ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-007

September 28, 2010

COUNTY OF THORHILD NO. 7

Case File Number F4979

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the County of Thorhild No. 7 (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to a lawyer's billings to the Public Body in relation to a judicial review.

In its response, the Public Body told the Applicant the total amount paid to the lawyer in relation to the judicial review for the requested periods, but declined to give the Applicant access to the invoices on the basis of privilege. Section 27(1)(a) of the FOIP Act authorizes the head of a public body to withhold information that is subject to legal privilege.

At the inquiry, the Public Body raised the issue of whether the information it had withheld was also subject to section 27(1)(b) (information prepared by or for a lawyer of a public body in relation to a matter involving the provision of legal services). The Adjudicator added the issue to the inquiry.

The Adjudicator found that the lawyers' billings were subject to a presumption of solicitor-client privilege. The Adjudicator found that this presumption was rebutted in relation to the firm letterhead on each invoice, the "re" line of each invoice, the dates of the invoices, the aggregate total line of each invoice and the contact information of the lawyer. She found that the presumption had not been rebutted in relation to descriptions of any legal advice or services provided, the times and dates of any services, the

breakdown of the fees, or the identities of any service providers, and that information of this kind was subject to section 27(1)(a).

The Adjudicator found that section 27(1)(b) did not apply to the information that she had found was not subject to privilege.

In reviewing the head of the Public Body's exercise of discretion to withhold information under a discretionary exception, the Adjudicator considered *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, a recent decision of the Supreme Court of Canada. She decided that as information had been withheld under section 27(1)(a) because it is subject to solicitor-client privilege, that that fact alone established discretion had been exercised appropriately.

In the event that she was wrong regarding the interpretation of section 27(1)(b), she considered whether the Public Body had established that it had properly exercised discretion in withholding information under this provision. She noted that the head of a Public Body must detail the reasons for the exercise of discretion, and explain how the interests protected by section 27(1)(b) outweigh the right of access in the particular circumstances, which the head of the Public Body had not done in this case.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 27, 72;

Authorities Cited: AB: Orders 96-017, 99-022. F2007-025, F2008-021, F2008-028,

Cases Cited: *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O. J. 1494 (ON. Div. Ct.); *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O. J. 941 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O. J. No. 2769 (ON Div. Ct.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B. C. J. 1093; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] On April 14, 2009, the Applicant, the Concerned Citizens of Thorhild County, made a request to the County of Thorhild No. 7 (the Public Body) for access to records containing the following information:

> 1) [A named lawyer's] billings specifically related to the Waste Management judicial review,
> - Dates, amounts, exclude privileged information.
> - April 2008 to April 2009

[para 2] In a letter dated May 6, 2009, the Public Body stated the following:

> Professional services provided by our lawyers are protected by solicitor client privileges. We are unable to provide you with the copies of invoices but are providing you with the total amount that was charged by [the named lawyer] of Brownlee LLP, pertaining to the judicial review. The total is $61,354.05 from the period April 2008 – April 2009.

[para 3] On May 27, 2009, the Applicant requested review by the Commissioner of the Public Body's response to her access request. In the request for review, it stated:

> I am aware that billings may contain sensitive legal information and respect solicitor client privilege. However, I do not believe that dates of service, billings for hours of services and billings for expenses, constitute privilege. These are the items that I am specifically asking for and not the advice legal counsel is giving to the County council members.
>
> It is also my understanding that the County is supposed to provide me with reasons & pertinent sections of the FOIP Act that pertain to my request for disclosure. These have not been provided to me.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The notice of inquiry prepared by this office states that the issue for inquiry is the following:

> Did the Public Body properly apply section 27(1)(a) (privileged information) to the records / information?

[para 5] However, in its submissions, the Public Body made arguments in relation to the application of section 27(1)(b) to the information in the records, as well as the application of section 27(1)(a). As the Public Body's letter of May 6, 2009 does not indicate that information was withheld from the records for any other reason than that it was privileged, I requested clarification from the head of the Public Body as to what provisions of the FOIP Act had been applied to withhold information from the records.

[para 6] Counsel for the Public Body explained in the Public Body's rebuttal submissions that he had sought clarification from the head of the Public Body and was told that the head had withheld the information in the records at issue pursuant to both sections 27(1)(a) and 27(1)(b) of the FOIP Act. I have therefore added the issue of whether the Public Body properly applied section 27(1)(b) to withhold the information in the records to the inquiry.

II. RECORDS AT ISSUE

[para 7] Copies of bills of account created by Brownlee LLP relating to the Waste Management Judicial Review from April 2008 – April 2009.

III. ISSUES

Issue A: Did the Public Body properly apply section 27(1)(a) (privileged information) to the information in the records?

Issue B: Did the Public Body properly apply section 27(1)(b)(iii) (information prepared by or for a lawyer of a public body in relation to a matter involving the provision of legal services)?

IV. DISCUSSION OF ISSUES

[para 8] The Applicant argues that not all information on a lawyer's bill of account is subject to solicitor-client privilege. Specifically, it argues that disclosing the date legal advice or service was provided, a breakdown of the fees and disbursements, and the total amount billed would not disclose information subject to solicitor-client privilege. In its rebuttal submissions, it provided copies of invoices it had received from other law firms to demonstrate that disclosing the information on these kinds of invoices would not disclose information subject to solicitor-client privilege.

[para 9] The Public Body relies on *Maranda v. Richer*, [2003] 3 S.C.R. 193, a decision of the Supreme Court of Canada, which holds that lawyer's bills of account are subject to a presumption of solicitor-client privilege. The Public Body also refers to *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O.J. 1494 (Ont. Div. Ct.) and *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O. J. 941 (ON CA), as well as Order F2007-025 in its submissions. The position of the Public Body is that disclosing all the information in the bills of account, other than the aggregate totals of the bills to which it referred in its letter of May 6, 2009, would either have the effect of revealing information that is subject to solicitor-client privilege or could be used to discover such information, and is therefore subject to section 27(1)(a).

[para 10] Section 27(1)(a) authorizes the head of a Public Body to withhold information from records if that information is subject to privilege. This provision states:

> *27(1) The head of a public body may refuse to disclose to an Applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*

[para 11] In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, the Supreme Court of Canada noted that the confidentiality associated with communications between a solicitor and client must be "as close to absolute as possible". The Court said at paragraph 9:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

> [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> (R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in Lavallee, Rackel & Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)

> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised…

[para 12] In *Maranda*, (*supra*) a decision of the Supreme Court of Canada, the Court determined that the information contained in a lawyer's bill of account may have the effect of revealing information that is subject to solicitor-client privilege. In that decision, Lebel J., writing for the majority, concluded:

> However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, §14.53):
>
> The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.
>
> While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for resolving disputes that arise in that respect (*Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 75; *By-law respecting accounting and trust accounts of advocates*, R.R.Q. 1981, c. B-1, r. 3; *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03 and 3.08.05; *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates*, (1994) 126 O.G. II, 4691). The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.
>
> In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5.

[para 13] In other words, the Supreme Court of Canada found that there is a presumption that the information contained in lawyers' bills of account is subject to solicitor-client privilege because they arise from the solicitor-client relationship.

[para 14] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O. J. 1494 (ON. Div. Ct.) Carnwath J. speaking for the Divisional Court noted that *Maranda* addresses the situation in which a search warrant was executed at a lawyer's office as part of a criminal investigation. The Court also noted that the presumption of privilege is rebuttable and said:

> It can be argued that the conclusions of LeBel J. in *Maranda* must be confined to situations where the information sought is as a result of an application for search and seizure by the Crown in pursuing a criminal prosecution. It can also be argued that LeBel J.'s conclusions extend to every instance where there is a solicitor-client relationship. However, in either instance, I find it open to the court to rebut the presumption identified by LeBel J. and to conclude, in certain circumstances, that the gross amount of a lawyer's account is neutral information not subject to solicitor-client privilege.

The Divisional Court upheld a decision of the Ontario Office of the Information and Privacy Commissioner to order disclosure of the global amounts of fees paid to four lawyers for legal services provided to Paul Bernardo, as it determined that disclosing this information would not have the effect of disclosing information subject to solicitor-client privilege.

[para 15] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O. J. 941 (ON CA), the Ontario Court of Appeal dismissed the Attorney General's appeal of the Divisional Court's decision. The Court adopted the following approach to determining when legal fees are protected by privilege:

> We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda v. LeBlanc, supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.
>
> *Maranda* arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of that relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.
>
> While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

> The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* 2003 BCCA 278, 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.
>
> We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.
>
> The Divisional Court did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to client/solicitor privilege.

[para 16] Similarly, in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, the Ontario Divisional Court upheld the decision of the Office of the Ontario Information and Privacy Commissioner to order disclosure of the aggregate totals on legal bills paid by the Ministry of Community and Social Services in relation to two civil actions.

[para 17] The case law establishes that lawyers' bills of account are presumed to be subject to solicitor-client privilege. However, the presumption is rebuttable. In an access request, the burden lies on the applicant to rebut the presumption. As in Order F2007-025, to determine whether the presumption is rebutted in this case, I will apply the test adopted by the British Columbia Court of Appeal in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B.C.J. 1093, and adopted by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General)* (*supra*): Is there a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege? If so, then the information is protected by solicitor-client privilege.

[para 18] While the burden of proof lies on the Applicant, as I noted in Order F2007-025, an applicant is at a disadvantage in making arguments or presenting evidence in relation to records he or she is unable to see. I will therefore consider the evidence of the bills of account to determine whether the information the Applicant requested could enable it to acquire communications protected by privilege or is neutral information that would not.

[para 19] In essence, the Applicant argues that the lawyers' bills of account do not contain privileged information. The Applicant is unable to provide evidence or specific argument as to why it believes that the information in the bills of account is not privileged, as the Applicant does not know what the information is. The Public Body argues that the Applicant has not rebutted the presumption that disclosing the information in the bills of account would not reveal privileged information.

[para 20] As noted above, an applicant is rarely in a position to make specific arguments in favour of disclosure of records as an applicant is unaware of their contents. I will therefore consider the evidence before me in determining whether the Applicant has rebutted the presumption in relation to the information in the records.

[para 21] The bills of account contain the following kinds of information:

i. A description of the legal advice or service provided
ii. The date, or time and date, the legal advice or service was provided
iii. A breakdown of the fees
iv. The identity of the service provider
v. The Public Body's name and address
vi. The aggregate total amount billed for the period
vii. A "re" line regarding the subject of the invoice
viii. The name of the law firm
ix. The date of the invoice

[para 22] I find that disclosing the description of the legal advice or service provided would enable the "assiduous inquirer" envisioned by the Ontario and British Columbia Courts of Appeal to determine what legal advice was provided and therefore, to learn communications protected by solicitor-client privilege.

[para 23] Disclosing the dates, or times and dates, that legal advice or services were provided could also enable an individual to ascertain privileged communications. Hypothetically, knowing the number of hours spent by a lawyer on a certain date combined with disbursal amount information could enable an individual to determine that information such as whether an expert had been retained. Alternatively, learning the dates that advice was given, coupled with knowledge of key events in litigation, could enable an individual to determine the subject matter of legal advice.

[para 24] Similarly, a breakdown of each fee charged could also reveal the legal advice or services provided, as this breakdown may indicate whether the advice or service was provided by a lawyer or by someone acting on behalf of the lawyer. The position or occupation of the person providing the service can often reveal the nature of the service. Fee breakdowns can also indicate the amounts of disbursements, from which an individual could determine what the disbursement was for.

[para 25] Disclosing the identity of the person providing advice could also reveal the nature of the advice provided. For example, if a particular lawyer is known for handling certain types of matters, the lawyer's name on the file could reveal the nature of the advice given. If a paralegal provides service, this information may indicate the nature of the service or the document prepared.

[para 26] Having reviewed the information in the bills of account, I am satisfied that disclosing a description of the legal advice or service provided, the date of the service, or time and date of the service, a breakdown of the fees and the identity of the service providers, would, in this case, reveal information that would enable the Applicant to learn privileged communications.

[para 27] However, I am also satisfied that disclosing the firm letterhead, the aggregate total from each invoice, the Public Body's name and address information, the "re" line, the contact information of the lawyer, and the date of each invoice would not enable the Applicant to acquire privileged communications. Disclosing this information from the records would reveal only that a particular lawyer from a law firm billed the Public Body, the aggregate totals billed for services on each invoice, and the dates of the invoices.

[para 28] While in some situations this kind of information could potentially reveal privileged information, I find that it does not do so in the circumstances of this case. That a particular lawyer of Brownlee LLP was retained by the Public Body was already known to the Applicant, as the law firm, at the direction of its client, represented the Public Body at a judicial review referred to in the access request. The Public Body also confirmed these facts in its response of May 6, 2009. In addition, the information appearing in the "re" line on the invoices is also referred to in the Public Body's correspondence of May 6, 2009, and therefore any privilege applying to this information has been effectively waived. Further, that the Public Body retained the law firm and its purpose in doing so was confirmed by the Public Body when it responded to the Applicant's access request. As the Applicant will not receive information relating to the dates of service on the bills of account, any services provided, or any individuals providing those services, the total aggregate amount billed by the law firm on each bill and the date of the invoice remain neutral information from which the Applicant will be unable to glean information about advice received from counsel or the legal strategies employed by the Public Body. I therefore find that there is no reasonable possibility that disclosure of the total aggregate amount of the fees billed on the invoices and the dates of the invoices will directly or indirectly reveal any communication protected by the privilege.

[para 29] For the reasons above, I find that while the Public Body properly withheld any information describing legal services, fees charged for services, the dates of any services, and the identities of any service providers, on the basis that it would enable the Applicant to learn privileged communications, it was wrong to apply section 27(1)(a) to the following information:

- the firm letterhead on each invoice

- the Public Body's name and address
- the "re" line of each invoice
- the dates of the invoices
- aggregate total on each invoice
- the contact information of the lawyer referred to in the Public Body's correspondence

Exercise of discretion

[para 30] Section 27(1)(a) states that the head of a public body *may* refuse to disclose any information that is subject to any legal privilege, including solicitor-client privilege. As a result, section 27(1)(a) is discretionary, given that the head is not required by the FOIP Act to withhold information subject to legal privilege.

[para 31] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of the Ontario Information and Privacy Commissioner to review the way in which the head of a public body exercises discretion to withhold information in response to an access request.

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:
>
> > ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original]
>
> Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

[para 32] In relation to the application of discretion to withhold information subject to solicitor-client privilege, the Court considered that the public policy in keeping this privilege "as close to absolute as possible" is sufficient to demonstrate that discretion has been exercised appropriately. In other words, if information is withheld under section 27(1)(a) because it is subject to solicitor-client privilege, then that is reason enough to establish that discretion was exercised appropriately. With solicitor-client privilege, the purpose for applying discretion to withhold the information is inherent in the privilege itself.

[para 33] As the Public Body withheld descriptions of information that could reveal either legal advice or services provided, the date or time of any services, a breakdown of the fees, and the identity of any service providers under section 27(1)(a) because this information would reveal information subject to solicitor-client privilege, and because of the public policy interests in protecting information that is subject to solicitor-client privilege, I find that the head's exercise of discretion to apply section 27(1)(a) to that information is appropriate.

Issue B: Did the Public Body properly apply section 27(1)(b)(iii) (information prepared by or for a lawyer of a public body in relation to a matter involving the provision of legal services)?

[para 34] As I have found that section 27(1)(a) does not apply to the firm letterhead on each invoice, the "re" line of each invoice, the Public Body's name and address, the dates of the invoices, aggregate total of each invoice, or to the contact information of the lawyer referred to in the Public Body's correspondence, I will consider whether section 27(1)(b) applies to this information.

[para 35] The Public Body argues that all the information in a lawyer's bill of account is information "prepared by a lawyer in relation to providing legal services." The Public Body relies on Order 99-022, in which the former Commissioner said:

> The information describing the lawyer's legal services related to the Applicant clearly meets all the criteria of section 26(1)(b) [now section 27(1)(b)], in that it is information prepared by a lawyer of a public body in relation to a matter involving the provision of legal services. Therefore, I find that the Public Body correctly applied section 26(1)(b) [now section 27(1)(b)] to that information. [my emphasis]

[para 36] Section 27(1)(b) states:

> *27(1) The head of a public body may refuse to disclose to an Applicant*
>
> *(b) information prepared by or for*
> *(i) the Minister of Justice and Attorney General,*
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services…*

[para 37] In Order F2008-021, I interpreted section 27(1)(b) in the following way:

> In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the *Canadian Oxford Dictionary* defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.
>
> It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a

> minimum, for the use of, the provider of legal services, who is, in this case, an Alberta Justice lawyer.

For section 27(1)(b) to apply to information, the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body.

[para 38] In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) precludes information that is not substantive, such as dates, letterhead, and names and business contact information. He said at paragraphs 156 – 158 of that order:

> I find that the substantive information on pages 305-311 was prepared for a lawyer of a public body in relation to a matter involving the provision of legal services, and therefore falls within section 27(1)(b)(iii). However, this is not because the information was sent to a solicitor, as the fact that information was destined to go to someone does not necessarily mean that it was prepared by or for that person. Under other sections of the Act, it has been concluded that, for a record or information to be created "by or for" a person, the record or information must be created "by or on behalf of" that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q) of the Act; Order 2000-003 at para. 66, discussing what is now section 4(1)(j); Order 2008-008 at para. 41, discussing section 24(1)(a)]. Here, I find that the substantive content of pages 305-311 was prepared "for" the lawyer who received the information because the covering letter indicates that the sender of the information was specifically asked to provide input.
>
> However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) - which applies more broadly to information that was prepared rather that the substance of deliberations or advice under sections 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.
>
> Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, I do not consider the information to be "prepared". In my view, the word "prepared" implies that there must be a greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere. There is presumably substantive content in the attachments to some of the e-mails, but that content is not actually revealed in the e-mails. I also find that the last five lines of page 352 and the top half of page 351 do not fall under section 27(1)(b) because, although the information is substantive, it is not in relation to legal services. The content expressly refers to "policy" objectives.

[para 39] Applying the reasoning in Orders 99-022, F2008-021, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal

services. Information sent to an agent or lawyer of the public body in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer. It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

[para 40] Although section 27(1)(b) may apply in some instances to records that are subject to solicitor-client privilege, it does not follow that section 27(1)(b) applies to all records that are subject to solicitor-client privilege. Determining whether section 27(1)(b) applies does not involve consideration of whether information is subject to privilege, but involves inquiring whether a person listed in subclauses 27(1)(b)(i – iii) prepared the record, and whether the record was prepared for the purpose of providing legal services. On a plain reading, section 27(1)(b) is not intended to protect privileged information, as that is the purpose of section 27(1)(a).

[para 41] Applying the reasoning in Order F2008-021 and in F2008-028, I find that section 27(1)(b) does not apply to the firm letterhead on each invoice, the "re" line of each invoice, the dates of the invoices, the aggregate total line of each invoice, or to the contact information of the lawyer referred to in the Public Body's correspondence. (This result is not inconsistent with Order 99-022, which referred only to the descriptions of legal services, which I have already found are subject to section 27(1)(a).) I make this finding on the basis that this information is not substantive, and does not reveal details about the legal services provided and was not prepared not for the purpose of providing legal services.

[para 42] If I am wrong regarding the scope of section 27(1)(b), and this provision applies to all information appearing on a record created by or on behalf of a lawyer relating in some way to legal services, then I will consider whether the Public Body properly exercised its discretion in withholding the firm letterhead on each invoice, the "re" line of each invoice, the Public Body's name and address, the dates of the invoices, the aggregate total line of each invoice, and to the contact information of the lawyer referred to in the Public Body's correspondence under section 27(1)(b).

Exercise of Discretion

[para 43] The May 6, 2009 response by the head of the Public Body makes reference only to privilege as a reason for withholding the information in the records, and does not refer to section 27(1)(b).

[para 44] The head of the Public Body provided an affidavit to explain how discretion was exercised to withhold all the information in the records. This affidavit states:

> In considering the Request for Access to Information, the County considered the principles of the FOIP Act in providing the public a right of access to a public body's records and the general accountability of the public body, and weighted this against the County's right to solicitor-client privilege in this highly contentious matter in the County. In the end the County exercised its discretion to deny access to the Solicitor's Accounts themselves, but did disclose to the Applicant the total amount of these accounts in an effort to provide transparency and accountability to the County's expenditure of its public funds.

This affidavit does not indicate that any information was withheld under section 27(1)(b), much less address factors that would be relevant to the application of section 27(1)(b).

[para 45] In *Ontario (Public Safety and Security)*, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.

> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 46] The Supreme Court of Canada confirmed the authority of the Information Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

In addition, the fact that the Court remitted the issue of whether the Head of the Public Body had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 47] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 48] In Order 96-017, the former Commissioner reviewed the law regarding a Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."

> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
>
> …
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception. In my view, this approach is similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 49] Unlike the other discretionary exceptions in the FOIP Act, section 27 does not refer to harm that would likely result to any aspect of a public body's operations or to a recognized head of public interest if information is disclosed. In the case of section 27(1)(a), the potential harm to the public body's operations or to a public interest can be presumed by the very fact that the provision addresses privileged information. Section 27(1)(a) is clearly intended to protect the various public interests the concept of privilege is intended to protect, by incorporation of the term "legal privilege." However, sections 27(1)(b) and 27(1)(c) do not appear to contemplate any potential harms, either to the operations of a public body or to a public interest. Moreover, it is unclear how disclosing

information falling under either of these subsections, if the information is not privileged and already subject to section 27(1)(a) in any event, could result in harm to a public body or public interest that would outweigh the public interest in disclosure that the FOIP Act is intended to protect.

[para 50] The head of the Public Body's decision of May 6, 2009 does not meet the requirements of section 12 of the FOIP Act, as it does not refer to the section of the FOIP Act on which the head relied to withhold information. Moreover, as it is clear from the letter that the head was prepared to disclose some of the information in the responsive records, given that the response contains this information, it is unclear why the head did not grant access to this information. However, the letter does refer to the reason for the head's decision to withhold information; specifically, that the head considered the information to be privileged.

[para 51] Assuming, for the sake of argument, that section 27(1)(b) authorizes the head of a public body to withhold information that is not privileged on the basis that it was created by a lawyer for the Public Body, it is difficult to imagine a situation in which considerations in favor of withholding information of this kind would outweigh the public right of access. Certainly in this case, where the head of the Public Body has already revealed the name of the lawyer and the law firm, the general subject of the services provided by the lawyer, and the total amount of all legal fees paid in relation to the matter, it is difficult to say that the head had a relevant purpose in exercising discretion to withhold the firm letterhead on each invoice, the "re" line of each invoice, the Public Body's name and address, and the contact information of the lawyer referred to in the Public Body's correspondence under section 27(1)(b). In addition, given that disclosing the dates of the invoices and the aggregate total of each invoice would not have the effect of disclosing privileged information, it is unclear why the dates of the invoices, (as opposed to the dates legal services were provided, which I have found are properly withheld under section 27(1)(a)), and the totals were withheld. In addition, it is unclear how withholding any of this information would outweigh the Applicant's right of access.

[para 52] Had I found section 27(1)(b) to apply to the name of the lawyer and the law firm, the general subject of the services provided by the lawyer, the dates of the invoices, and the total amount of all legal fees paid in relation to the matter, I would have ordered the head of the Public Body to reconsider the decision to withhold this information. Specifically, I would have ordered the head to take into account that the information was not subject to privilege, that some of this information had been provided to the Applicant in the response of May 6, 2009, and that it has not been demonstrated that any harm to the public body's operations or to the public interest would be likely to result if the information were disclosed.

[para 53] If, as I have found, section 27(1)(b) applies to non-privileged, substantive information prepared by or on behalf of a lawyer of a public body", so that the agent or lawyer may provide legal services, the circumstances in which the interests protected by section 27(1)(b) would outweigh the right of access and its attendant principles of

accountability and transparency, are equally difficult to imagine. That is to say, it is unclear what interest there is in protecting information prepared by or on behalf of a lawyer that is not already protected by the other discretionary sections in the FOIP Act. At the very least, to establish that discretion was applied appropriately to withhold information under section 27(1)(b), it would be necessary for the head of a public body to detail the reasons for the exercise of the discretion, and explain how the interests protected by section 27(1)(b) outweigh the right of access in the particular circumstances.

V. ORDER

[para 54] I make this Order under section 72 of the Act.

[para 55] I confirm the decision of the head of the Public Body to withhold the following kinds of information from the records at issue:

- descriptions of any legal advice or services provided
- the times and dates of any services
- the breakdown of the fees
- the identities of service providers

[para 56] I order the head of the Public Body to give the Applicant access to the following information:

- the firm letterhead on each invoice
- the Public Body's name and address information
- the "re" line of each invoice
- the dates of the invoices
- aggregate total line of each invoice
- the contact information of the lawyer referred to in the Public Body's correspondence of May 6, 2009

[para 57] I further order the head of the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with the Order.

_____

Teresa Cunningham
Adjudicator