



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2727**

## **Appeal PA07-71**

### **Liquor Control Board of Ontario**



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## NATURE OF THE APPEAL:

The Liquor Control Board of Ontario (LCBO) received the following multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like to request records pertaining to the amount of money spent on external legal service from 2003 to 2006 inclusive. Please provide detailed billings (copies of invoices) and please note which contracts were put up for tender (if any). I would also like a copy of the LCBO policy on securing external services (i.e. consultants, lawyers). Please note that I am not interested in receiving a list of legal fees; I want copies of actual legal invoices. ....

The LCBO identified records responsive to the request and issued a decision letter. The LCBO disclosed the total aggregate amount of legal fees paid for external legal services from April 1, 2003 to December 31, 2006 to the requester and advised that it was not required to tender for legal services. The LCBO relied on section 19 of the *Act* (solicitor-client privilege) to deny access to the actual legal invoices.

The requester (now the appellant) appealed the decision.

During the mediation stage of the appeal, the LCBO advised that the appellant attended at its office to photocopy parts of its Administrative Manual dealing with LCBO policy for securing external services. The appellant confirmed the attendance and advised the mediator that he is no longer seeking access to that information. As a result, it is no longer at issue in the appeal. The appellant continued to pursue access to records responsive to the other part of his request. He also clarified that this includes access to the names of the external law firms and the amounts that each billed.

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process.

I commenced the inquiry by sending the LCBO a Notice of Inquiry setting out the facts and issues in the appeal and inviting representations in response. I enclosed with the Notice copies of Orders MO-2190, PO-2483, PO-2484, PO-2548 and the recent decision of the Divisional Court in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769, which dismissed an application for judicial review of Orders PO-2484 and PO-2548. The LCBO was invited to consider these authorities when preparing its representations. The LCBO provided representations in response to the Notice and asked that a portion of its representations be withheld due to confidentiality concerns.

I then sent a Notice of Inquiry to the appellant seeking representations on the facts and issues in the appeal, as well as the non-confidential representations of the LCBO. I enclosed with the Notice the same authorities that I provided to the LCBO. In light of the ruling of the Court of Appeal in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), where it was held that the exemption in section 19 is to be "read in" as

exemptions that may be overridden by section 23, in the circumstances of this appeal, I also invited the appellant to make representations on the possible application of section 23 of the *Act*. The appellant provided representations in response to the notice. I decided that the appellant's representations raised issues to which the LCBO should be provided an opportunity to reply. Accordingly, I forwarded a letter to the LCBO inviting their reply submissions on the portions of the appellant's submissions that I summarized in the letter. The LCBO provided representations in reply.

## **RECORDS:**

The records at issue in this appeal consist of approximately 700 invoices submitted to the LCBO by a number of external law firms. The invoices are for the fiscal year from April 1 to March 31 for each of the years 2003 to 2006.

## **DISCUSSION:**

### **SCOPE OF THE REQUEST**

The LCBO claims that the accounts or invoices from external counsel to the LCBO are exempt in their entirety under section 19 of the *Act*. The LCBO submits that they are confidential communications made within the framework of the solicitor-client relationship, for the purpose of the LCBO obtaining legal advice. In particular, the LCBO submits in its representations that:

As noted in the Notice of Inquiry, the Requester is seeking "records pertaining to the amount of money spent [by the LCBO] on external legal services from 2003 to 2006 inclusive". The LCBO has already provided the Requester with the total amount of legal fees paid for external legal services from April 1, 2003 to December 31, 2006. However, the Requester has indicated that he is "not interested in receiving a list of legal fees; I want copies of actual legal invoices". Put differently, the Requester is seeking the narrative portions of the legal accounts, which describe the nature of the legal service rendered, the law firms and lawyers who provided the services, the dates on which the services were supplied and the break-down (by hours spent and billing lawyer) of the fees charged. The records at issue consist of approximately 700 invoices submitted to the LCBO by a number of external law firms.

In response, the appellant advised in his representations that:

..., I am not interested in breaching any solicitor/client privileges; thus, the details regarding the law suits can be severed. What I do need, however, are **numbered invoices** [emphasis in original] showing the total legal fees charged by the various external law firms. Simply supplying a total amount without backing up the sum is useless to me. What's more, providing copies of numbered invoices in no way breaches any solicitor/client privilege.

In my view, the appellant narrowed the scope of his request (and this appeal) to be for access only to numbered invoices showing the name of the external law firm and bottom line total legal fees, including disbursements, charged. As a result, I find that the remaining information in the records, including individual lawyers' names, lawyers' hourly rates and the narrative portion and other details of the invoice to be non-responsive.

### **SOLICITOR-CLIENT PRIVILEGE**

The LCBO claims that even with the narrowed scope of the request, the information sought by the appellant is exempt from disclosure because it is subject to solicitor-client privilege.

Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19(c) does not apply in the circumstances of this appeal.

### **Section 19(a)**

Section 19(a) encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19(a) 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) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

### ***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].

As well, 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”. I will bear this in mind in assessing the application of section 19 in this appeal.

The application of solicitor-client privilege to legal billing information was canvassed by the Supreme Court of Canada’s decision in *Maranda v. Richer*, [2003] 3 S.C.R. 193 (“*Maranda*”). In the access to information context, and specifically the solicitor-client exemption at section 19 of the *Act*, the Ontario Courts have applied *Maranda* and upheld Orders PO-1922 and PO-1952, which ordered disclosure of legal fee information in fairly summary form. The Divisional Court ruling on Orders PO-1922 and PO-1952, reported at *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779, was upheld by the Court of Appeal in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (*Attorney General*).

Although they differ in their particulars, Senior Adjudicator John Higgins’ decisions in Orders PO-2483 and PO-2484 both conclude by requiring disclosure of aggregated fees and disbursements. In (*Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*), [2007] O.J. No. 2769 the Divisional Court also upheld the Senior Adjudicator’s decision that the bottom line legal fee amounts appearing on legal accounts were not exempt under the solicitor-client privilege exemption at section 19.

In Order PO-2483 (which was not subject to an application for judicial review) Senior Adjudicator Higgins carefully described the progression of jurisprudence relating to the application of privilege to information about lawyer’s fees. Specifically, he quotes extensively from the decision of the Supreme Court of Canada in *Maranda* and relies on the reasoning contained therein. He states:

*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 decision goes on to find that the approach set forth in *Maranda* applies in both the criminal and the civil context, in accordance with the approach taken by the Court of Appeal in *Attorney General*. In that decision, the Court of Appeal set out the test for rebuttal of the presumption of privilege as follows:

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. (4<sup>th</sup>) 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 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.

### **The Representations of the LCBO**

The LCBO submits that applying this test to the present case, the requester qualifies as an “assiduous inquirer” or requester and, taking into account all the circumstances, the requested information should not be disclosed.

In particular, the LCBO submits:

... The requester is a journalist who has written extensively for many years on matters pertaining to the LCBO. To that end, the requester has made numerous access to information requests and has actively monitored many aspects of the LCBO’s operations; policies; labour, employment and human resources practices and issues; finances and involvement in litigation. Between 2002 and 2006 alone (which is included in the period covered by the present access to information request), this requester made 49 separate access to information requests to the LCBO, pertaining to LCBO matters. [The LCBO attached a summary of those requests as a schedule to its submissions].

Much of the information requested pertained to the operations, policies, decisions and advice given by the LCBO’s internal Legal Department, the retainer of external legal counsel by the LCBO’s internal Legal Department or Human Resource Department and the LCBO’s involvement in negotiations or litigation concerning the termination, severance or handling of grievances by current or former LCBO employees. For example, the 49 FOI requests by this requester included the following:

- Request No. 202163, seeking departmental budgets from, 1999 to 2002 for, among other things, legal services

- Request No. 202164, seeking a list of tenders for law firms for legal services for 1996 to 2002
- Request No. 202165, requesting money spent on external legal firms by LCBO Legal Department from 1996 to 2002
- Request No. 202166, seeking a list of the law firms employed by the LCBO Legal Department
- Request No. 202176, seeking the terms and conditions of severance packages for two former LCBO employees
- Request No. 202179, seeking terms and conditions of termination and the severance package for a former LCBO employee
- Request No. 202182, seeking human resources' departments legal fees and public tenders for hiring of legal firms for human resource matters
- Request No. 204208, seeking information about staff turn over in the resource protection department
- Request No. 204209, seeking information about staff turn over in the Legal Department
- Request No. 206160, seeking records pertaining to the amount of money spent on external legal services by the LCBO from 2003 to 2006
- Request No. 206161, seeking a description of each function that the LCBO's General Counsel (and head of the LCBO's internal Legal Department) fulfills at the LCBO
- Request No. 206168, seeking information about a former LCBO accounting employee who made allegations of financial impropriety against the LCBO
- Request No. 206172, seeking the amount of LPIC fees and Law Society of Upper Canada membership fees that the LCBO pays on a yearly basis for its General Counsel and all the other lawyers in the LCBO Legal Department and information about what category and/or restrictions the General Counsel and other lawyers with the LCBO Legal Department are subject to in respect of their legal practice as in house counsel.



Pursuant to those various requests for access to information, the requester has already received a substantial amount of information from the LCBO pertaining to these matters, in addition to any information that the requester may have been able to attain from other sources. In addition, it is evident from the frequency, specificity and sophistication of the information requests that the requester has a very detailed and extensive knowledge of the LCBO. This is also evident from the various articles published by the requester; some of which are posted on his website. [The LCBO attached a copy of the website print out as a schedule to its submission]. The requester publishes articles relating to the LCBO with sufficient frequency that he has a separate category on his website for those articles, entitled "LCBO Reports". Given this background, it is submitted that this requester is an "assiduous inquirer" who has extensive background information which, combined with the information now being sought, would allow the requester to deduce or otherwise acquire privileged communications.

In addition, the requester has already received aggregate totals for the legal fees spent by the LCBO for external counsel from 2003 to 2006, as requested. Nevertheless, the requester continues to seek disclosure of the actual invoices. As observed by the IPC in Order MO-2211:

This suggests that the Appellant in the present appeal is not merely interested in obtaining general information about fees paid, but also wishes to subject the invoices themselves to further scrutiny. In this circumstance, I am prepared to draw an inference that the requester is very "assiduous", and seeks the full content of the invoices in order to glean further information about the solicitor - client relationship. On that basis, I find that disclosure of the particulars of the invoices would result in a reasonable possibility that privileged information will be disclosed.

It is submitted that the above comments are applicable to the present case and that a similar inference should be drawn concerning the purpose for which this requester seeks the invoices in question.

### **The Representations of the Appellant**

The appellant takes the position that disclosing the records in accordance with his narrowed request would not breach any solicitor-client privilege. He also takes issue with being described as an "assiduous inquirer" and states that the stories that he writes about the LCBO are factual and have appeared in credible, national publications. He asserts that the LCBO has never once asked for a retraction or commenced a libel action. He submits that "in the case of most of the magazine pieces, the statements and quotations in the stories were fact-checked by an independent staffer at the periodical. Are we to assume the fact-checkers and editors are also 'assiduous'?" Finally, he submits that his sources of information about the LCBO are

“whistleblowers regarding the unethical and even illegal activity being conducted by [the LCBO].”

### **The Reply Representations of the LCBO**

In reply, the LCBO discusses how the appellant’s narrowing of the scope of his request does not change its position. In particular, the LCBO submits that:

Even if the Appellant is seeking copies of the invoices showing the invoice numbers, with some of the other information severed, the insistence on invoice numbers still raises concerns. Invoice numbers are typically useful only for the purpose of matching an invoice to another related document or record such as, for example, a cheque, receipt, ledger or piece of correspondence referencing the invoice number. The focus on numbered invoices suggests that the Appellant has other related information to which he wants to match the invoices, in order to glean further details about the legal services to which the invoices relate. As set out in the LCBO’s original submission, the Appellant is an “assiduous inquirer” who is aware of extensive background information about the LCBO, has made many previous access to information requests and has actively monitored many aspects of the LCBO’s operations, policies, employment and labour issues, finances and involvement in litigation. That being so, there is a reasonable possibility that providing copies of numbered invoices showing total legal fees charged by various external law firms would allow the Appellant, as an assiduous inquirer, to deduce or otherwise acquire information protected by solicitor/client privilege.

In response to the appellant’s submission that his sources of information are “whistleblowers regarding the unethical and even illegal activity being conducted by the LCBO”, the LCBO further states:

Viewed in this context, the Appellant’s insistence on access to “numbered invoices” suggests that “the Appellant in the present appeal is not merely interested in obtaining general information about fees paid, but also wishes to subject the invoices themselves to further scrutiny”, justifying the IPC in drawing an “inference that the Appellant is very ‘assiduous’, and seeks the full content of the invoices in order to glean further information about the solicitor/client relationship” [footnote omitted].

While the Appellant in the present case has indicated that he does not require some of the content of the invoices, the insistence on obtaining copies of the records themselves bearing the invoice numbers suggests (as noted earlier in this submission) that the Appellant wishes to make use of those invoice numbers and other information contained in the invoices to match or combine them with other documents or information he has received from his various sources, in order to be able to piece together that information and draw inferences about the legal matters

to which they relate. It is submitted that this is precisely the type of direct or indirect revealing of solicitor/client communications that the presumptive privilege for legal accounts and, more broadly, Section 19 of [the *Act*], are designed to avoid.

### **Analysis and Findings**

In Order PO-2484, the only records before Senior Adjudicator Higgins were a series of invoices. In order to avoid disclosing privileged information, he withheld the invoices in their entirety, except the bottom line dollar figure contained in each invoice. He ordered disclosure only of the most aggregated information available, in the most minimal way possible, with dates and all other information severed.

In the present case, an aggregate total has already been disclosed. As noted, the appellant has significant knowledge of the matter in question, and has received aggregated information similar to what was ordered disclosed in Order PO-2484.

Nevertheless, the fact that Senior Adjudicator Higgins ordered the disclosure of a *series* of totals in Order PO-2484, rather than one aggregated total, raises the question of whether I should find that the presumption is rebutted for the bottom line of each invoice, as it was in Order PO-2484.

In my view, Order PO-2484 is distinguishable from the present case and it is not appropriate that the higher level of disclosure ordered there should occur here. In Order PO-2484, the appellant was prepared to accept a cumulative total figure, but no such figure existed. Here, the appellant has received an aggregated figure but continues to insist on disclosure of the numbered invoices showing the name of the external law firm and bottom line total legal fees, including disbursements, charged. In his own words what he “need(s), however, are numbered invoices showing the total legal fees charged by the various external law firms. Simply supplying a total amount without backing up the sum is useless to me.” This suggests that the appellant in the present appeal is not merely interested in obtaining general information about fees paid, but also wishes to subject the invoices themselves to further scrutiny. In this circumstance, I am prepared to draw an inference that the requester is in fact an “assiduous inquirer” as contemplated in *Maranda* and seeks additional content of the invoices in order to glean further information about the solicitor-client relationship. On that basis, even disclosing the numbered invoices showing only the name of the external law firm and bottom line total legal fees, including disbursements, charged, would result in a reasonable possibility that privileged information will be disclosed.

Accordingly, I find that the presumption of privilege is not rebutted for the requested information in the invoices at issue in this appeal. It is therefore subject to common law solicitor-client communication privilege and exempt under branch 1 of section 19.

## **EXERCISE OF DISCRETION**

### **Introduction**

The section 19 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the LCBO failed to do so.

I may also find that the LCBO erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In all these cases, I may send the matter back to the LCBO for an exercise of discretion based on proper considerations [Order MO-1573].

### **Relevant considerations**

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Although the appellant made no specific submissions on the LCBO's exercise of discretion he submits generally that this information ought to be disclosed.

The LCBO submits that when exercising its discretion it took into account a number of relevant factors and did not rely on irrelevant considerations or act in bad faith or for an improper purpose. It submits that, in particular, it considered the following:

- The purposes of the *Act*, including the principles that information should be available to the public, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected.
- The consideration that individuals should have a right of access to their own personal information was not relevant in the present case, since the requester was not seeking his own personal information.
- The need to protect the privacy interests of individuals was a relevant consideration, since some of the records in question are legal accounts pertaining to matters involving individual LCBO employees or customers. For example, certain of the accounts pertain to labour or employment matters involving the dismissal of LCBO employees or grievances filed by such employees.
- Other accounts pertain to advice concerning the eligibility of individual applicants for various authorizations or privileges under the *Liquor Control Act*, or individuals of relevant legislation, regulations or policies. Still other accounts pertain to legal advice concerning allegations of improper conduct made by or against LCBO customers. Those individuals have privacy interests which would be affected by the release of the records sought.
- The wording of the section 19 exemption and the interest it seeks to protect.

- Whether the requester has a sympathetic or compelling need to receive the information. In the LCBO's view, there is no indication that the requester has a sympathetic or compelling need for disclosure.
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person. The LCBO submitted that the requested information is sensitive to the LCBO and to other individuals involved in the legal matters to which those accounts relate.
- The age of the information: The LCBO submits that the information is fairly recent, pertaining to accounts rendered in 2003 to 2006 and that many of the matters to which the accounts relate are still ongoing. The LCBO submits that in many instances, where the accounts pertain to employment or grievance matters, the individuals involved are still LCBO employees.

In my opinion, based upon my review of the representations and the records, the LCBO took into account relevant considerations and did not consider irrelevant ones. I will not, accordingly, disturb its exercise of discretion on appeal.

#### **PUBLIC INTEREST IN DISCLOSURE**

The appellant raises the possible application of the "public interest override" at section 23 which reads:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

In my view s. 23 of the *Act* infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. ... I would read the words "14 and 19" into s. 23 of the *Act*.

In order for section 23 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemptions (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984]. A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

It should be noted that a public interest is not automatically established where the requester is a member of the media [Order M-773].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [See Order P-1398].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province’s ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism [Order M-249]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Although the appellant made no specific submissions on the application of section 23, he submits generally that this information ought to be disclosed. He asserts that his sources of information about the LCBO are “whistleblowers regarding the unethical and even illegal activity being conducted by [the LCBO].”

In its submissions on the exercise of discretion, the LCBO submits:

... the s. 19 exemption seeks to protect (among other things) communications of a confidential nature between solicitor and client and, more broadly, the integrity of the solicitor-client relationship. The Supreme Court of Canada, in [*Maranda*], recognized that a solicitor’s bill of account to a client and its payment by the client arises out of the solicitor client relationship and must be regarded as “one of its elements”. The sanctity of the solicitor-client relationship and the importance of the values sought to be protected by s.19 was again recognized by the Supreme Court of Canada in *Goodis v. Ontario (Ministry of Correctional Services)*, [[2006] 2 S.C.R. 32], where Rothstein J. held that records which were subject to a claim of solicitor-client privilege could only be disclosed to a requester’s counsel “where absolutely necessary”, in light of the sanctity of the solicitor-client relationship. The importance of the relationship and of solicitor client privilege was also emphasized by the Supreme Court of Canada in the case of *Lavallee, Rachel & Heinz v. Canada (Attorney General)* [cited above] where the court noted that solicitor-client privilege must remain “as close to absolute as possible”.

### **Analysis and Finding**

I have carefully considered the public interest in disclosing the withheld information, keeping in mind that the LCBO has already disclosed to the appellant the total aggregate amount of legal fees paid for external legal services during the relevant time period.

In *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, 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”. In my view, this is a clear recognition by the Supreme Court



of Canada of the fundamental importance of solicitor-client privilege, reflected in how other Ontario Courts and this office have carefully treated this exemption claim. In my view, denying access to the additional requested information in the circumstances of this appeal, where disclosure of general information about legal fees has already been given, is consistent with the purpose of the section 19 exemption. The disclosure of an aggregate figure is sufficient in this case to meet any transparency interest in this information. I conclude that there is no public interest which is sufficiently compelling in the disclosure of the exempt information that would override the application of section 19, in the circumstances of this appeal.

Therefore, I conclude that there is no compelling public interest in the disclosure of the withheld information.

**ORDER:**

I uphold the decision of the LCBO.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ October 29, 2008