ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-15

April 5, 2018

UNIVERSITY OF CALGARY

Case File Numbers F7271, F8051

Office URL: www.oipc.ab.ca

Summary: The Applicant made two access requests under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the University of Calgary (the Public Body) for copies of its legal bills associated with a judicial review application, an appeal, and a leave to appeal action in which he and the Public Body were adverse parties.

The Public Body responded to the Applicant and provided copies of the billings with what it described as "narrative portions" severed from them under section 27(1) of the FOIP Act.

At the inquiry, the Public Body stated that it was relying on solicitor-client privilege to withhold information from the Applicant. It declined to provide the records for the Adjudicator's review. It submitted an affidavit from its FOIP Analyst that states, in part:

> The records are Statements of Account issued by external counsel to the University, the contents of which I believe and have been reliably informed by external counsel contain solicitor-client privileged information.

The Adjudicator determined that the Public Body had the burden of proving that the information in the statements of account was privileged. She found that this burden was not met and ordered disclosure of the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 11, 27, 69, 71, 72

Authorities Cited: AB: Orders F2007-014, F2010-007, F2015-08, F2015-32, F2016-35, F2017-28, F2017-54, F2017-57, F2017-58 **ON:** Order PO-2483

Cases Cited: *Canadian Natural Resources ltd. v. ShawCor Ltd.*, 2014 ABCA 289; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Stevens v. Canada (Prime Minister)*, [1998] 4 FCR 89; *Maranda v. Richer* [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA); *Chief of Police of the Calgary Police Service v. Criminal Trial Lawyers' Association, Information and Privacy Commissioner and Minister of Justice and Attorney General* [*sic*] Registry Number 1501 05251 (Calgary); *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114

I. BACKGROUND

[para 1] On March 27, 2013, the Applicant made an access request to the University of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested:

> Legal bills (including those of Miller Thompson LLP) submitted to and / or paid by the Public Body in respect of [*Oleynik v. the University of Calgary*] in the [Court of Queen's Bench] (court file No Q1101-09075) and the court of appeal (court file No 1201-0082AC)

[para 2] The Public Body responded to the Applicant by email on April 29, 2013. The Public Body indicated that it had severed some information from the records under section 27(1) (privileged information). It provided the total amounts paid for legal services, the letterhead on the bill, and the name of the matter for which legal services had been sought.

[para 3] The Public Body stated:

> The redacted information is excepted from disclosure under section 27(1). Section 27(1) states that the University may refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege. The detailed sections supporting the excising of particular information are attached to this letter.

[para 4] The Applicant requested that the Commissioner review the Public Body's decision to sever information from the records he requested. He also requested review of the time it had taken the Public Body to respond to his access request.

[para 5] On March 3, 2014, the Applicant made another access request to the Public Body. He requested the Public Body's legal bills for the time period March 27, 2013 – March 3, 2014 in respect of *Oleynik v. University of Calgary* in the Court of Queen's Bench, the Court of Appeal and the Supreme Court of Canada.

[para 6] As before, the Public Body provided the Applicant with the totals, the letterhead, and the subject matter of the legal bills, but severed all other information citing section 27(1) of the FOIP Act. It stated:

> Some of the records you requested contain information that is withheld from disclosure under the *Freedom of Information and Protection of Privacy (FOIP) Act*. We have redacted the excepted information so that the remaining information can be disclosed. Redactions are indicated on the face of the document. The redacted information is excepted from disclosure under section 27(1). Section 27(1) states that the University may refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege. The detailed sections supporting the redaction of particular information are attached to this letter.

The Applicant requested that the Commissioner review this decision as well.

[para 7] The Commissioner authorized a mediator to investigate and attempt to settle the matters between the Applicant and the Public Body. As this process was unsuccessful, the matters were scheduled for a written inquiry and the Commissioner delegated the authority to conduct the inquiry to me.

[para 8] The Public Body did not indicate in either of its responses to the Applicant the nature of the privilege on which its application of section 27(1)(a) was grounded, citing legal privilege, solicitor-client privilege, and parliamentary privilege as possible grounds for its authority to withhold the information. However, in its submissions, it referred to the case, *Stevens v. Canada (Prime Minister)*, [1998] 4 FCR 89, a decision of the Federal Court of Appeal, and stated:

> The Federal Court of Canada in the 1998 Court of Appeal case *Stevens v. Canada (Prime Minister (C.A.)* made clear that solicitor-client privilege is designed to allow for the free flow of communication between lawyer and client and is intended to protect the integrity of the solicitor-client relationship. Integral to that relationship are statements of account.
>
> In the above case it was determined that the narrative portions of statements of account issued by a lawyer to his client revealed communications for the purposes of seeking, formulating and obtaining legal advice and, consequently, were subject to solicitor-client privilege. Therefore, if a public body determines that the narrative portion of statements of account reveal communications for the purposes of seeking, formulating, and obtaining legal advice those narrative portions are subject to solicitor-client privilege and the public body has the discretionary right to redact those portions of the statements of account.
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> The University argues that the narrative portion of the Statements of Account revealed communications between Miller Thomson LLP, as the University's solicitor, and the University as a legal client, for the purposes of seeking, formulating and obtaining legal advice.
>
> Consequently, the information contained in the narrative portion of the Statements of Accounts is subject to solicitor-client privilege. The University exercised its discretion pursuant to Section 27(1)(a) and redacted the narrative details of the Statements of Account.

The Public Body also cited Order F2010-007 as authority for its position.

[para 9] As the Public Body argued that the narrative portion of the legal bill of account sent to it by its lawyer are communications for the purpose of seeking, formulating, and obtaining legal advice, I asked that it provide an affidavit meeting the evidentiary requirements for establishing privilege, which the Alberta Court of Appeal set down in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, to support its arguments.

[para 10] The Public Body submitted an affidavit from its FOIP Analyst. The affidavit states:

> I am a FOIP Analyst at the University of Calgary. I am responsible for the administration and coordination of matters related to the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c F-25 (the "Act").
>
> I processed FOIP Request File # A13-023 (Inquiry F7271) and File #A14-003 (Inquiry #F8051) and as such I have personal knowledge of the matters and facts deposed to in this Affidavit.
>
> I have reviewed the records at issue.
>
> The records are similar in nature.
>
> The records in File #A13-023 are numbered 1-49. The records in File #A14-003 are numbered 1-49. The records in File #A14-003 are numbered 1-24.
>
> The records are Statements of Account issued by external counsel to the University, the contents of which I believe and have been reliably informed by external counsel contain solicitor-client privileged information.

[para 11] I accepted the affidavit into evidence.

[para 12] In reviewing the materials the parties provided for inquiry, I noticed that the issue of whether the Public Body had complied with the requirements of section 11 of the FOIP Act had inadvertently been left out of the notice of inquiry. While the Applicant made submissions on the issue, the Public Body did not. I considered issuing an amended notice of inquiry to include this issue; however, I concluded that I did not need to hear from the Public Body regarding its compliance with section 11 in order to decide the issue.

II. INFORMATION AT ISSUE

[para 13] The information severed under section 27(1) from the legal bills that are the subjects of the Applicant's access requests is at issue.

III. ISSUES

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

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

IV. DISCUSSION OF ISSUES

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

[para 14] 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 15] 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 16] In *Maranda v. Richer*, [2003] 3 S.C.R. 193 Court described a general rule that lawyer's billings, 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, *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 17] As set out in the background, above, the Applicant has made an access request for the Public Body's legal bills in relation to its participation at judicial review applications he made at the Court of Queen's Bench, the Court of Appeal, and the Supreme Court of Canada. The circumstances in this case are different than those

described in the *Maranda* case, which dealt with the execution of a search warrant in a lawyer's office. In addition, as noted in the background, the Public Body has provided the Applicant with information from the records, such as the totals of the bills, the letterhead of the law firm, and the dates and subject lines of the bills.

[para 18] The Public Body relies on Order F2010-007 of this office as authority for its position that it need not provide what it describes as the narrative portions of the bills.

[para 19] In Order F2010-007, I followed *Maranda* and *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA), a decision of the Ontario Court of Appeal, in arriving at my decision. I did so as these cases address privilege in relation to lawyers' bills of account. In Order F2010-007, I determined that neutral information that could not disclose solicitor-client communications should be disclosed to the requestor, but that information serving to reveal such communications could be withheld.

[para 20] In *Maranda*, 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. Lebel J., writing for the majority, concluded:

> *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. [my emphasis]

[para 21] In the foregoing case, 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 when authorization is sought for a search of a law office because bills of account arise from the solicitor-client relationship. 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 22] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA) the Ontario Court of Appeal held that the presumption set out in *Maranda* was rebuttable. The Court said:

> 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.
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> *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 (CanLII), 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 23] The Ontario Court of Appeal appeared to accept that the presumption set out in *Maranda* could apply in the circumstance where a requestor made an access request under freedom of information legislation and was not limited to the circumstance in which a warrant is executed in a law office. The Court applied the "assiduous inquirer" test to determine whether the presumption was rebutted. The Court determined that the presumption was rebutted in relation to the total amounts billed as these amounts could not be expected to reveal privileged communications. The Court considered that the burden of proof is on the requestor to rebut the presumption of privilege in relation to lawyers' bills of account.

[para 24] The assiduous inquirer test was applied in Orders F2007-014, F2010-007, and F2015-08 of this office. As the Public Body notes, in Order F2010-007, it was found that lawyers' billings are presumptively privileged. It was also held in that order that the descriptions of legal advice and services in the bills could reveal privileged communications and could be withheld from the requestor, but that the presumption was rebutted in that case in relation to neutral information – information that could not reveal privileged communications – such as the firm letterhead, the date, and the total amounts billed.

[para 25] 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[1], the rule is not that the privilege necessarily applies, but that it *presumptively* applies. Like all presumptions, this one can be rebutted.

[para 26] As noted in the background, the Public Body argues:

> Therefore, if a public body determines that the narrative portion of statements of account reveal communications for the purposes of seeking, formulating, and obtaining legal advice those narrative portions are subject to solicitor-client privilege and the public body has the discretionary right to redact those portions of the statements of account.
>
> The University argues that the narrative portion of the Statements of Account revealed communications between Miller Thomson LLP, as the University's solicitor, and the University as a legal client, for the purposes of seeking, formulating and obtaining legal advice.

[para 27] The Public Body argues that the narrative portion of the requested billings reveal communications between the Public Body and its solicitor for the purpose of seeking, formulating, and obtaining legal advice. It also provided the affidavit of its FOIP Analyst, which, as discussed above, states that the FOIP Analyst believes she is reliably informed by counsel that the records contain solicitor-client privileged information.

[para 28] The Public Body's evidence is ambiguous. It is unclear what is meant by "[the] records are statements of account issued by external counsel to the University, the contents of which I believe and have been reliably informed by external counsel contain solicitor-client privileged information." Does this statement refer to the entire record, including the information that the Public Body has decided should not be withheld, or does it refer to the narrative portions only, or only to some of the narrative portions? Moreover, it is unclear on what basis the lawyer formed the opinion that the bills of account, or portions of them, were privileged.

[para 29] The Public Body has not provided the records at issue for my review. It is therefore impossible for me to apply the assiduous inquirer test proposed by the Ontario Court of Appeal and followed in previous decisions of this office as a means to decide the

[1] The Supreme Court of Canada appears to limit the application of the presumption to the circumstance "when authorization is sought for a search of a lawyer's office" by the Crown.

issue of whether the Public Body has properly withheld the narrative portions of the requested billings.

[para 30] Section 71(1) of the FOIP Act sets out the burden of proof in an inquiry. It states, in part:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 31] Section 71(1) imposes the burden of proof in an inquiry on the public body to prove that an applicant has no right of access.

[para 32] The standard of proof imposed on a public body under section 71(1) of the FOIP Act is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, a public body must prove that it is more likely than not that an exception under Division 2 of Part 1 of the FOIP Act applies.

[para 33] In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 34] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information. As the Public Body decided to apply sections 27(1)(a) to withhold information from the Applicant, it must prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 35] There is tension between the standard of proof set out in the decision of the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner) (supra)* and the burden of proof set out in section 71(1) of the FOIP Act. While that case holds that an applicant must rebut the presumption that information in lawyers' billings reveals privileged communications, the standard of proof in the FOIP Act imposes that burden on a public body seeking to withhold information from an applicant.

[para 36] In Order PO-2483, an Adjudicator with the Office of the Information and Privacy Commissioner of Ontario addressed this issue, stating:

> … while the Court of Appeal did indicate in [*Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner),* ("*Attorney General 2005*") that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. The entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the requester. (In fact, in one of the orders under review in [*Attorney General 2005*], the requester had not provided representations at all – see Order PO-1922.) This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner.

[para 37] Similarly, in Order F2010-007, I said:

> 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 BCCA 278, 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.
>
> 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.
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> 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.
>
> 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 38] In *Chief of Police of the Calgary Police Service v. Criminal Trial Lawyers' Association, Information and Privacy Commissioner and Minister of Justice and Attorney General* [*sic*] Registry Number 1501 05251 (Calgary), Nation J. in an oral decision, noted that section 71 establishes the burden of proof in an inquiry, and formed

the legislative background in making the determination whether the Commissioner's decision regarding legal billings was correct. Nation J. determined that the Commissioner's decision that the requested billing information was not privileged was correct in that case.

[para 39] Finally, past orders of this office have held that section 71(1) of the FOIP Act imposes the burden of proof in an inquiry on the public body, to establish that an applicant has no right of access to information to which it has applied section 27(1)(a). This point is made in Orders F2015-32, F2016-35, F2017-28, F2017-54, F2017-57, F2017-58. Given that a public body bears the burden of proving that records it believes contain legal advice are subject to privilege, it would absurd to find that an applicant bears the burden of proof in relation to legal billings.

[para 40] In my view, past orders of this office are incorrect to the extent that they could be said to have imposed the burden of proof on an applicant to show that billings are not subject to privilege. Section 71(1) of the FOIP Act imposes the burden of proof on a public body to prove that an applicant has no right of access. A common law principle such as that articulated in *Maranda* and one which is not clearly applicable in a circumstance other than when the state is contemplating executing a search warrant in a law office, cannot serve to supplant the clear statement of Legislative intent set out in section 71(1) – that a public body must prove its case.

[para 41] In the present case, I requested that the Public Body provide the records for my review, or evidence sufficiently detailed to establish the privilege it claimed. The Public Body elected not to do so. I am therefore unable to follow the previous case law of this office and that of the Ontario Courts, which entails reviewing legal billings to determine whether the information they contain is privileged or whether the information they contain is neutral.

Has the Public Body met the burden of establishing that section 27(1)(a) applies to the information it has withheld from the Applicant?

[para 42] As noted above, the Public Body provided the following statement from its FOIP Analyst to support its claim of solicitor-client privilege: "The records are Statements of Account issued by external counsel to the university, the contents of which I believe and have been reliably informed by external counsel contain solicitor-client privileged information."

[para 43] The FOIP Analyst states that the record contains solicitor-client privileged information. However, she does not assert that *all* the information that has been withheld is subject to privilege. In addition, her belief that there are privileged communications within the records is based on information from external counsel; however, it is unclear on what basis legal counsel considered the records to contain privileged information, given that no affidavit has been provided by the legal counsel for this inquiry. Further, I have not been told which aspects of the information were considered privileged communications and which were not so that I could pinpoint portions of the billings that I

could determine to reveal privileged communications or neutral information. In sum, I have not been given sufficient evidence about the nature of the severed information that would enable me to conclude that it is non-neutral information that could reveal solicitor-client communications. Ultimately, unsubstantiated hearsay supports the Public Body's decision to sever information from the records.

[para 44] It is conceivable that some of the information severed by the Public Body is non-neutral and could reveal privileged communications. However, it is also conceivable that some or all of the information severed by the Public Body is neutral information that would not reveal privileged communications in any way if it were disclosed. This is because records responsive to the access request (set out in the background above), would be billings relating to legal counsel's appearance at judicial review and appeal proceedings in which the Applicant was a party. Information establishing only that counsel for the Public Body attended Court or prepared arguments on behalf of the Public Body would be neutral in this case.

[para 45] As I am unable to determine on the evidence before me whether the information the Public Body has withheld is likely to be non-neutral information that would reveal privileged communications, I find that the Public Body has failed to meet the burden in the inquiry. I must therefore order the Public Body to disclose the information it has withheld from the Applicant.

[para 46] Recently, in *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 the Alberta Court of Appeal determined that on judicial review, where the issue relates to a public body's application of privilege under the FOIP Act, the Court may review the records over which the Public Body is asserting privilege. The Court stated:

> The question before us today is limited. We are not dealing with a range of possible issues, including whether a different statutory regime might be adopted in light of observations made by the Supreme Court of Canada. Instead, it is whether, on a judicial review application under the *Freedom of Information and Protection of Privacy Act*, a Court is entitled to review documents over which claims of solicitor client privilege have been made even though those documents were not reviewed by the Privacy Commissioner and are not "formally" part of the certified record.
>
> We are satisfied that on a judicial review application where the dispute centres on whether the documents in question are subject to solicitor client privilege, those documents should be put before the reviewing Court. It is this simple. The issue—whether solicitor client privilege exists with respect to the disputed documents—cannot be properly determined in these circumstances without examining the documents themselves. This approach is consistent with the supervisory role of the Court.

[para 47] From the foregoing, I conclude that if the Public Body is dissatisfied with my order, it may apply to the Court for judicial review and provide the records to the Court it declined to provide in this inquiry. The Court will then make the determination as to whether the information withheld is privileged or neutral.

Issue B: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 48] Section 11 of the FOIP Act requires a public body to take all reasonable steps to respond to an applicant within 30 days of receiving an access request. It states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> *(a) that time limit is extended under section 14, or*
>
> *(b) the request has been transferred under section 15 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

The Applicant argues that the Public Body did not meet its statutory duty as it responded to the access request it received from him on March 27, 2013 on April 29, 2013.

[para 49] The Public Body responded to the Applicant's access request on April 29, 2013. It also provided the records to the Applicant with information severed from them. There is therefore no reason to deem the Public Body to have refused to give access to the records. There is also no order I could make that would have the effect of making the Public Body respond prior to April 29, 2013. In effect, there is nothing to be gained by ordering the Public Body to do what it cannot do at this time and I decline to do so.

V. ORDER

[para 50] I make this order under section 72 of the Act.

[para 51] I order the Public Body to disclose the records at issue to the Applicant in their entirety.

[para 52] I order the Public Body to notify me with 50 days of receiving this order that it has complied with it.

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Teresa Cunningham
Adjudicator