheques that the Ministry issued to the law firm of one of the lawyers who represented the former financial planner in criminal proceedings. Although the records also contain the name of the specific lawyer to whom the cover letters were sent and the name and address of his firm, I have found that this information must be severed from the records because it is not responsive to the appellant's request.

Similarly, the former financial planner's name appears in the subject headings of the two letters, which refer to the case name ["R. v. (name of former financial planner)"] of the proceeding that led to the court order directing the Ontario government to pay the legal fees and disbursements of the two lawyers. However, I have found that this information must also be severed from the records because it is not responsive to the appellant's request.

In short, it must be determined whether the dollar amounts of the two cheques that the Ministry issued to the lawyer's firm is "personal information," as that term is defined in section 2(1) of the *Act*, and if so, to whom does this "personal information" relate.

**The former financial planner's lawyer**

I will start by determining whether the information at issue qualifies as the lawyer's "personal information."

To qualify as personal information, the information must be about an "identifiable individual." Although I have found that the name of the lawyer and the name and address of his law firm must be severed because this information is not responsive to the appellant's request, the names of both lawyers who represented the former financial planner in this high profile case are public knowledge. Consequently, it could be argued that the information at issue is "about an identifiable individual."

However, to qualify as "personal information," the information must also be about an individual in a personal capacity. As a general rule, information associated with an individual in a

professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The two cheques issued by the Ministry were made out to the lawyer's firm. To the extent that these two cheques relate to the lawyer at all, this is clearly information about that lawyer in his professional or business capacity, not his personal capacity. The law firm received these cheques as payment for professional services, and therefore this information is associated with the lawyer in a business capacity, not a personal capacity. I find, therefore, that the information at issue does not constitute the lawyer's "personal information."

**The former financial planner**

I will now determine whether the information at issue qualifies as the former financial planner's "personal information."

In Order PO-1952, which was upheld by both the Divisional Court and the Court of Appeal, former Assistant Commissioner Tom Mitchinson considered whether the information in the records at issue, which is similar to the information at issue in this appeal, might fall within paragraph (b) of section 2(1) with respect to the client of the lawyers who received payments from the Ministry. This paragraph encompasses information relating to "financial transactions in which the individual has been involved."

Former Assistant Commissioner Mitchinson found that although the lawyers provided legal services to their client, any financial transactions that formed the basis of the figures in the record at issue were between the Ministry and the individual lawyers, not between the Ministry and the lawyers' client. Consequently, he found that the information at issue was not the client's "personal information," within the meaning of paragraph (b) of the section 2(1).

However, he found that the information in the record at issue fell within the scope of the introductory wording of the definition of "personal information" in section 2(1) with respect to the client:

> … I do accept that the Page 1 record contains information about the affected person in a more general sense. The affected person's identity is known to the appellant and others, and the aggregate figures reflected on the record relate to various billings or payments made by the Ministry to his lawyers over a period of time. In my view, this is information "about an identifiable individual", the affected person, and falls within the scope of the introductory wording of the definition of "personal information" in section 2(1) of the *Act*.

I agree with former Assistant Commissioner Mitchinson and adopt his reasoning for the purposes of this appeal. The two cheques issued by the Ministry were made out to the lawyer's firm. Consequently, it is clear that the former financial planner was not involved in any financial transactions with the Ministry. In short, paragraph (b) of section 2(1) of the *Act*, which pertains to "financial transactions *in which the individual has been involved*," does not support a conclusion that this is the former financial planner's personal information.

However, I accept that the information at issue is about the former financial planner in a more general sense. The financial planner's identity is known to the appellant and others, and the dollar amounts contained in the records reflect payments that the Ministry made to the firm of one of the lawyers who provided him with legal representation. In my view, the information at issue is therefore "about an identifiable individual" (the former financial planner), and it falls within the scope of the introductory wording of the definition of personal information in section 2(1) of the *Act*.

Given that I have found that the information at issue constitutes the "personal information" of the former financial planner, I will now consider whether it is exempt under the personal privacy exemption in section 21(1) of the *Act*.

## PERSONAL PRIVACY

### General principles

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which states:

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

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

I have carefully considered the representations of the parties and the nature of the information at issue. In my view, disclosure of this information would not constitute an unjustified invasion of the former financial planner's personal privacy, for the following reasons.

### The presumptions in section 21(3)

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section

21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The Ministry submits that the presumption in section 21(3)(f) applies in the circumstances of this appeal. This provision states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The Ministry submits that the section 21(3)(f) presumption applies to the personal information of the former financial planner's lawyer:

> In [*Ontario (Attorney General)*], the Court of Appeal for Ontario held that disclosure of the amounts of legal fees paid to lawyers did not constitute disclosure of the lawyer's finances because the amounts disclosed did not relate to payments to any specific lawyer. In the instant matter, the amount of legal fees would constitute disclosure of a lawyer's finances as the record itself indicates the recipient of the payments and, in any event, the requester knows the names of the lawyer representing the accused, as evidenced by the access request itself.

I have already found that the information at issue does not constitute the personal information of the lawyer. Consequently, the Ministry's submission, which assumes that the information at issue is the lawyer's personal information, is not applicable.

However, I have found that the information at issue constitutes the personal information of the former financial planner. Therefore, I will consider whether the section 21(3)(f) presumption applies in that context.

In Order PO-1952, former Assistant Commissioner Mitchinson found that the section 21(3)(f) presumption did not apply to the personal information of the client of the lawyers in that appeal:

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

This finding was upheld by both the Divisional Court and the Court of Appeal. In its decision, the Court of Appeal stated:

> We are also satisfied that information as to the total amount paid for legal fees did not in any way describe the finances of the clients to whom the legal services has

> been provided (s. 21(3)(f)). The clients had nothing to do with the payment of the fees by the Attorney General and the amount revealed nothing about their finances.

In my view, the same reasoning applies in the circumstances of this appeal. I find that the information at issue does not describe the former financial planner's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. The financial planner had nothing to do with the payment of fees by the Ministry and the amounts reveal nothing about his finances. I find, therefore, that the section 21(3)(f) presumption does not apply to the information at issue.

If any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21. However, given that I have found the presumption in section 21(3)(f) does not apply and none of the parties have claimed that any other section 21(3) presumptions are applicable, it is not necessary to consider whether section 21(4)(b) of the *Act* might apply or whether the Supreme Court of Nova Scotia's decision in *Doctors Nova Scotia* has any application in this appeal.

I will now consider if any of the factors in section 21(2) of the *Act* are applicable to assist in determining whether disclosure of the information at issue would constitute an unjustified invasion of personal privacy.

**The factors in section 21(2)**

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

Section 21(2) states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Neither the Ministry nor the affected parties (the lawyer and his client) provided any representations as to whether the various factors listed in section 21(2) of the *Act* are relevant in determining whether disclosure of the information at issue would constitute an unjustified invasion of the former financial planner's personal privacy. However, the submission of the former financial planner's lawyer that disclosing the information at issue would "further embarrass" his client could be construed as an argument that the factors in sections 21(2)(f) (highly sensitive) and 21(2)(i) (unfairly damage the reputation of any person) are relevant.

In Order PO-1952, former Assistant Commissioner Mitchinson reviewed all of the factors in section 21(2) that favour privacy protection and found that none applied in the circumstances of that appeal:

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

Former Assistant Commissioner Mitchinson then examined the factors favouring disclosure under section 21(2) and found that the factor in section 21(2)(a) (disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny) applied:

> The affected person in this appeal was convicted of first degree murder after a very highly publicized and controversial trial. He applied for and was granted the right to have counsel appointed under section 684(1) of the *Criminal Code* to represent him on the appeal of his conviction. His successful application under section 684(1) and the subsequent appeal were also the subject of significant media and public attention. It is not necessary to provide a detailed description of events in order for me to conclude that the level of public interest in criminal matters involving this particular affected person is virtually without parallel in the province. In my view, the provision of public funds in order to represent the affected person on appeal is one component of the broader public interest in these matters. Although I do not necessarily accept all of the reasoning put forward by the appellant, given the unique circumstances of this appeal, I accept his basic position that disclosing the aggregate figures reflecting the costs or charges for legal services in the affected person's appeal is desirable for the purpose of subjecting the Ministry to public scrutiny. Accordingly, I find that the factor in section 21(2)(a) of the *Act* is a relevant consideration, although I would give this factor only moderate weight in the circumstances.
>
> In conclusion, I have found that there are no relevant factors favouring privacy protection, and one factor favouring disclosure of the personal information of the affected person contained in the record. Although I have assigned this one factor only moderate weight, in my view, it is sufficient to outweigh any inherent privacy considerations in the circumstances, and I find that disclosure of the Page 1 record would not constitute an unjustified invasion of the affected person's privacy.

In my view, similar circumstances exist in the appeal before me. In determining whether disclosure of the information at issue would constitute an unjustified invasion of the personal privacy of the former financial planner, I have reviewed all of the factors in section 21(2) that favour privacy protection and find that none apply in the circumstances of this appeal.

For example, in order for personal information to be regarded as "highly sensitive" [section 21(2)(f)], it must be established that its release would cause excessive personal distress to the individuals involved. It is not sufficient that release might cause some level of embarrassment to those affected [Order P-434].

I accept that disclosure of the dollar amounts of the two cheques that the Ministry issued to the lawyer's firm might cause some level of embarrassment for the former financial planner. However, I have not been provided with any evidence that it would cause him excessive personal distress. I find, therefore, that the information at issue is not "highly sensitive."

Similarly, I am not persuaded that disclosure of the information at issue would unfairly damage the reputation of the former financial planner [section 21(2)(i)]. Given that he pleaded guilty in criminal court to charges of fraud and theft relating to more than $5.3 million that was stolen from 128 investors, it is not reasonable to conclude that disclosure of the dollar amounts of the two cheques that the Ministry issued to his lawyer's firm would "unfairly" damage his reputation.

I have also reviewed the factors in section 21(2) favouring disclosure and find that the factor in section 21(2)(a) is applicable and should be accorded moderate weight. Section 21(2)(a) requires the head of an institution to consider whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

As noted above, the former financial planner pleaded guilty in criminal court to charges of fraud and theft. This high profile case generated significant media coverage both in Sudbury and elsewhere in Ontario. Although the appellant did not submit representations in this appeal, he stated in his appeal letter that there were "significant public interests to warrant disclosure of this information, given the circumstances and high profile of this criminal case and the fact that taxpayers financed the entire costs in question."

The provision of public funds to compensate the former financial planner's lawyer for his fees and disbursements is one component of the broader public interest in these matters. In my view, disclosing the dollar amounts of the two cheques that the Ministry issued to the lawyer's firm is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny, although I would give this factor only moderate weight in these circumstances.

In summary, I have found that there are no relevant section 21(2) factors that favour privacy protection. However, one factor [section 21(2)(a)] favours disclosure of the personal information of the former financial planner. Although I have assigned this factor only moderate weight, in my view, it is sufficient to outweigh any inherent privacy considerations in the circumstances.

I find, therefore, that disclosure of the information at issue would not constitute an unjustified invasion of the former financial planner's personal privacy under section 21(1) of the *Act*.

## CONCLUSION

Given that I have found that the information at issue in the records does not qualify for exemption under sections 19 or 21(1) of the *Act*, I will order that it be disclosed to the appellant.

Although the appellant claims that the public interest override in section 23 of the *Act* applies to this information, it is not necessary for me to evaluate the possible application of this provision because I have already found that the section 19 and 21(1) exemptions do not apply.

## ORDER:

1. I order the Ministry to disclose the dollar amounts of the two cheques referred to in the records by **June 4, 2007** but not before **May 30, 2007**. I am providing the Ministry with a copy of the records and have highlighted in green those portions of the records that must be severed because they are not responsive to the appellant's request. To be clear, the Ministry must not disclose the green highlighted portions of the records.

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 records that it discloses to the appellant.

Original signed by: April 26, 2007
Colin Bhattacharjee
Adjudicator