ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-08

March 31, 2015

CALGARY POLICE SERVICE

Case File Number F6900

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Summary: The Criminal Trial Lawyers' Association (the Applicant) made a request to the Calgary Police Service (the Public Body) for access to the following kinds of recorded information:

1. Money spent in 2011 to lawyers other than in-house counsel

2. Money spent by the Public Body on in-house counsel, excluding any counsel who work on litigation or claims involving "police vehicles"

3. Money spent on in-house counsel who do FOIP Act work

The Public Body denied access to the information on the basis that the information was subject to solicitor-client privilege. However, the Public Body stated at the inquiry that responsive records do not exist, but acknowledged that if it were found that solicitor-client privilege did not attach to the information requested by the Applicant, it had a duty under section 10(2) of the FOIP Act to create responsive records.

The Adjudicator determined that it was necessary for the Public Body to respond to the Applicant's access request, either by creating records, or by producing severed records that would enable the Applicant to determine the amounts specified in its access request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 27, 72

Authorities Cited: AB: F2004-017, F2007-014, F2010-007

Cases Cited: *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941; *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Stevens v. Canada (Prime Minister)*, [1998] 4 FCR 89; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815*; Re Kaiser*, [2012] O.J. No. 5601; *R. v. Cunningham*, [2010] 1 SCR 331

I. BACKGROUND

[para 1] On December 17, 2012, the Criminal Trial Lawyers' Association (the Applicant) made a request for access to the Calgary Police Service (the Public Body) for the following information:

1. Money spent in 2011 to lawyers other than in-house counsel

2. Money spent by the Public Body on in-house counsel, not including any counsel who work on litigation or claims involving "police vehicles"

3. Money spent on in-house counsel who do FOIP Act work

[para 2] The Public Body responded to the access request on February 6, 2013. The Public Body denied the access request on the basis of privilege.

[para 3] The Applicant requested review of the Public Body's decision to deny access to the records it had requested.

[para 4] The Commissioner authorized an investigator to attempt to mediate the issues between the Applicant and the Public Body. As mediation was unsuccessful, the matter was scheduled for written inquiry.

[para 5] In its initial submissions, the Public Body stated that it could not provide the records for inquiry, or an index, as a record responsive to the Applicant's access request did not exist. However, the Public Body stated:

> There are not any records in existence. The CTLA seeks certain information, namely three different dollar figures, relating to money spent on various lawyers. The CPS agrees that if that information is not privileged, then the CPS will have an obligation under s. 10(2) of the FOIPP Act to create a record for the CTLA that is responsive to the information request. However, as of this date, that record has not been created since CPS is asserting privilege over that information.

[para 6] Section 10 of the FOIP Act, to which the Public Body refers, states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

II. ISSUE

Issue A: Did the Public Body properly apply section 27(1)(a) of the Act to withhold information from the Applicant?

III. DISCUSSION OF ISSUE

[para 7] Section 27(1)(a) of the FOIP Act authorizes a public body to withhold privileged information from an applicant. It 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 8] The Public Body relies on solicitor-client privilege to refuse to create a record for the Applicant under section 10(2).

[para 9] The test to determine whether information is subject to solicitor-client privilege is set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In *Solosky*, the Court said:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[para 10] The Court in *Solosky* is clear that not every communication between a solicitor and another party is legal advice or subject to solicitor-client privilege. Rather, solicitor-client privilege will attach to confidential communications between a legal advisor, acting in that capacity, and a client, where the communication is made for the purpose of giving or seeking legal advice. It will only be communications that meet all three requirements of this test that are subject to solicitor-client privilege.

[para 11] The Applicant argues:

> The CTLA agrees that the controlling authority in relation to issues of privilege about fees and disbursements billed by a lawyer to a client is *Maranda v. Richer*, 2003 SCC 67 [TAB 1, Written Submissions of the Calgary Police Service]. However, it must be borne in mind that *Maranda* dealt with a search warrant executed on a lawyer's office looking for evidence pertaining to money laundering by a client and it pertained to fees and disbursements charges by a specific lawyer for a specific client.

[para 12] The Public Body states:

> The CTLA raised in its Request for Inquiry the "assiduous inquirer test". We are aware of a line of relatively recent Alberta privacy decisions that have departed from *Maranda* and the prior Alberta privacy decisions that have purported to determine that no privilege attaches if there is no reasonable possibility that an assiduous inquirer, aware of the 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. In effect, the assiduous inquirer test is a test to determine whether information is neutral or not. This approach misunderstands *Maranda* and effectively adopts the position of the dissent (neutral fee information is not privileged) rather than the majority (neutral fee information is privileged). As explained above, it is not sufficient to demonstrate, as the assiduous inquiry tests seeks to do, that the information is neutral. *Maranda* assumed the information in that case was neutral and still found it to be privileged. To escape the general rule in *Maranda* something more is needed to negate that privilege, such [as] public safety concerns.

[para 13] In its rebuttal submissions, the Public Body argues:

> With respect to paragraphs 7 to 11 of the CTLA Rebuttal, the primary response of the CPS to the OIPC orders cited by the CTLA is contained in paragraphs 9 to 20 of the Written Submissions of the CPS. That line of OIPC orders followed a line of Ontario cases that is demonstrably wrong and irreconcilable with *Maranda*, which is the binding authority in Alberta.
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> The orders do not convincingly distinguish the previous line of OIPC orders that held such information to be privileged. 4 For example, Order F2007-014 says that the previous line of OIPC orders did not have the benefit of *Maranda* and the Ontario cases (which is in error, as F2004-017 was decided after *Maranda*, and explicitly followed*). Stevens v. Canada (Prime Minister)* [1998] 4 FC 89 (FCA) [Tab 9] which was approved of in *Maranda*. The other orders repeat the same errors. In Order F2010-007, the adjudicator merely adopted her earlier mistaken approach in Order F2007-014, at para 17. In Order F2013-13, the same adjudicator repeats the error with little discussion, at para 206. The mistaken line of OIPC orders, and the Ontario cases, compound the error by plucking and applying the "assiduous inquirer" test from a BC Court of Appeal decision that pre-dated, and was overruled in effect by, *Maranda: Legal Services Society v British Columbia (Information and Privacy Commissioner)* (2003), 14 BCLR (4th) 67.
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> With respect to paragraph 12 of the CTLA Rebuttal, the CPS denies the hyperbole that it engaged in wild speculation with no foundation, but the assiduous inquirer test does call upon the parties to speculate about what a fictitious inquirer who is assiduous could deduce from the *prima facie* privileged information if it was combined with background information available to the public. It is just that very sort of inquiry that the *Maranda* said should not be done: the difficulties inherent in determining whether information contained in lawyers' bills of accounts is actually neutral presents too great a risk to solicitor-client privilege to be pursued, so all that information is deemed privileged unless an exception to privilege applies, such as, it is submitted, public safety concerns or the right to make full answer and defence. Nonetheless, were it to be applied, an

> assiduous inquirer would gain access to how big a legal war chest the CPS has, and gain insight into how often and how much access the CPS has to legal advice. The CPS is entitled to have all communication with a view to obtaining legal advice kept confidential. Further, the concern is not fanciful, as the CTLA, including its counsel who is an active member of the CTLA himself, is a frequent litigator against police services on a broad range of issues.

The global amounts of the payments

[para 14] I will begin my analysis by noting that the Public Body's submissions respond to the suggestion of the Applicant, quoted above, that "the controlling authority in relation to issues of privilege about fees and disbursements billed by a lawyer to a client is *Maranda v. Richer,* [2003] 3 S.C.R. 193.

[para 15] I accept the proposition that *Maranda* represents the law in relation to lawyers' billings; however, I note that the Applicant's access request is not for lawyers' billings, but for the sums of the Public Body's payments in relation to billings. Moreover, as will be discussed below, I do not agree with the Public Body's reading of *Maranda*.

[para 16] The Applicant does not request any specific information about the details of the work that was done to generate the billings, beyond, for the latter two of the three elements of the request, tying the payments to particular broad categories of work. As the Public Body said itself, records containing those global payment amounts do not exist and would have to be generated electronically from other sources.

[para 17] I recognize that, at least for the first of the three items in the request, the global amounts of fees paid may be derived from adding up payments or billings for work on individual files or topics. However, unless all these payments are in relation to a single matter or file, and the subject matter of the file is also provided, one cannot determine from a response to the first part of the request, the total amount of fees paid in respect of any *individual* matter. Further, it seems likely this global amount could relate to work done on multiple files or topics by many lawyers or law firms. Thus, even if the total amount of a fee for a particular matter could be said to attract the privilege (and, as discussed below, cases ruling on these situations have found this not to be the case), the amounts requested by the Applicant are more general.

[para 18] With respect to the latter two elements of the request, the salaries of in-house counsel, insofar as they could be associated with categories of work, would at most reveal money spent in relation to particular job descriptions. This would reveal nothing about the content of individual files or topics on which work was performed other than that for the third item, the content related in some way to the administration of the FOIP Act. (It may be possible that in-house counsel has some form of record keeping for work on individual matters that is equivalent to billing, but even so, the cumulative amounts would not reveal substantive information. The most that would be disclosed is that in-house lawyers working files relating to matters under the FOIP Act on average earn a particular amount of money, and that in-house lawyers *not* working on particular kinds of files earn another amount.)

[para 19] It follows that the global amounts of the payments could not possibly be subject to solicitor-client privilege, because they reveal nothing about the particulars of matters about which advice is sought or given (other than that some of the matters may relate generally to matters arising under the "FOIP" Act). The global amounts will not reveal communications between solicitor and client, the nature of any advice, or from whom advice is sought or given, and therefore cannot be said to violate the confidentiality of the solicitor-client relationship. As the Supreme Court of Canada said in *Maranda*, solicitor-client privilege "covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions, or representation in the courts" (para 30). Providing information that, for example, in-house lawyers are paid a particular cumulative amount for FOIP work, does not compromise the ability of the Public Body to freely communicate to these lawyers the particular matters about which it seeks FOIP advice, or to receive such particular advice. While the payment for the services may be an element of the solicitor-client relationship, the level of generality of that information in the present case, particularly as the payment is not associated with any one lawyer, could not inhibit or compromise, or reveal anything about, the individual transactions, and therefore could not be said to violate the confidentiality of the solicitor-client relationship.

[para 20] With regard to what could be derived from the requested information, the Public Body asserts:

> … were it [the assiduous inquirer test] to be applied, an assiduous inquirer would gain access to how big a legal war chest the CPS has, and gain insight into how often and how much access the CPS has to legal advice. The CPS is entitled to have all communication with a view to obtaining legal advice kept confidential.

[para 21] I do not accept the Public Body's assertions.

[para 22] An assiduous inquirer could not determine the size of the Public Body's legal war chest from the information requested by the Applicant. The Applicant has not requested the total amounts of legal fees the Public Body has spent in a year, but only a portion of them. As a result, the total amount of fees the Public Body paid in 2011 would remain unknown to it if the Public Body produces the requested information. In addition, even if the Applicant had requested the total amount of legal fees paid in 2011, this amount would not reveal how much the Public Body was able to, or was prepared to spend on legal fees in that year, or any other year.

[para 23] In addition, the information the Applicant has requested would not assist it to learn how often the Public Body seeks legal advice, as the Applicant has not requested records that would provide a breakdown of the services provided, the number of services provided, the number of lawyers who provide services, or the amount of time spent providing the services. The Applicant has not requested information regarding the number of matters for which legal advice was sought, or the rates charged by counsel.

Without any of this information, it would be impossible to determine how often the Public Body has sought legal advice.

[para 24] The Public Body neither suggests how, nor asserts that, information regarding its legal war chest or frequency with which it consults legal counsel, if disclosed, could affect its relationship with its lawyers or its freedom to communicate with them for the purposes of obtaining advice. (Nor could it, as the Applicant has not requested the names of lawyers or law firms, and no one lawyer or law firm is associated with the information that is the subject of the access request.)

[para 25] Further, information about the size of the Public Body's legal war chest or the number of times it consults counsel in a year cannot be construed as a "communication with a view to obtaining legal advice", within the terms of *Solosky*, *supra*. While individual billings and payments for them might be regarded as revealing communications within the terms of the *Solosky* test, the same cannot be said of global amounts of payments (or numbers of consultations) which are never communicated in the context of any individual case. Thus such information cannot be said to fall within the scope of "communication with a view to obtaining legal advice" which the Public Body says it is entitled to keep confidential. Assuming that the Public Body will respond to the Applicant under section 10(2) of the FOIP Act by creating a record from a record in electronic form, the record that will be created will be generated by the Public Body outside the solicitor-client relationship and will contain new information that was never exchanged in the course of such a relationship.

[para 26] For all the foregoing reasons, I find that if the Public Body were to generate records in order to respond to the Applicant's access request, such records would not be subject to solicitor-client privilege.

Individual records of billings and/or payments

[para 27] Apart from generated records, however, individual records that would, cumulatively, answer the questions (with unresponsive information appropriately severed) would themselves be responsive, in that the Applicant could add up the amounts in the three categories to determine the amounts he specified in his access request.

[para 28] I am told by the Public Body that records responsive to the Applicant's access request do not exist; however, it appears possible that records that would serve to respond to the Applicant's access request could be in the custody or control of the Public Body. It seems likely that bills of account submitted by external counsel, as well as corresponding individual payments, exist, or at least existed at one time. (As noted, there might also be some form of equivalent "billing" records kept by in-house counsel.) Given that the financial parts of any such records would be responsive to the Applicant's request in the sense that as the Applicant could add the financial amounts to determine the amounts it is seeking, I will also consider whether such records, if any such exist, could, once the unresponsive parts are removed, be regarded as subject to solicitor-client privilege.

[para 29] The Public Body's arguments indicate that it interprets the decision of the Supreme Court in *Maranda* as confirming that solicitor-client privilege applies to lawyers' bills of account, subject only to exceptions involving "public safety concerns or the right to make full answer and defence". The Public Body rejects the view, expressed in Order F2007-014 and F2010-007 of this office, as well as in a line of post-*Maranda* cases of the Ontario Court of Appeal, that hold that while the privilege applies to lawyers' bills of account presumptively or "as a general rule", the privilege will not apply where the party seeking the information can show that disclosure of information contained in a bill of account would not violate the privilege or the confidentiality of the solicitor-client relationship.

[para 30] In my view, the recent decisions of this office, to which the Public Body refers, and the Ontario Court of Appeal, do not misinterpret the *Maranda* decision.

[para 31] I agree with the Public Body that the Supreme Court in *Maranda* held that in the context of criminal cases, and more broadly, lawyers' bills of account arise out of and are connected to the solicitor-client relationship and are "as a general rule" one of the elements of that relationship. However, the Court itself described this general rule that the amount of fees, in the context of a search by police of a lawyer's office, is protected by solicitor-client privilege as a "presumption", using this descriptor three times in setting out (in para 33) the rule it was laying down. These statements included the following:

> 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[1], *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. [my emphasis]

The Court went on to state that the onus is on the party seeking disclosure of information (in that case the Crown, in the context of the defence's application to quash a search warrant of a lawyer's office) to persuade the judge that disclosure of the information would not violate the confidentiality of the solicitor-client relationship. It was held that the information had to remain confidential because the Crown, in the case under consideration, had neither alleged nor proved that there would be no such violation.

[para 32] The necessary implication of this discussion, as recognized by recent decisions of this office as well as by the Ontario Court of Appeal, is that where it is shown that disclosure would not violate the confidentiality of the solicitor-client relationship, lawyers' bills of account will not be covered by the privilege. Whatever the circumstances under which the rule applies[2], the rule is not that the privilege necessarily applies, but that it *presumptively* applies. Like all presumptions, this one

[1] Here, the Court may have been talking about the values as they arise in criminal cases, as it had described earlier in its para 29.

[2] Possibly the Court meant it to apply only to criminal cases or even more narrowly, to searches of lawyers' offices.

can be rebutted. The presumption of application can be overcome where it is shown by the party seeking the information that disclosure will not violate the confidentiality of the relationship. (The Public Body seems to agree at one point in its submission that the privilege for bills of account can be overridden; however, it substitutes the circumstances under which records that are *clearly* privileged will be disclosed – as set out by the Supreme Court in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815 at paragraph 53 for the circumstances set out by the Supreme Court in *Maranda* under which a *presumption of* privilege will be overcome.)

[para 33] In its submission the Public Body also asserts that the Supreme Court in *Maranda* "approved" *Stevens v Canada (Prime Minister)*, [1998] 4 FCR 89 (FCA). The Public Body argues that Order F2004-017, a decision of this office, correctly followed *Stevens*, but that subsequent orders of this office have failed to adequately distinguish F2004-017.

[para 34] In *Stevens*, the Federal Court of Appeal found solicitor-client privilege applied to legal bills of account as these reveal communications between a solicitor and a client made for the giving or seeking of legal advice.

[para 35] While the Court in *Maranda* referred to *Stevens*, the Court did not, in fact, approve or follow that case. Rather, the reference to *Stevens* is made in the context of the Court's review of two opposing points of view with respect to bills of account. *Stevens* is mentioned as the key in a line of cases holding that the amount of fees had to be protected by the privilege.[3] The opposing line of cases to which the Court also referred in its discussion (at para 25) were to the effect that "access to information [is] permitted as a general rule, unless the context showed that disclosing it would violate privilege". (Under the latter view, payments of fees are "facts", separate, as such, from the privileged elements of the solicitor-client communication. The latter view also holds that disclosure cannot in any event jeopardize the purpose of the privilege.)

[para 36] After setting out these two opposing points of view, the Supreme Court went on to discuss why it rejected the latter one, particularly in the context of a criminal case because criminal cases involve "the fundamental values and institutions of criminal law and procedure", and also because the Court regarded billing for fees as an element of the solicitor-client relationship (rather than an unconnected fact).

[para 37] However, contrary to what the Public Body asserts in its submission, the Court's solution was not to adopt the *Stevens* approach. Rather, it was to find a middle way between these contrasting viewpoints by, in essence, reversing the presumption adopted by the 'pro-disclosure' line of cases, such that there is, in the Court's words, "a presumption that such information falls *prima facie* within the privileged category".

[3] The *Steven*s case, in any event, talked about the "narrative portions" of bills of account. The Federal Court of Appeal did not say exactly what that means, but it may be the case that it was referring to more information than merely the amounts of the fees.

[para 38] The foregoing is the interpretation of *Maranda* adopted by the Ontario Court of Appeal in the cases with which the Public Body disagrees. The Court of Appeal supplements *Maranda* by setting out the circumstances (derived from a pre-*Maranda* decision of the British Columbia Court of Appeal) in which the presumption of applicability of the privilege will not be overcome: where "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".

[para 39] The first such case was *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941. In this case the Ontario Court of Appeal determined that disclosing only the aggregate amounts of the amounts billed by Paul Bernardo's legal defense team would not reveal communications subject to solicitor-client privilege. The Court said:

> *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.
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> 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.
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> 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), 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*.

[para 40] In *Re Kaiser*, [2012] O.J. No. 5601, the Ontario Court of Appeal applied its reasoning in *Ontario (Ministry of the Attorney General)* to determine whether information regarding legal fees was subject to solicitor-client privilege. It reviewed the case law and stated:

> This Court applied the "presumptive privilege" approach introduced in *Maranda* outside the criminal/search warrant context in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, (2005), 251 D.L.R. (4th) 65. There, the issue was whether the total amount of fees paid by the Attorney General to outside counsel in two high-profile criminal matters was privileged, and therefore exempt from disclosure under the *Freedom of Information and Protection of Personal Privacy Act*, R.S.O. 1990, c. F. 31. The Information and Privacy Commissioner concluded that this information was not privileged, and ordered the Attorney General to disclose it. The Attorney General disagreed and challenged the production

> order in court. The Commissioner's order to disclose the information was upheld in the Divisional Court and in this Court on the basis of the *Maranda* analysis. At para. 9 of its reasons, this Court said:
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> > Assuming that [*Maranda*] ... 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.* [Emphasis added.]

[para 41] I turn finally to the Public Body's assertion that the foregoing interpretations are wrong because the Supreme Court in *Maranda* assumed that the information at issue was neutral, yet found it to be privileged. Contrary to the Public Body's assertion, the assumption made by the Court (at para 24) is not that the information was neutral but that the information sought was limited to the gross amount of the fees. Indeed, the Court noted that the information might not be neutral because an intelligent investigator might be able to "reconstruct some of the client's comings and goings" from the information. The Court said:

> The question has never before been submitted to this Court in these terms. To answer it, I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. I have some doubts on that point, however, after reading the list of documents sought. The documents and information sought, in particular concerning Mr. Maranda's disbursement accounts, might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. In any event, I shall examine the issue in the terms defined by the parties, who assume that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements billed by Mr. Maranda to his client, Mr. Charron.

Ultimately, the Court applied the privilege in *Maranda* because the Crown had not alleged or demonstrated that disclosure of the gross amount of the lawyer's billings would not violate the privilege that protected the lawyer's professional relationship with his client.

[para 42] I note too that there is a significant difference between the circumstances in *Maranda* and those before me. In *Maranda*, the Crown was not seeking partial or severed records; rather, the warrant described certain records in their entirety, even though the Crown claimed to want only portions of them. It is not possible in those circumstances to sever non-neutral information, as it is under the FOIP Act. Under section 6 of the FOIP Act, information that is subject to an exception may be severed and the remaining neutral information provided to an applicant.

[para 43] Further, I note that in *R. v. Cunningham*, [2010] 1 SCR 331, the Supreme Court of Canada described *Maranda* as a case in which it had held that "in the context of a law office search, an accused's financial and fee information may be privileged" , and continued as follows:

> […] In *Maranda*, the Court was concerned that fee information, specifically the amount of fees and disbursements, may appear to be "neutral" when in fact disclosure of the information could be prejudicial to the accused. In particular, LeBel J. stated that fee information
>
> > might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. [para. 24]
>
> This information could then be used to charge and/or convict the client. Because of the potentially detrimental effect of disclosure on the client, fee information is considered *prima facie* privileged for the purposes of the search. If the Crown seeks disclosure, the ultimate decision of whether the fee information is *in fact* privileged is made by the court, not the police.

[para 44] The foregoing passages make it clear that the Supreme Court accepted the "intelligent investigator" test as an appropriate measure for assessing the neutrality, or otherwise, of the information. The Court considered the potential non-neutrality of the information as the basis for applying the privilege on a *prima facie* basis, while still leaving open the possibility that the Crown might, in an appropriate case, rebut this presumption by demonstrating that the information is neutral.

[para 45] In *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner),* discussed above, the Ontario Court of Appeal discussed the information at issue before it as follows:

> 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.
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> 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 46] In the present case, the only responsive information in billing records would be amounts billed for the services provided in the general areas specified by the Applicant. In most cases, the total amount of the bill, rather than discrete amounts, will be responsive. Any other information appearing on the records could be severed as the Applicant has not requested it. The Applicant is not seeking information about the names of law firms, lawyers, any details about the services or advice provided (other than that some of it relates very generally to the FOIP Act), or the hours spent providing services. This information could be provided without disclosing privileged information by creating a record under section 10(2), or alternatively, by providing all the bills of account that were paid in 2011, with all information severed from them but for the responsive amounts, so that the Applicant could determine the amounts it is seeking itself.

Conclusion

[para 47] I find that creating a record or records to satisfy the Applicant's access request would not reveal solicitor-client communications. I therefore intend to order the Public Body to comply with its duty under section 10(2) in relation to the Applicant's access request. If it is not possible for the Public Body to do so, the Public Body may provide severed copies of bills to the Applicant with only the relevant amounts visible so that the Applicant may determine the amounts it has requested itself.

IV. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I order the Public Body to meet its duty under section 10 of the FOIP Act by creating a responsive record from one that is in electronic form, or to provide the Applicant with copies of responsive records, appropriately severed, that would enable the Applicant to determine the amounts it specified in its access request.

[para 50] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator