

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4019

Appeal MA18-00855

Toronto Community Housing Corporation

March 8, 2021

Summary: A reporter sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to information about the Toronto Community Housing Corporation's (TCHC) spending on investigations conducted by external legal counsel. In particular, the appellant sought access to a record listing the law firms' names, invoices dates, and the dollar amount of each invoice received by the TCHC between January 1, 2017 and July 24, 2018. The TCHC denied access to the requested record based on the labour relations and employment records exclusion in section 52(3), and, in the alternative, pursuant to the third party information and solicitor-client privilege exemptions in sections 10(1) and 12 of the *Act*, respectively. In this order, the adjudicator finds that the record is not excluded from the scope of the *Act* under section 52(3), and that it is also not subject to the third party information exemption in section 10(1). She finds that the invoice dates are exempt under section 12, and orders the TCHC to disclose the remaining information to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 12, and 52(3).

Orders and Investigation Reports Considered: Orders PO-2483, PO-2484, PO-3669, and MO-3664.

Cases Considered: *Brockville (City) v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413; *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696; and *Maranda v. Richer* [2003] 3 SCR 193.

OVERVIEW:

[1] A reporter submitted an access request to the Toronto Community Housing Corporation (TCHC) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking information about the TCHC's expenditures on external legal counsel. In particular, the requester initially sought access to:

The sum total TCHC spent on external legal counsel, along with the total broken down by year for 2013, 2014, 2015, 2016, 2017 and 2018 so far.
(Part A)

Any and all invoices for investigations/investigative work conducted by external legal counsel (January 1, 2013 to date of the request). (Part B)

[2] After receiving an interim access decision and fee estimate from the TCHC, the requester narrowed the period of her request to January 1, 2017 to July 24, 2018.

[3] The TCHC issued a revised interim access decision and fee estimate acknowledging the narrowed scope of the request.

[4] The requester paid the fee deposit and the TCHC issued a decision granting partial access to the responsive records. With regard to Part A of the request, the TCHC decided to grant full access to the responsive totals upon receipt of the outstanding balance of the fee. With regard to Part B of the request, the TCHC advised that it was withholding the responsive records in full under sections 7(1) (advice or recommendations), 10(1) (third party information), 11(c) and 11(d) (economic and other interests), 12 (solicitor-client privilege), 14(1) (personal privacy) and the exclusion in section 52(3)3 (labour relations and employment) of the *Act*. As an alternative, the TCHC offered to disclose the sum total of payments made during the responsive period, as well as a breakdown of the amounts applicable to 2017 and 2018.

[5] The requester appealed the TCHC's decision to withhold the records responsive to Part B of her request, thereby becoming the appellant in Appeal MA18-00855.

[6] The appeal was assigned to a mediator to explore the possibility of resolving the issues under dispute. The TCHC advised the mediator that it was no longer relying on sections 11(c) and 11(d) of the *Act* to withhold the information at issue.

[7] The appellant advised the mediator that the TCHC's offer to disclose the total sum payments made for 2017 and 2018 was not a suitable substitute for the requested information. As a "counter-offer" the appellant indicated that she would accept disclosure of a "list of all the responsive invoices by date, with the name of the external counsel law firm billing TCHC and the amount of money invoiced," as opposed to copies of the invoices themselves. In response to the revised scope, the TCHC continued to maintain that the requested information would still be subject to the sections of the *Act* referred to in its decision.

[8] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process. During my inquiry, I invited and received representations, reply, sur-reply, and supplementary representations from the TCHC and the appellant. Given the revised scope of the appellant's request, the TCHC advised that it is only relying on sections 52(3), 10(1) and 12 as a basis for denying access to the requested information.¹ I also invited five law firms that provided legal services to TCHC, and whose billing information is at issue in this appeal, to provide representations on the relevance of the third party exemption under section 10(1) of the *Act* as affected parties. The parties' submissions were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[9] For the reasons that follow, I find that the responsive information is not excluded from the scope of the *Act* under section 52(3), and that it is also not subject to the third party information exemption in section 10(1). I find that the invoice dates are exempt under section 12, and I order the TCHC to disclose the remaining information to the appellant.

RECORD:

[10] The record at issue is a list of external counsel invoice dates, law firm names, and the amounts billed between January 1, 2017 and July 24, 2018.

ISSUES:

- A. Does the labour relations and employment exclusion at section 52(3) exclude the record from the *Act*?
- B. Does the mandatory third party information exemption at section 10(1) apply to the record?
- C. Does the discretionary solicitor-client privilege exemption at section 12 apply to the record?
- D. Did the TCHC exercise its discretion under section 12? If so, should this office uphold that exercise of discretion?

¹ The TCHC reserved the right to provide submissions on sections 7 and 14(1) if the appellant decided to seek access to the entire invoices. The appellant confirmed that she was not seeking access to the invoices; therefore, sections 7 and 14(1) are not at issue in this appeal.

DISCUSSION:

Issue A: Does the labour relations and employment exclusion at section 52(3) exclude the record from the *Act*?

[11] The TCHC relies on the labour relations and employment exclusion at section 52(3) of the *Act* to deny access to the responsive information. This section states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[12] If section 52(3) applies to a record, and none of the exceptions found in section 52(4) apply, then the record is excluded from the scope of the *Act*.

[13] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2, or 3 of this section, it must be reasonable to conclude that there is "*some connection*" between them. The "some connection" standard requires a connection that is relevant to the statutory scheme and purpose, understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations has been found not to meet the "some connection" standard.²

[14] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.

[15] The term "employment of a person" refers to the relationship between an

² Order MO-3664, upheld on judicial review in *Brockville (City) v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413.

employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.

[16] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.

[17] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

Section 52(3)1: court or tribunal proceedings

[18] For section 52(3)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Section 52(3)2: negotiations

[19] For section 52(3)2 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.³

Section 52(3)3: matters in which the institution has an interest

[20] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

³ Orders M-861 and PO-1648.

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

The TCHC's representations⁴

[21] In the non-confidential portion of its submissions,⁵ the TCHC maintains that the legal invoices are excluded from the *Act* under section 52(3) and, as a result, there is "no basis by which the specific information requested from the [invoices] is to be disclosed." In support of its position, the TCHC relies on Order MO-3313 in which Assistant Commissioner Sherry Liang found that the records at issue in the appeal before her were excluded from the *Act* by virtue of section 52(3)3 because they were directly related to the institution's investigations of misconduct by its own employees, and the ensuing labour relations proceedings between the institution and its employees.

[22] In the present appeal, the TCHC submits that the requested information from law firm invoices relates directly to employment matters, because the invoices address human resources and staff matters arising from the relationship between the TCHC and its employees. Given the context in which the invoices were created, the TCHC maintains that they relate to the TCHC's management of its own workforce, and are therefore excluded under section 52(3)3.

[23] In its submissions, the TCHC refers to Order MO-2810, in which the adjudicator found that the total cost of legal services incurred by an institution in its labour negotiations with a professional board was excluded under section 52(3).

[24] The TCHC also refers to Order MO-3664, in which the appellant sought access to the total amounts charged for legal services. In that case, the legal services were rendered while negotiating a collective bargaining agreement between an institution and a professional association. The TCHC notes that in Order MO-3664, the adjudicator found that the second element of the tests under section 52(3) were not established because the "some connection" requirement was not satisfied.

[25] In this appeal, the TCHC maintains that the appellant is seeking access to more information than just the total amount of legal fees (which, the TCHC says, it has already offered). In addition, the TCHC submits that the invoices at issue in Orders MO-3664 and MO-2810 related to negotiations that "broadly and generally related to an institution's entire workforce," whereas the information at issue in this appeal relates to

⁴ This section summarizes both the TCHC's initial and supplementary representations on section 52(3).

⁵ Although I do not refer to the TCHC's confidential submissions in this order, I have taken them into consideration.

the relationship between the TCHC and specific employees and specific workplace conduct issues that necessitated investigations. It claims that records “that relate to identifiable individuals should be viewed through a different lens than the more general invoices” at issue in the two previous decisions.

[26] According to the TCHC, the invoices at issue were prepared at or about the same time that investigations of alleged employee misconduct were conducted. On this basis, it maintains that disclosing the invoices would be “contrary to the purpose of section 52(3)” because it would reveal information about the TCHC’s employment relations with specific members of its own workforce, and its efforts to address employee misconduct.

[27] The TCHC also seeks to distinguish this appeal from those considered in Orders MO-3664 and MO-2810 on the basis that it is relying on sections 52(3)1, 52(3)2, and 52(3)3,⁶ whereas the institutions in the other appeals only relied on section 52(3)2.⁷ It claims that the information is closely related to anticipated proceedings between the TCHC and specific employees regarding their continuing employment with the TCHC, and there is therefore a “strong connection between the invoices and the maintenance and termination of employee relations with the institution.”

[28] The TCHC argues that disclosing the requested information would not achieve the objectives of the *Act*, but would instead allow an assiduous inquirer to connect the disclosed information with other information in order to “uncover information which would not otherwise be publicly available.” It argues that this office “should not condone such requests when the information that is most closely aligned with the legislation’s objectives, and financial accountability, is the total amount of legal fees.”

*The appellant’s representations*⁸

[29] The appellant challenges the TCHC’s reliance on the exclusion in section 52(3). She claims that the invoice-related information that she seeks does not speak to the TCHC’s relationship with its workforce, but rather to public funds spent on the services of particular law firms for “undisclosed investigative work.” The appellant maintains that although the TCHC has said that the invoices address human resources and staff matters arising from its relationship with employees, it has failed to show how the specific information at issue would reveal those matters.

[30] The appellant refers to Order MO-3664, in which the adjudicator determined that records, including law firm invoices, did not relate to the institution’s relations with its workforce, but to expenses arising out of those relations. She argues that the

⁶ I note that the TCHC’s decision letter of November 19, 2018, and the Mediator’s Report of March 5, 2019, refer specifically to the exclusion in section 52(3)3 of the *Act*, and not those in sections 52(3)1 or 52(3)2. However, TCHC relied on all three paragraphs in its representations.

⁷ Despite the TCHC’s representations, both sections 52(3)2 and 52(3)3 were at issue in Order MO-3664.

⁸ This section summarizes both the appellant’s initial and supplementary representations on section 52(3).

information at issue in this appeal should similarly be found to be outside the scope of the section 52(3) exclusions, such that it is subject to the *Act*.

[31] The appellant submits that the factual underpinning of this appeal is not distinct from that in Order MO-3664. She says that in both cases, the institution failed to provide “tangible, concrete evidence to prove ‘some connection’ to labour relations, which must go further than noting the broad stroke relationship between the records and labour relations characterized as ‘tangentially related.’”

[32] The appellant maintains that none of the information sought would reveal the content of the services provided by the external law firms to the TCHC. She also submits that TCHC has failed to provide evidence of how releasing the requested information would have negative effects on labour relations. As a result, she says the following statement by Justice Myers in *Brockville*,⁹ which upheld Order MO-3664 on judicial review, should be applied to this case:

The “some connection” standard still must involve a connection that is relevant to the statutory scheme and objects understood in the proper context. It is very significant that there was no evidence adduced before the adjudicator that would help her understand how the release of the legal figures from negotiations would have any effect on labour relations, let alone an unbalanced or destabilizing effect.

[33] The appellant further submits that the information at issue “needs to be disclosed” to achieve the transparency and accountability objectives of the *Act*. She once again refers to Justice Myers’ comments when dismissing the judicial review application in *Brockville*: “ensuring accountability for public expenditures is a core focus of freedom of information legislation.”

Analysis and findings

[34] As stated above, section 52(3) applies to records collected, prepared, maintained or used by the institution in relation to (1) proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution, (2) negotiations or anticipated negotiations relating to labour relations between the institution and bargaining agents, and (3) meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[35] Although the parties made representations on whether the law firm invoices are excluded pursuant to section 52(3), the invoices are not what is at issue before me. As stated above, the record at issue is a list of law firm names, invoice dates, and invoice amounts. Therefore, bearing in mind the parties’ submissions, I will determine whether this record is excluded under section 52(3). In any event, I would come to the same

⁹ *Brockville (City) v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413.

conclusion with respect to the invoices themselves as I have for the summary record before me.

[36] Above, I set out the three-part tests that must be satisfied in order for each of the section 52(3) exclusions to apply. For the reasons that follow, I find that the second requirement of each test is not met. As all three parts of the tests must be satisfied in order for one of the section 52(3) exclusions to apply, I find that none of the exclusions apply to the record, and it is therefore not excluded from the application of the *Act*.

[37] Part 2 of the section 52(3) tests requires the record to have been collected, prepared, maintained or used "in relation to" the subjects mentioned in paragraphs 1, 2, or 3 section 52(3). To meet this requirement, it must be reasonable to conclude that there is "some connection" between the record and the subject of the exclusions.¹⁰

[38] The "some connection" standard requires a connection that is relevant to the statutory scheme and purpose, understood in their proper context.¹¹ In *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*,¹² the Ontario Divisional Court considered the objects of the provincial equivalent of the *Act*,¹³ together with the application of the research exclusion in section 65(8.1)(a) of that *Act*, and stated as follows:

Section 1 of the *Act* provides that:

The purpose of the Act is to provide a right of access to information under the control of institutions in accordance with the principles that (i) information should be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of government information should be reviewed independently of government.

Exceptions to disclosure for research are therefore to be narrowly construed. The Legislature did not intend to create an exclusion from the *Act* whose reach would be broader than necessary to accomplish these objectives.¹⁴

[39] In Order MO-3664, Adjudicator Justine Wai found that the principles expressed in *Carleton University* are equally applicable to the exclusions in section 52(3).¹⁵ She stated that the section 52(3) exclusions "should not be broader than necessary to accomplish the goals of protecting information relating to the relations between an

¹⁰ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

¹¹ Order MO-3664.

¹² 2018 ONSC 3696 (*Carleton University*).

¹³ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

¹⁴ *Carleton University*, cited above, at para 29.

¹⁵ Specifically, Adjudicator Wai made this finding with respect to paragraphs 2 and 3 of section 52(3).

institution and its workforce.”¹⁶

[40] In dismissing the City of Brockville’s reliance on section 52(3)2 to deny access to law firm invoices, among other records, Adjudicator Wai made the following finding:¹⁷

[... the records were] collected, used or maintained by the city for accounting purposes as they consist of statements of accounts or invoices prepared by arbitrators or legal counsel to charge the city for services rendered. It does not appear that these records have some connection or relate to the negotiations or anticipated negotiations themselves, other than in a tangential way. In light of the purpose of the exclusion to protect “records relating to” an institution’s relations with their own work force, I am not satisfied the collection, preparation, maintenance or use of the accounting or expense records at issue can be considered to have some connection to the labour relations negotiations between the city and the [Brockville Professional Fire Fighters Association] for the purpose of section 52(3)2 of the *Act*.

As noted by the Divisional Court in *Reynolds*,¹⁸ the purpose of section 52(3)2 is to protect the interests of institutions by removing the public right of access to certain records relating to institutions’ relations with their own workforces.^[19] In my view, the records at issue relate not to the city’s relations with its workforce but to expenses arising out of those relations. I find that these are not the types of records that section 52(3)2 is intended to exclude from the *Act*.²⁰ (emphasis added)

[41] Regarding whether this interpretation was consistent with the overall scheme and purpose of the *Act*, Adjudicator Wai made the following finding at paragraph 29 of her decision:

[...] the records at issue relate to the expenditure of public funds to negotiate collective agreements. In my view, this type of information has a strong connection to government accountability, which the Supreme Court of Canada has referred to as an overarching purpose of access legislation.²¹ Accountability for expenditures of public funds requires that

¹⁶ Order MO-3664 at para 28.

¹⁷ Order MO-3664 at paras 26-27.

¹⁸ *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.). (*Reynolds*).

¹⁹ See also *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

²⁰ At para 42, Adjudicator Wai said that for similar reasons, she was not satisfied that the records related to the relations between the city and its workforce for the purpose of section 52(3)3, but that they were only “tangentially connected” to the meetings, discussions, consultations, or communications contemplated by that exclusion.

²¹ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61.

records of the type at issue in this appeal be subject to the *Act*.²²
(emphasis added)

[42] For these reasons, Adjudicator Wai found that the relationship between labour relations and documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations was not sufficient to meet the "some connection" standard required for the exclusions in paragraphs 2 or 3 of section 52(3).²³

[43] I agree with Adjudicator Wai's reasoning and adopt it for the purpose of this appeal. The record at issue in this appeal reveals the costs that were incurred by the TCHC as a result of external legal counsel's investigative work into allegations of TCHC employee misconduct. However, I do not agree with the TCHC's submission that the information "directly relate[s] to employment-related matters" and, specifically, its management of its own workforce. Rather, I find that it relates to expenses incurred by the TCHC in addressing its relations with employees.

[44] In Order MO-3664, the legal invoices at issue were accounting records for the assistance that external legal counsel provided in negotiating a collective bargaining agreement. In this appeal, the record summarizes the TCHC's spending on workplace investigations conducted by external legal counsel in response to an access request under the *Act*. The record uses information from law firm invoices that were generated to request payment for the investigations they conducted for the TCHC.

[45] In my view, the record before me does not bear any more of a connection to the section 52(3) matters than those considered in Order MO-3664. I find that the record relates to legal accounts and expenses that do not have "some connection" to labour or employment matters within the meaning of section 52(3). As a result, I find that the record, which reflects the TCHC's spending on workplace investigations, is merely *tangentially* related to the matters described in paragraphs 1, 2, and 3 of section 52(3), such that the "some connection" requirement in part 2 of the three-part tests is not met.

[46] I am satisfied that this interpretation and finding is consistent with the Divisional Court's decision in *Brockville*, which emphasized the need to consider the statutory scheme and purpose of the *Act* when determining whether there is "some connection" between the record and employment matters. As previously mentioned, one of the

²² See *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139 at para. 44.

²³ As noted above, Order MO-3664 was upheld on judicial review in *Brockville (City) v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413.

purposes of the *Act* is to promote government accountability for expenditures.²⁴

[47] Given my finding that the second requirement of the section 52(3) tests has not been established, it is not necessary for me to consider the other two requirements. I find that none of the section 52(3) exclusions apply, and that the record is within the scope of the *Act*.

[48] Before I conclude this portion of my analysis, I acknowledge that the parties refer to conflicting IPC caselaw regarding whether law firm billing information arising out of employment matters is subject to exclusion under section 52(3).²⁵ As noted in Order PO-3669, IPC adjudicators are not bound by *stare decisis*, the common law doctrine that decision-makers are bound by precedent.²⁶ Adjudicators are free to “depart from earlier interpretations of the same provision, particularly when doing so is required, for example, to clarify its meaning.”²⁷ I prefer the reasoning in the more recent decision of the IPC on this point, Order MO-3664, which the Divisional Court upheld.

[49] Since the record is subject to the *Act*, I will now turn to the exemptions that the TCHC relied on in the alternative to its section 52(3) claim.

Issue B: Does the mandatory third party information exemption at section 10(1) apply to the record?

[50] TCHC relies on section 10(1) as a basis for denying access to the requested record. This section states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

²⁴ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61; *Brockville (City) v Information and Privacy Commissioner of Ontario*, 2020 ONSC 4413; Order PO-2435. See also *Carleton University*, cited above.

²⁵ Or under section 65(6) of the provincial *Act*.

²⁶ See *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at paragraph 14.

²⁷ Order PO-3669. See also Order PO-3617, upheld on judicial review in *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673; Order PO-2976, citing *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 DLR (2nd) 482 (OCA); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 DLR (3d) 388 (Man. CA).

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[51] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.

[52] For section 10(1) to apply, the party resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Representations

The TCHC's representations

[53] The TCHC's initial decision letter indicated that disclosure of the records “could prejudice the position or interests of the third parties [that provided information in confidence] or another person or organization.” It appears, therefore, that the TCHC initially relied on the exemption in section 10(1)(a), in particular. However, in its submissions, the TCHC also addresses section 10(1)(b).

[54] With respect to the first part of the section 10(1) test, the TCHC submits that the information sought by the appellant, namely the total amount of each invoice, law firm name, and invoice dates, is the law firms' commercial and financial information. According to the TCHC, the fees charged represent the buying and selling of the law firms' professional services, and qualify as commercial information under section 10(1). The information also relates to the pricing practices of various law firms for workplace

investigations.

[55] With respect to part 2 of the test, the TCHC maintains that the amounts and dates of the law firm invoices were supplied to the TCHC by each law firm in confidence, because it was expected that the information contained in the invoices would remain confidential.

[56] Regarding the final part of the section 10(1) test, the TCHC says that disclosing the grand total of the invoices would not lead to the harms contemplated by section 10(1), but disclosing the amount and date of each individual invoice will likely result in similar information no longer being supplied to the TCHC, as contemplated by section 10(1)(b). The TCHC also argues that if professional legal service providers' invoices are subject to scrutiny and disclosure by the IPC, then it would significantly prejudice the competitive position or interfere significantly with the ability of law firms to tailor their services for specific institutions or clients on a confidential basis, as contemplated by section 10(1)(a). For these reasons, the TCHC submits that there is a reasonable expectation of the section 10(1) harms occurring if the requested information is disclosed.

The appellant's representations

[57] The appellant agrees that the money invoiced by an external law firm is "commercial and financial information," but argues that the section 10(1) exemption is not established because there is no reasonable expectation of harm with its disclosure.

[58] In the appellant's view, the requested information will not affect a law firm's competitive position or its ability to tailor services, as claimed by the TCHC. She submits that disclosure would not reveal what specific services were rendered or how many hours of legal work went into those services; that information, she concedes, might reveal a firm's billable hour rate alongside the total amount invoiced.

[59] The appellant maintains that the total amount of money invoiced by a law firm on a certain date is "far too generic and benign" to meet the requirements for a reasonable expectation of harm. She also submits that the TCHC has not provided any specific reasons that prove otherwise.

[60] Finally, the appellant states that she has previously received "the same information" that the TCHC is currently "refusing to provide," in the form of redacted invoices from private investigation firms.

Representations of the five affected parties (law firms)²⁸

[61] All of the affected party law firms that were invited to provide representations on

²⁸ This section summarizes the non-confidential portions of the affected parties' submissions. Although not set out in this order, I have considered their entirety of their submissions in reaching my findings.

the applicability of section 10(1) agreed with the TCHC's decision to withhold the information at issue on the basis that its disclosure could prejudice their competitive position, as contemplated by section 10(1)(a).

[62] The first firm maintains that the disclosure of any information relating to the work it conducted in connection with its retainers with TCHC is addressed in its retainer agreement with the TCHC, which states:

This letter contains contractual terms and pricing information which are both proprietary and financial and which we consider to be confidential. This information is not generally available to the public and is provided in confidence with the expectation that it will not be made public or subject to any freedom of information request or disclosure.

[63] That same firm submits that the total cost for one of its invoices was "well above what is often associated with work of this nature," which was reflective of the unique nature of a particular investigation. The firm maintains that if that information is made public without the accompanying contextual information explaining the unique nature of the investigation, it will create a public perception that will significantly prejudice its competitive position. The firm also says that it could suffer economic harm if that information is used by its competitors.

[64] The second firm maintains that disclosure of the requested information would reveal financial and commercial information relating to the sale of legal services to the TCHC pursuant to a retainer agreement. According to the second firm, the appellant seeks information that it provided to the TCHC in confidence when it rendered and delivered its invoices. The firm asserts that the requested information is not subject to negotiation between it and the TCHC, but rather it consists of "specific costs calculated based on time spent [by the firm] on TCHC's legal matters at [the firm's] set billing rates."

[65] In support of its claim that the invoices were provided in confidence, the second firm notes that each invoice was provided in the context of a solicitor-client relationship and is marked "Private & Confidential." According to this law firm, its invoices and the legal costs incurred by the TCHC are not available through public sources, which "further underscores" the parties' reasonable expectation of confidentiality.

[66] Regarding the final element of the section 10(1) test, the second firm maintains that disclosure of the amounts billed to the TCHC could reasonably be expected to prejudice its competitive position in the marketplace. It claims that if the information is released to the public, competitor law firms may "ascertain or readily infer" its billing rates and use that information to "interfere with [its] ability to secure new clients or negotiate new retainer agreements." In support of its position, the firm explains that when law firms participate in a public institution's procurement process, the rates charged are often a "determinative" factor in deciding how a bid is awarded.

[67] The third firm maintains that disclosing its name along with the amounts billed on a particular date would result in an “irreparable breach of confidentiality that could also be exploited by [its] competitors.” This firm maintains that the requested information is financial and commercial information that was supplied to the TCHC in confidence, as required for parts 1 and 2 of the section 10(1) test.

[68] With respect to the third part of the section 10(1) test, the third firm maintains that “two principal and overlapping types of harm” are anticipated to arise if the requested information is disclosed. First, it submits that the information could be exploited by its competitors to its detriment. In support of this position, the firm notes that the legal market is “highly competitive, particularly for the work of a high-profile public body such as the TCHC, and in the growing investigations market.” The firm explains that investigation work is different than other legal work, and therefore the pricing structure is different as well. It submits that investigation work involves a discrete task (conducting an investigation) that is generally more predictable than other types of legal work, such as litigation. Therefore, it claims that disclosing the requested information would provide material information about its pricing for a discrete type of work, which could allow other firms to gain a competitive advantage.

[69] The second harm cited by this firm is the breach of confidentiality. The firm explains that investigations are some of its “most sensitive work,” and it therefore ensures, to the extent that it can, that every aspect of an investigation remains strictly confidential, including the fact that an investigation has taken place at all. The firm submits that disclosure of the name of its client, and the type of work done for a particular client, is addressed in Rule 3 of the Law Society of Ontario’s *Rules of Professional Conduct*,²⁹ which provides that unless the nature of the matter requires disclosure, a lawyer should not disclose that they have been consulted or retained by a person about a particular matter.

[70] The third firm claims that the “harm would be significantly reduced if the matter were already public,” such as invoices relating to public litigation or procurement. However, it maintains that the investigations at issue are not public, and remain confidential. The firm further submits that an individual that has access to a law firm name, the date and amount of an investigation-related invoice may be able to “link the timing and extent of the investigation to an identifiable individual [...] including a specific complaint in that workplace.”

[71] Although not relied on by the TCHC, the third firm also refers to the harm contemplated by section 10(1)(d), which reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

²⁹ Rules of Professional Conduct, Section 3.3 Confidentiality.

supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

Reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute.

[72] The firm maintains that disclosing the requested information would also give rise to this category of harm. In support of its position, the firm explains that the TCHC, as an employer, is required to conduct investigations pursuant to section 32.0.7(1)(a) of the *Occupational Health and Safety Act*³⁰ and, in doing so, must appoint either an internal or external investigator. The firm submits that by sharing pertinent details about its investigations, including the mere existence of an investigation and its timing, disclosure risks the harm contemplated by section 10(1)(d).

[73] The fourth firm submits that its invoices are commercial information and were provided to the TCHC based on the understanding that they would be retained in confidence.

[74] The fifth firm objects to the disclosure of the “names of [its] lawyers, their fee rates, or the time spent on the matters described in [their] invoices,” on the basis that its staffing and pricing information is proprietary and its disclosure would be detrimental to its business, as it may be used by its competitors.

The TCHC’s reply representations

[75] The TCHC objects to the appellant’s description of the information at issue as being “generic and benign.” It submits that a law firm’s ability to tailor its rates and offer discounts to clients in a confidential manner allows it to attract and retain institutional clients, and to prevent competitors from attempting to adjust their own prices to underbid it on future opportunities.

[76] The TCHC maintains that the legal field in Toronto is “highly competitive” and the competitive position of each law firm would be compromised by disclosing the requested pricing information, especially in situations where competitors bid for a contract.

The appellant’s sur-reply representations

[77] The appellant concedes that the affected parties’ competitive positions may be prejudiced if their *entire* invoices were disclosed; however, she maintains that she is not seeking access to the details about the work each law firm did for the TCHC, and therefore says that their arguments do not “hold weight.” She maintains that competing law firms will not be able to undercut each other without knowing the nature of the

³⁰ RSO 1990 c01.

work that was conducted, and how many hours were billed. She says this is true even with the knowledge that the work billed for was investigative in nature, per her request.

[78] Accordingly, the appellant submits that the TCHC and affected parties' representations have failed to demonstrate that disclosing the requested information would give rise to a reasonable expectation of harm under section 10(1).

Analysis and findings

[79] As set out above, in order for the mandatory third party information exemption to apply, all three aspects of the section 10(1) test must be established by the parties resisting disclosure.³¹ I will begin my analysis by considering the third requirement of the section 10(1) test, which requires those parties to establish that disclosure will give rise to a reasonable expectation of one of the harms in paragraph (a), (b), (c), or (d) of section 10(1) occurring.

Part 3: harms

[80] Parties resisting disclosure must establish a risk of one of the harms in sections 10(1)(a) to (d) resulting from disclosure that is well beyond the merely possible or speculative. They are required to provide detailed evidence to demonstrate the harm, but they do not need to prove that disclosure will in fact result in such harm.³² How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³³

[81] In the circumstances of this appeal, the TCHC and affected party law firms have relied on the harms in sections 10(1)(a), (b), and (d), which are set out above. For the reasons that follow, I find that there is no reasonable expectation any of these harms resulting from disclosure of the requested record.

[82] In considering the parties' submissions, I accept the evidence before me indicating that the legal market is "highly competitive, particularly for the work of a high-profile public body such as the TCHC." I also accept that investigation work is distinct from other forms of legal work, as it involves a discrete task that, as one party described, is generally more predictable than other types of legal work, such as litigation. It follows, therefore, that the costs associated with investigation work would, too, be more predictable than those associated with other legal services.

[83] However, I am not persuaded that disclosing a record listing firm names, invoice amounts, and invoice dates would provide "material information" about the affected

³¹ Order 36 and P-373.

³² *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

³³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

parties' pricing structure for investigative work, nor am I satisfied that anyone could "ascertain or readily infer" a firm's billing rate or structure based on the disclosure of that information.

[84] While investigations may involve predictable stages and typically take a similar amount of time, there is evidence before me to suggest that in certain circumstances, an investigation may be significantly more involved than usual. Therefore, in my view, additional information revealing, for example, the scope of work, hours billed, number and seniority of staff assigned to a given file, etc., would be required for any material information about a firm's billing structure to be revealed.

[85] I am also not persuaded that disclosing the record could reasonably be expected to prejudice the affected parties' ability to attract and retain institutional clients by tailoring their rates and offering discounts to clients in a confidential manner, as argued by the TCHC. The IPC has long held that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its competitive position.³⁴

[86] As a result, I find that it is not reasonable to expect that competitors could use the record at issue, containing firm names, invoice amounts, and invoice dates, on its own in order to gain a competitive advantage over the affected parties, or to otherwise prejudice the competitive position of the affected parties, as described by section 10(1)(a).

[87] I am also not satisfied that the evidence establishes a reasonable risk of the harm described in section 10(1)(b) resulting from disclosure. In my view, the TCHC's submissions in support of this harm are speculative and not supported by standard practice in the legal industry. If the TCHC continues to retain external legal counsel and enjoy the benefit of their services, it is reasonable to expect that the retained law firms will continue to provide invoices accounting for their services. Therefore, I find that it is not realistic or reasonable to expect that similar information would not be provided to the TCHC in the future, as contemplated by section 10(1)(b).

[88] Although section 10(1)(d) was raised by one of the affected parties, there is insufficient evidence before me to establish that record could reasonably be expected to "reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute" as required by that section. I find that the harm described in this section has not been established.

[89] Finally, one affected party raised the issue of confidentiality as addressed in Rule 3.3 of the Law Society of Ontario's *Rules of Professional Conduct*, which provides that unless the nature of the matter requires disclosure, a lawyer should not disclose that

³⁴ Orders PO-2435, MO-3905 and others.

they have been consulted or retained by a person about a particular matter. In my view, this more aptly speaks to the issue of solicitor-client privilege, which I consider at Issue C, below. I also find that the third firm's submission that an individual may be able to link the responsive information to a particular investigation and an identifiable individual is speculative, and not supported based on the information at issue and the totality of the evidence before me.

[90] As stated above, to meet part 3 of the section 10(1) test, the parties resisting disclosure must provide sufficient evidence to establish a "reasonable expectation of harm." The TCHC and affected parties argued that disclosure could reasonably be expected to result in the harms envisioned in sections 10(1)(a), (b) and (d). However, I have found that the evidence fails to establish that disclosing the responsive record could reasonably be expected to result in any of those harms occurring. Therefore, I find that the third requirement of the 3-part test under section 10(1) has not been met.

[91] As a result of this finding, and because all three parts of the section 10(1) test for exemption must be established for the exemption to apply, it is not necessary for me to consider the first and second requirements of the section 10(1) test. I find that the section 10(1) exemption does not apply to the record sought by the appellant.

Issue C: Does the discretionary solicitor-client privilege exemption at section 12 apply to the record?

[92] As an alternative to its section 52(3) and section 10(1) claims, the TCHC also maintains that the record is exempt under the solicitor-client privilege exemption in section 12, which states:

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.

[93] 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.

[94] The Index of Records provided to this office by the TCHC indicates that the TCHC relies on the common law solicitor-client communication and litigation privilege under Branch 1, as well as the statutory litigation privilege under Branch 2.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[96] 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. The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter. 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.

[97] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.

[98] 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. The privilege does not cover communications between a solicitor and a party on the other side of a transaction.

Litigation privilege

[99] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications. It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel. The litigation must be ongoing or reasonably contemplated.

Loss of privilege

Waiver

[100] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.

[101] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.

[102] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege. However, waiver may not apply where the record is disclosed to another party

that has a common interest with the disclosing party.

Termination of litigation

[103] Common law litigation privilege generally comes to an end with the termination of litigation.

Branch 2: statutory privilege

[104] Branch 2 is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[105] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Statutory litigation privilege

[106] This privilege applies to records prepared by or for counsel employed or retained by an institution “in contemplation of or for use in litigation.” It does not apply to records created outside of the “zone of privacy” intended to be protected by the litigation privilege, such as communications between opposing counsel.

[107] The statutory litigation privilege in section 12 protects records prepared for use in the mediation or settlement of litigation.

[108] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 12.

Representations

The TCHC’s representations

[109] The TCHC maintains that both Branch 1 and 2 of the section 12 exemption apply to the content of the invoices, and that it has not directly or indirectly waived that privilege.

[110] With regard to Branch 1, the TCHC notes that in Order MO-3253-I, the IPC considered whether legal invoices that were prepared by a school board’s legal counsel were covered by solicitor-client communication privilege. In that order, Senior Adjudicator Gillian Shaw relied on the proposition from *Maranda v Richer (Maranda)*,³⁵

³⁵ [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

that legal billing information is presumptively privileged unless the information is “neutral” and does not directly or indirectly reveal privileged communications.

[111] The TCHC submits that in order to determine whether the presumption of privilege has been rebutted, this office must consider the following questions:

- i. Is there any reasonable possibility that disclosure of the amount of fees paid will directly or indirectly reveal any communication protected by the privilege?
- ii. Could an assiduous inquirer, aware of the background information, use the information request to deduce or otherwise acquire privileged communications?

[112] The TCHC acknowledges that the IPC has held that the total dollar figure of invoices may be “neutral information,” such that it is not exempt under section 12. However, it notes that this office has also held that other information in legal invoices, including dates, are exempt. For example, the TCHC refers to Order PO-2484, in which then Senior Adjudicator John Higgins found that the total dollar figure in each of the invoices was “neutral information” that ought to be disclosed, but that the other information in the invoices, including the dates of the invoices, was exempt under Branch 1 of section 19.

[113] Referring back to Order MO-3253-I, the TCHC says that Senior Adjudicator Shaw found that the service descriptions, dates, and amounts in the legal invoices were presumptively privileged. Although she found that the presumption had been rebutted with respect to the invoice amounts, she determined that the descriptions and dates conveyed privileged information that may lead an observer to conclude, based on dates, that legal advice was sought related to a specific issue.³⁶

[114] In the context of this appeal, the TCHC submits that the appellant has previously obtained information through an access request, court records, and interviews with former TCHC employees. Therefore, the TCHC maintains that there is a reasonable possibility that disclosing the amount of the fees paid to specific law firms, and the timing of those invoices, will directly or indirectly reveal privileged information including “the timing of when specific external legal advice [was] sought by the institution, and the discretionary decision that the [TCHC] maintains to engage external law firms to investigate employee related issues.” The TCHC further submits that the appellant will be able to use her “background knowledge” to draw inferences about the activities that certain law firms were retained to perform, and ascertain the circumstances in which the TCHC elects to engage external counsel to conduct investigations.

[115] With respect to Branch 2, the TCHC submits that the information at issue might enable an assiduous inquirer to “reconstruct some of the issues that the [TCHC] was

Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), [2005] O.J. No. 941 (C.A.).

³⁶ Order MO-3253-I paras 44-45.

seeking legal advice about.” The TCHC believes that the appellant may be able to glean information prepared by the law firms for the TCHC in order to provide legal advice, and that the appellant may then use that information to “assemble evidence regarding, among other things, the timing that the institution sought or gave the legal advice.”

[116] In support of its position, the TCHC refers to *Maranda*, in which it says the Supreme Court of Canada held that the amount of lawyers’ fees is generally protected by solicitor-client privilege. The Court also held that the scope of the privilege is broad, and that “fine judgments” should not be made about whether or not information can be gleaned from specifics about law firm billings.

The appellant’s representations

[117] The appellant points to TCHC’s acknowledgement that the IPC has previously held that the dollar figure of legal invoices is “neutral information” that ought to be disclosed. She maintains that the TCHC has only provided speculative evidence regarding the possibility that disclosure will directly or indirectly reveal aspects of the solicitor-client privileged relationship.

[118] In response to the TCHC’s submissions regarding her work as a journalist, she maintains that:

the fact that [she has] previously connected publicly available information with the information [she] received through an access request proves nothing other than the fact that [she has] done her job by providing the public with information about how their tax dollars are being used by a publicly funded institution.

According to the appellant, there is nothing “nefarious” about that work. In her view, any inferences drawn from court records was the result of the TCHC “deciding to include information in records that are a matter of public record and accessible to anyone.”

[119] The appellant questions the TCHC’s submission regarding the “background information” that she allegedly possesses. She claims that she is left to speculate that the TCHC believes she will make inferences from the record at issue in conjunction with information already in the public realm. She says that if that is the case, then:

... the inference that the TCHC refers to could not possibly reveal information protected by solicitor-client privilege, because the ‘background information’ (eg. court records, news articles) is already a part of the public record and therefore any privilege that may or may not have been attached to it has already been waived.

[120] The appellant maintains that she is not looking to “glean further information about the solicitor-client relationship.” Rather, she seeks fact-specific information about

the firms retained and the amounts paid by the TCHC. She reiterates that she is not seeking access to details of the services rendered by those law firms.

The TCHC's reply representations

[121] In response to the appellant's submissions, the TCHC maintains that it does not have to prove that the appellant's intentions are to obtain solicitor-client privileged information. Rather, the TCHC submits that the exemption only requires it to establish that disclosure may give the appellant an opportunity to infer privileged information. It notes that the IPC has held that this could include leading "an observer to conclude, based on dates, that legal advice was sought related to a specific issue."³⁷

[122] The TCHC refers to Order PO-2484, in which the IPC found that disclosing the name of a law firm and the date of an invoice may have allowed the appellant, who in that case "was aware of the history of the litigation," to infer privileged information.

[123] In the context of this appeal, the TCHC submits that the background information known to the appellant "includes factual material obtained through prior access requests and other public documents." The TCHC says that there is a reasonable possibility of the appellant using the requested information to deduce "the timing that the [TCHC] sought privileged advice with respect to certain matters," due to her existing knowledge of matters involving the TCHC, including legal proceedings.

[124] In response to the appellant's claim that any background information she possesses is in the public record, the TCHC refers to Order PO-2484, in which it says the adjudicator held that the ability to link background knowledge to information acquired through an access request is "a very significant factor justifying a more restrictive approach."

[125] The appellant's sur-reply representations did not address section 12.

Analysis and findings

Solicitor-client communication privilege (Branch 1 and 2)

[126] The TCHC has withheld the responsive record - a list of law firm names, invoice dates, and invoice amounts - pursuant to the common law and statutory solicitor-client communication and litigation privileges under Branches 1 and 2 of section 12. I will address the communication privilege found in Branches 1 and 2 first.

[127] The IPC has considered whether legal billing information, such as that at issue in this appeal, is subject to solicitor-client communication privilege in a number of past

³⁷ The TCHC refers to Order MO-3664, para 61, in which the adjudicator quotes from Interim Order MO-3253-I, para 44.

orders.³⁸ In doing so, adjudicators apply the principle established in *Maranda*,³⁹ in which the Supreme Court of Canada found that information in legal invoices is presumptively privileged and, therefore, qualifies for exemption unless it is established that the information is “neutral” and does not directly or indirectly reveal privileged communications.

[128] The TCHC maintains that the information at issue cannot be categorized as “neutral” when considered together with the appellant’s “background knowledge.” It argues that when considered together with the factual material the appellant has obtained through prior access requests and other public documents, the record may allow the appellant to infer privileged information.

[129] The TCHC refers to Order PO-2484 in support of this position; however, the facts in Order PO-2484 are distinguishable from those in this appeal. In Order PO-2484, the appellant was opposing counsel in the proceedings to which the legal invoices at issue were related. In my view, that role would have provided them with far greater “background knowledge” than what the appellant in this appeal is able to glean through access requests and the public record.

[130] Regarding whether law firm names are subject to solicitor-client communication privilege, former Senior Adjudicator John Higgins made the following finding in Order PO-2483:

[...] the existence of a solicitor-client relationship between an identified client and lawyer normally does not qualify for solicitor-client communication privilege because it does not consist of or reveal a “communication between solicitor and client” [see *Douglas v. Small* [1989] B.C.J. No. 1197 (S.C.), *Bank of Nova Scotia v. Simonot*, [1991] S.J. No. 606 (Q.B.), and J. Sopinka et al., *The Law of Evidence in Canada* (Markham: Butterworth’s, 1992), p. 639]. In my view, the fact that law firms are identified in the records does not add any weight to the [institution’s] privilege arguments in the circumstances of this appeal.

[131] I agree with the above. In my view, in the circumstances of this appeal and based on the evidence before me, disclosing the law firm names at issue cannot reasonably be expected to reveal, or allow accurate inferences to be made about, privileged communications between the TCHC and its external legal counsel. The appellant is already aware of the nature of the services provided, which were investigations into human resource matters. Accordingly, I find that the appellant has established that the law firms’ names are “neutral” information, such that the presumption of privilege is rebutted with respect to them.

³⁸ See, for example, Orders MO-3664, MO-3455, PO-2483, PO-2484, and PO-2548. See also *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779 (Div. Ct.).

³⁹ *Maranda v Richer*, [2003] 3 S.C.R. 193.

[132] With respect to the invoice amounts, I note that previous orders have held that the legal fees paid by an institution would not allow for an assiduous requester or knowledgeable counsel to ascertain information subject to solicitor-client communication privilege.⁴⁰ In addition, past orders have found that the total amount of legal fees paid by an institution together with the name of the law firm that charged those fees is neutral information and is not privileged.⁴¹

[133] I accept that there may be instances in which a requester's familiarity with or knowledge of legal proceedings will support a finding that disclosure of certain legal billing information could reasonably be expected to reveal privileged information; however, I am not satisfied that such is the case in this appeal. Although the appellant seeks the total for each invoice, that dollar figure does not describe the type of work done in narrative terms, nor does it reveal fees for each itemized "type" of work or disbursements. In my view, disclosing the invoice totals together with the law firms' names would not provide privileged information about the legal representation provided to the TCHC. I find that it is not reasonable to expect that the "specifics of law firm billings" or other privileged communications could be ascertained by disclosing these two types of information to the appellant.

[134] Therefore, I find that there is no reasonable possibility that any confidential solicitor-client communications could be revealed by disclosing the invoice amounts together with the law firms' names or that this information could be connected with other available information in order to draw accurate inferences about privileged communications. Applying the principles in *Maranda*, I find that the invoice amounts are neutral information such that the presumption of privilege is rebutted.

[135] In contrast, I find that the invoice dates are exempt from disclosure under the solicitor-client communication privilege in Branch 1 and 2 of section 12. I agree with the TCHC that an assiduous inquirer may be able to conclude, based on invoice dates and other available information (including law firm names and invoice amounts), that legal advice was sought and received relating to specific issues. Accordingly, I find that the invoice dates are not neutral, and the presumption of privilege over that information remains.

Litigation privilege (Branch 1 and 2)

[136] The TCHC also relies on the common law and statutory litigation privilege under section 12. While I accept that the legal invoices may have been prepared in association with work conducted in anticipation of litigation, this does not, in my view, lead to the conclusion that they were prepared in contemplation of or for use in litigation.⁴² Rather, I find that the information at issue was prepared for the *ancillary* purpose of accounting for the legal services provided to the TCHC by external legal counsel, and not for the

⁴⁰ See for example Orders PO-2483 and PO-2548-F.

⁴¹ See for example Order MO-3729.

⁴² See Orders PO-2483 and PO-2484.

dominant purposed of reasonably contemplated litigation or for use in litigation. Therefore, I find that the common law litigation privilege in Branch 1, and the statutory litigation privilege in Branch 2 do not apply to the requested information.

Waiver

[137] I find no evidence demonstrating that the solicitor-client communication privilege attaching to the invoice dates has been waived by the TCHC. I will, therefore, uphold the TCHC's decision to withhold that information under section 12, subject to my review of the TCHC's exercise of discretion, below.

Issue D: Did the TCHC exercise its discretion under section 12? If so, should this office uphold that exercise of discretion?

[138] 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. In this review, I consider only the exercise of TCHC's discretion in relation to the information that I found exempt under section 12, above.

[139] 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
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[140] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴³ This office may not, however, substitute its own discretion for that of the institution.⁴⁴

[141] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁵

- 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

⁴³ Order MO-1573.

⁴⁴ Section 43(2).

⁴⁵ Orders P-344 and MO-1573.

- 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.

[142] The TCHC maintains that it offered to disclose the total amount of legal fees paid over the period in question in order to facilitate transparency. It submits that this demonstrates a good faith exercise of discretion on its behalf. In support of its position, the TCHC notes that in Order MO-2900, the adjudicator determined that there was no bad faith on the part of the institution because it had offered to disclose the amounts of legal invoices and the total legal fees charged. The adjudicator was satisfied that the institution had provided an appropriate amount of transparency, while still protecting information that was subject to an exemption.

[143] The appellant's submissions do not speak to the TCHC's exercise of discretion.

[144] Based on the evidence before me, I find that the TCHC did not improperly exercise its discretion in withholding certain information under section 12. I find that the TCHC exercised its discretion in good faith and took into account appropriate considerations, including the importance of solicitor-client privilege as recognized by the courts,⁴⁶ the appellant's right of access, and the purposes of the *Act*. The evidence does not suggest that the TCHC took into account irrelevant considerations, or sought to withhold the information in bad faith or for an improper purpose. Therefore, I will uphold its exercise of discretion to withhold information that I have found to be exempt under section 12 of the *Act*.

⁴⁶ This is alluded to in the TCHC's representations under section 12, in particular. See paragraph 116.

ORDER:

1. I uphold the TCHC's decision to withhold the legal invoice dates under section 12.
2. I order the TCHC to disclose the remainder of the record to the appellant by **April 12, 2021** but not before **April 6, 2021**.
3. In order to verify compliance with this order, I reserve the right to require the TCHC to provide me with a copy of the information that I have ordered disclosed in order provision 2.
4. The timelines in this order may be extended if the TCHC is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by: _____

Jaime Cardy
Adjudicator

_____ March 8, 2021