

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-3589

Appeal MA16-750

Township of Puslinch

April 12, 2018

**Summary:** The township received a request for access to invoices from a named law firm regarding a particular OMB hearing. The township disclosed the total amount of the invoices, but withheld the other details in the legal invoices. In this order, the adjudicator upholds the township's decision to withhold the remaining information contained in the legal invoices pursuant to section 12.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12 and 10(1).

**Orders and Investigation Reports Considered:** Orders PO-3735, MO-2222, MO-2211, MO-3393, MO-3253-I, PO-2484 and MO-3455.

**Cases Considered:** *Maranda v. Richer* [2003] 3 S.C.R. 193 and *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319.

### BACKGROUND:

[1] The Township of Puslinch (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the invoices from a named law firm regarding a particular Ontario Municipal Board (OMB) hearing.

[2] Prior to issuing its access decision, the township identified for the appellant the

total amount for the three legal invoices.

[3] Following affected party notification of the law firm, the township denied access to the responsive records pursuant to section 10(1) (third party information) of the *Act*.

[4] The requester, now the appellant, appealed the township's decision.

[5] During mediation, the township issued a revised decision letter in which it indicated that it was also relying on section 12 (solicitor-client privilege) of the *Act* to withhold the responsive records.

[6] The appellant also raised the late raising of a discretionary exemption as an issue with respect to the township's revised decision.

[7] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*.

[8] I sought and received representations, reply representations and sur-reply representations from the parties. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared.

[9] In its reply representations, the township confirmed that it would provide the appellant with the total amount for each of the three invoices. As a result, the total amount for each invoice is no longer at issue, and I will not address the totals further in this order.

[10] In this order, I uphold the township's decision to withhold the remaining portions of the records at issue pursuant to section 12 of the *Act*.

## **RECORDS:**

[11] The information at issue consists of the details in the three legal invoices, excluding the total amount.

## **ISSUES:**

- A. Does the discretionary exemption at section 12 apply to the information at issue?
- B. Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?
- C. Does the mandatory exemption at section 10 apply to the information at issue?

## **DISCUSSION:**

### **Preliminary Issue: Late Raising of Discretionary Exemption**

[12] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[13] Section 11.01 states:

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[14] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.<sup>1</sup>

[15] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the township and to the appellant.<sup>2</sup> The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.<sup>3</sup>

[16] The township did not claim section 12 in its decision letter. However, it claimed the application of this exemption in a revised decision letter dated February 27, 2017. Consequently, the township did not claim the section 12 exemption within 35 days after being notified of the appeal, as required by section 11.01 of the *Code*.

[17] The township submits that the appellant was not prejudiced by the late raising of the solicitor-client privilege. It states that it was already not releasing the records at issue under another exemption, but, due to an error, solicitor-client privilege was omitted as an additional exemption. The township also submits that it was late by only

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<sup>1</sup> *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

<sup>2</sup> Order PO-1832.

<sup>3</sup> Orders PO-2113 and PO-2331.

five days in raising the solicitor-client privilege, which was raised at the end of mediation.

[18] The appellant submits that he has been prejudiced by the late raising of the solicitor-client privilege because it permits the township to rely on another exemption against him.

[19] In Order MO-2070, Adjudicator Catherine Corban explained the purposes of this office's policy on the late raising of discretionary exemptions. In doing so, she stated:

Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

[20] I adopt the above approach taken by Adjudicator Corban.

[21] For the following reasons, I have decided to allow the township to rely on section 12. Given that the addition of this exemption took place at the end of mediation, I have concluded that the appellant will not be prejudiced by the late raising of section 12, as he was given an opportunity to address this claim during the inquiry of this appeal, and no delay has resulted from the additional claim.

[22] In addition, I have also taken into account the importance that the courts have attached to the principle of solicitor-client privilege. For example, in *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, Mr. Justice Fish of the Supreme Court of Canada stated the following:

... The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[23] Given the importance that the courts have ascribed to the principle of solicitor-

client privilege, the township should, in the circumstances of this particular appeal, be given an opportunity to rely on the section 12 exemption.

[24] Accordingly, I will allow the township to rely on solicitor-client privilege, and I will then determine whether the exemption applies.

**A: Does the discretionary exemption at section 12 apply to the information at issue?**

[25] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[26] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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

[27] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

*Solicitor-client communication privilege*

[28] 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.<sup>4</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>5</sup> The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>6</sup>

[29] 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.<sup>7</sup> The privilege does not cover communications between a

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<sup>4</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>5</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>6</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>7</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

solicitor and a party on the other side of a transaction.<sup>8</sup>

### *Legal billing information*

[30] Legal billing information is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.<sup>9</sup>

[31] In determining whether or not the presumption has been rebutted, the following questions may 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?<sup>10</sup>

### *Representations*

[32] In its representations, the township submits that the legal invoices are subject to common law solicitor-client communication privilege. It states that the legal invoices are direct communications from the affected party to it concerning legal services rendered regarding a matter before the OMB. It also states that these invoices contain evidence of the legal services that were performed pursuant to confidential instructions, which may be reasonably discerned from the invoices. The township further submits that the invoices were provided to it by the affected party in confidence. Alternatively, it submits that the invoices were provided with an implicit understanding that they were communications that were subject to solicitor-client privilege and were not to be disclosed.

[33] In addition, the township submits that the information contained in the legal invoices is not “neutral” as it could directly and indirectly reveal privileged communications concerning the matter before the OMB, for which it sought the advice of the affected party. It also submits that disclosure would permit an inquirer to deduce privileged communications from the affected party based on the services rendered and described in the legal invoices.

[34] Finally, the township submits that disclosure of the amount of fees paid could reasonably permit a person to determine the amount of time spent by the affected party with respect to the matter before the OMB. It states:

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<sup>8</sup> *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

<sup>9</sup> *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

<sup>10</sup> See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

... Given that the [OMB] process is largely open to the public, these citizens are aware of the significant amount of background information with respect to the matter. Using the knowledge they already possess, there is a reasonable possibility that an assiduous inquirer could deduce or otherwise acquire privileged communications such as the instructions provided by the [township] to [the affected party] or other communications concerning the legal services that were rendered.

[35] In his representations, the appellant submits that the legal invoices are not subject to solicitor-client communication privilege. He submits that common law litigation privilege generally comes to an end with the termination of litigation. As such, he submits that as the OMB hearing was terminated, there should be no need not to release these invoices.

[36] In its reply representations, the township submits that the appellant has not rebutted the presumption of privilege. It submits that the information contained in the legal invoices is not "neutral" and therefore subject to solicitor-client privilege. It also submits:

... The invoices contain correspondence from the solicitor that an assiduous inquirer, who is aware of background information available to the public, could use the information requested to deduce or otherwise acquire communications protected by the privilege. [The appellant] has been directly involved with all matters pertaining to this property – from the minor variance, to the OMB appeal, to the site plan agreements ... As such, the invoices contain correspondence from the solicitor that could be used by [the appellant], an assiduous inquirer, to deduce otherwise privileged communication between the township and the solicitor.

[37] In addition, the township submits that common law dictates that solicitor-client communication privilege is permanent and the fact that the litigation is over is not determinative of this issue.

[38] In his sur-reply representations, the appellant makes the following responses. First, he states that he wants to know what the tax payers paid for, as presently it has the appearance of a misappropriation of funds. Second, the appellant submits that the discussion between the township and the affected party are not privileged information as there was no litigation or pending litigation with respect to this matter, and therefore the information contained in the legal invoices are not privileged. Third, he submits:

... The township had no reason or right to be engaged in any strategical discussions with respect to this minor variance. Any strategy to influence the OMB decision to the detriment of the [appellant], or how to further assist the Applicant in his attempt to circumvent the By-Law and avoid an

OMB hearing altogether, must be revealed, as it demonstrates a deliberate effort to interfere with Public process ...

[39] Finally, the appellant argues that the township has branded him an assiduous inquirer because he is aware of some common knowledge information. However, he points out:

... From this, one would conclude that anyone not in possession of these attributes, would be entitled to the release of these documents, as the [township] has offered no other reason as to why a requester would be disentitled under this line of argument ...

[40] Although the affected party provided representations, its representations simply addresses the mandatory third party information at section 10(1). As such, I will discuss the affected party's representations under that heading.

#### *Analysis and findings*

[41] The information at issue in this appeal are the details contained in three legal invoices (excluding the total amount) submitted by the solicitor (the affected party) to its client (the township) and is clearly legal billing information.

[42] The details consist of narrative entries in chronological order, including the date, description of the services provided, the name of the individual within the affected party's firm who provided the services identified in each entry, the number of hours spent, and the total fee for each entry. These amounts are totalled at the end of each invoice.

[43] The appellant argues that the discussions between the township and the affected party are not privileged information as there was no litigation or pending litigation with respect to this matter. He further argues:

... There would be no legal or punitive consequence for the township if the OMB was to overturn the COA decision, so it is difficult to explain or justify how costs on the invoices could be related to providing legal advice with regard to this matter, and therefore would also not include privileged information. If fees were related to discussions with the Applicant, his Agent or representative, that would not qualify as privileged information, as the township is required to maintain a position of neutrality with respect to these discussions ...

[44] Regardless of the categorization of the OMB process, communications between the township and the affected party is covered under the category of solicitor-client communication privilege. Under this heading, the communications do not need to be for litigation purposes. As such, I reject the appellant's argument.



[45] In Order MO-3455, Adjudicator Steven Faughnan states the following:

... [The] Supreme Court of Canada's decision in *Maranda v. Richer*,<sup>11</sup> specifically found that information in legal invoices is presumptively privileged and, therefore, qualifies for exemption unless it can be established that the information is neutral. Accordingly, in these circumstances, the burden of proof does not rest with the town, and the information is exempt unless I find that the information (or any portions of the information) is "neutral." ...

[46] In this case, I find the appellant has not rebutted the presumption. The information at issue are the details contained in the legal invoices. The appellant has not established that these details are "neutral." I find that the appellant's direct involvement and knowledge of the OMB process would qualify him as an "assiduous inquirer" as contemplated in the *Maranda* decision. In particular, I note the appellant has received the total for the three legal invoices, but he wishes to subject the invoices themselves to further scrutiny in order to glean further information about the solicitor-client relationship.

[47] As stated in Order MO-2211, solicitor-client communication privilege is permanent and will outlast the matter for which the advice is sought unless an exception to privilege, such as waiver, is established.

[48] In this circumstance, I am also satisfied that the township has not waived any privilege in the legal invoices for the purposes of the *Act*.

[49] Therefore, I find that the information contained in the legal invoices is solicitor-client privileged information and qualifies for exemption under Branch 1 of section 12.

**B: Did the institution exercise its discretion under section 12? If so, should this office uphold the exercise of discretion?**

[50] The section 12 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, the Commissioner may determine whether the institution failed to do so.

[51] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

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<sup>11</sup> [2003] 3 S.C.R. 193. See also Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); and *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[52] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>12</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>13</sup>

[53] In its representations, the township submits that it had properly exercised its discretion under section 12. It submits that it had not exercised its discretion in bad faith, or for an improper purpose. The township submits that its willingness to disclose the total amount for the legal invoices from the outset demonstrates that it is acting in good faith. It also submits that it considered the appellant's involvement in all municipal/OMB matters with respect to a specified address as part of its consideration to exercise the section 12 discretion.

[54] Although the appellant provided representations, his representations did not address this issue.

[55] Having regard to the circumstances of this appeal, I am satisfied that the township considered a number of relevant factors when determining whether to disclose the information at issue to the appellant, that it did not take into account irrelevant considerations or fail to take into account relevant considerations. I note that the township disclosed the total amount for the legal invoices in an earlier correspondence. I also note that the township has indicated that it would disclose the total amount of each of the three legal invoices. Accordingly, I am satisfied that the township properly exercised its discretion to apply section 12 to the information at issue, and I uphold the township's decision that the information at issue qualify for exemption under section 12 of the *Act*.

**C: Does the mandatory exemption at section 10(1) apply to the information at issue?**

[56] Due to my findings above, it is unnecessary for me to consider whether the information at issue is exempt under section 10(1).

**ORDER:**

1. I uphold the township's decision to deny access to the remaining information in the records, and dismiss this appeal.

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<sup>12</sup> Order MO-1573.

<sup>13</sup> Section 43(2).

Original Signed by: \_\_\_\_\_

Lan An  
Adjudicator

April 12, 2018 \_\_\_\_\_