



Office of the  
Yukon Ombudsman &  
Information and Privacy  
Commissioner

## **INQUIRY #08-008AR**

Pursuant to section 52 of the  
*Access to Information and Protection of Privacy Act*

## **INQUIRY REPORT**

**Yukon Information and Privacy Commissioner**

**Tracy-Anne McPhee**

**April 26, 2010**

## INQUIRY #08-008AR

### Pursuant to section 52 of the *Access to Information and Protection of Privacy Act (the Act)*

## INQUIRY REPORT

**Public Body:** Public Service Commission (PSC)

**Summary:** The Applicant requested a review of the decision of the Public Service Commission to refuse access to records containing information relating to legal fees paid to a particular law firm for services in matters involving the Applicant, over a specific period of time.

The PSC's response to the Applicant refused access claiming that all parts of any records identified by them as responsive were subject to solicitor client privilege, pursuant to section 18(a) of the *Access to Information and Protection of Privacy Act* (ATIPP Act). The PSC response also referred the Applicant to a government website and included a web address.

The PSC did not provide a copy of the information from the government website as part of its response to the Applicant. But in its submission as part of this Inquiry, the PSC attached a copy of the web page and argued that the document was responsive to the Access Request.

The Applicant argued that access to the amounts of total fees paid from public funds should be available as they are not subject to solicitor client privilege.

The Commissioner found that the website page was not a PSC record and therefore was not responsive to the Access Request. The PSC had not met its duty to assist the Applicant required by the ATIPP Act. The Commissioner found that one record was not responsive and another was out of scope.

The Commissioner found that eight (8) records, identified as Journal Headers were not subject to solicitor client privilege.

The Commissioner found that ten (10) records, identified as Invoices, were presumptively protected by solicitor client privilege but that the requested information was neutral and could not reveal any privileged communication. As a result, the presumption was rebutted. The Commissioner found that, pursuant to s.5(2), the records should be severed.

**Recommendations:** The Commissioner recommended that the Public Service Commission provide the access to which the Applicant is entitled by disclosing the eight (8) records, identified as Journal Headers, and by severing the non-responsive portions of the ten (10) records, identified as Invoices, and disclosing the remaining information, namely the total amounts due, the name of the lawyer, the name of the law firm and reference to the PSC as addressee.

**Statutes Cited:** *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1, sections 5(2), 18(a), 18(b) 54(1)(a), 57(2)(b)(i).

**Authorities Cited:** **Solosky v. The Queen** 1979 CanLII 9 (S.C.C.);  
**Maranda v. Richer**, 2003 SCC 67 [2003] 3 S.C.R. 193;  
**Stevens v. Canada** (Prime Minister), 1998 CanLII 9075 (F.C.A.)  
**Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)** 2005 CanLII 6045 (ON C.A.);  
**Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)** 2007 CanLII 65615 (ON S.C.D.C.);  
**Avoledo v. The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission**, 2003 YKSC 10;  
Newfoundland and Labrador OIPC Report A-2010-001;  
[2008] B.C.I.P.C.D No. 14; [2001] B.C.I.P.C.D. No. 11;  
[1995] O.I.P.C. No. 102

## I BACKGROUND

[1] On February 6, 2008, the Applicant made a request to the Government of Yukon, Public Service Commission (PSC), for access to a summary of legal fees paid to a particular lawyer at Harris & Co., a Vancouver based law firm, in relation to the Applicant's matters from 2005 to the present.

[2] On February 13, 2008, the Records Manager wrote to the Applicant:

The Public Service Commission has completed work on your ATIPP request #A-2252. The response to your request follows.

**Access Refused**

The Public Service Commission has refused access to your request. The refusal is in accordance with section 18(a) of the ATIPP Act which states: A

public body may refuse to disclose to an applicant a record (a) that is subject to solicitor client privilege.<sup>1</sup>

- [3] The response went on to say:  
The Public Service Commission has advised that information about this contract is available online at <http://www.gov.yk.ca/registry/contracts/registry.html> <sup>2</sup>
- [4] The Applicant filed a Request for Review of the PSC decision with my office.
- [5] Mediation was authorized but did not proceed. I am therefore required by section 52 of the Act to conduct an Inquiry.

## II INQUIRY PROCESS

- [6] On April 25, 2008 a Notice of Inquiry was issued.
- [7] On May 9, 2008 I granted the Public Service Commission's request for an extension of the time to make a written submission.
- [8] An Amended Notice of Inquiry was issued requiring initial written submissions by May 30, 2008 and reply submissions by June 13, 2008.
- [9] On June 13, 2008 the PSC filed an initial written submission. Attached to that submission was a document entitled "printout of webpage search results". No other records were provided to me.
- [10] The Applicant did not make an initial submission.
- [11] Both parties filed written reply submissions.
- [12] On August 1, 2008, I requested that PSC provide me with a Schedule of Records indicating the number of records that were identified as responsive to the Request for Access to Records (Access Request) and a description of each one.
- [13] On August 11, 2008, I received a Schedule of Records identifying 21 records as responsive to the Applicant's request.

### **Preliminary Matters**

#### **Duty to Assist**

- [14] The ATIPP Act requires that both the Records Manager and the public body have a duty to assist an applicant making an Access Request. The duty includes responding openly, accurately and completely. The Records Manager and the public body must make reasonable efforts to assist the applicant. This may require contacting the Applicant to clarify a request, obtain more detail or determine if the request can be accommodated informally outside of the ATIPP Act. The

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<sup>1</sup> Response from Records Manager

<sup>2</sup> Ibid

fundamental right of access should not be frustrated by a failure to assist the Applicant.

- [15] The PSC response to the Applicant was “Access Refused”. At the bottom of the response, the Applicant was directed as follows:

The Public Service Commission has advised that information about this contract is available online at

<http://www.gov.yk.ca/registry/contracts/registry.html><sup>3</sup>

- [16] The PSC position is that referring the Applicant to a government website is a sufficient response. This is wrong. In order to comply with the Act and respond openly, accurately and completely, the PSC is obliged to thoroughly search its’ records for any records that are responsive to the Access Request, identify the records found and prepare a response that relates to those records. Referring an applicant to a website where information might be found, is not sufficient.

- [17] The PSC’s written submission on this Inquiry had attached a copy of a printout from the webpage noted above. The PSC submitted:

...that the attached summary of legal fees is responsive to request #A-2252 and was publicly available to the requestor on the Government website.<sup>4</sup>

- [18] Although the record was described as a summary of legal fees that is not in fact what it shows. The website shows information about contracts with Harris & Co. in relation to the Applicant, but it only shows the total amount of those contracts. The website does not report how much of those contracts have actually been spent. It is critical in responding to an Access Request that the public body focus on what information or records are actually being requested.

- [19] While the website pages may have contained some information that would have satisfied the Applicant, there is no evidence that the Records Manager or PSC made any effort to confirm with the Applicant if this was actually the case. Had they done so, the considerable time and effort expended in this Inquiry may not have been necessary.

- [20] In my view, neither the PSC nor the Records Manager have met the duty to assist the Applicant in this case.

- [21] To aid public bodies in understanding and fulfilling their obligation to assist applicants, I have issued Best Practice #2: Duty to Assist. It is available at <http://www.ombudsman.yk.ca/privacy/ipcpublications.html>

**Is the PSC entitled to rely on additional exceptions to disclosure not originally cited in its response to the Applicant?**

- [22] The initial response to the Access Request indicated access to the records was refused “in accordance with section 18(a)”. In its reply submission dated June 18, 2008, PSC claimed for the first time that section 18(b) was a reason for refusing access to the Applicant’s request. There is no evidence before me that the PSC at

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<sup>3</sup> Response from Records Manager

<sup>4</sup> PSC Submission, page 4

any time before this indicated to the Applicant that it was relying on another exception.

[23] Section 18(b) is a discretionary exception. It is well established practice, addressed in many reports and orders issued by Information and Privacy Commissioners across Canada (Newfoundland and Labrador OIPC Reports A-2010-001; [2008] B.C.I.P.C.D No. 14; [2001] B.C.I.P.C.D. No 11; [1995] O.I.P.C. No. 102) that discretionary exceptions for refusing access to records should be claimed at the time a response is issued to the Applicant's Access Request. While mandatory exceptions will be considered by my office at any time, discretionary exceptions claimed, late in the day, as at the Inquiry stage, will generally not be considered. There may be times when new evidence or circumstances results in a public body being permitted to apply a new discretionary exemption, but these will be exceedingly rare.

[24] The British Columbia IPC may have put it best when he said:

As a general proposition, the raising of additional discretionary exceptions at the inquiry stage is unacceptable. A public body must, at the time it considers an access request, assess which one of the Act's exceptions to the right of access may, or must, be applied to information in requested records. Although I may, in appropriate circumstances, permit the raising of discretionary exceptions during the inquiry process, I am not generally inclined to do so, especially in a case such as this, where the public body raises a new discretionary exception for the first time in its initial submission and without explicitly giving any reason for doing so...<sup>5</sup>

[25] I have not been persuaded as to why section 18(b) is applicable in the circumstances of this case nor any reason why it was not raised at the time of the response to the Applicant. In fairness, I will not consider the application of section 18(b) to the records at issue in this Inquiry.

### **Factual Evidence Required – Interim Report Issued**

[26] The PSC's initial submission failed to provide sufficient factual information to allow me to make a determination that solicitor client privilege was properly claimed in relation to the records it identified as responsive to the Access Request.

[27] Although section 53 allows me to compel the production of the responsive records for examination to determine if an exception has been properly applied, I will not routinely do so in relation to records over which solicitor client privilege is claimed. While disclosure of the records to me within the confines of an Inquiry is not a waiver to anyone of the privilege claimed over the records, I am mindful of the unique importance of solicitor client privilege within our legal system and the need to protect it. Therefore I will consider compelling such records, on a case by case basis, only when it is absolutely necessary to fairly adjudicate the existence of the privilege claimed.

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<sup>5</sup> [2007] B.C.I.P.C.D. No. 14

- [28] On the basis of the material initially filed by PSC in the Inquiry, I was unable to reach a conclusion as to whether the section 18(a) had been properly claimed by the PSC. It is not sufficient for a public body to simply assert that an exception from the ATIPP Act applies to the records at issue. Evidence must be provided to support the assertion. Each exception under the ATIPP Act has certain requirements which must be satisfied. When a public body is claiming an exception, it is important to provide evidence of each of these requirements. If submissions are too general or if the necessary connections are not made by the public body, the representations will fail to establish that the exception applies. Factual evidence is required for me to be able to determine if section 18(a) has been properly applied to the records at issue in this Inquiry.
- [29] As a result, I issued an Interim Report requesting that the Public Service Commission either provide me with copies of the records at issue or evidence in the form of a sworn affidavit, to assist in my determination of the facts.
- [30] I also asked the Public Service Commission to make a submission regarding the application of section 5(2) of ATIPP Act to the responsive records, as it had not addressed that issue in its first submission.

#### **Affidavit Evidence**

- [31] The Public Service Commission did not provide the responsive records for my examination, but chose instead to provide an affidavit providing details of the records identified as responsive.
- [32] On July 9, 2009 I received the following:
- an affidavit sworn by the Senior Planner & Information Analyst and ATIPP Coordinator for the Public Service Commission; and
  - a document entitled “Submissions by the Public Body to the Interim Report of the Information and Privacy Commissioner dated May 27, 2009.”

### **III SCHEDULE OF RECORDS**

- [33] The PSC provided a Schedule of Records identifying 21 documents as being responsive to the Applicant’s Request. The Schedule of Records has the following entries:
1. Printout of webpage search results (March 25, 2008)
  2. Print out from SOFT – General Ledger Report Search results
  3. Journal Header
  4. Invoice from Harris & Company (incomplete)
  5. Journal Header
  6. Invoice from Harris & Company (incomplete)
  7. Invoice from Harris & Company

8. Journal Header
9. Invoice from Harris & Company
10. Invoice from Harris & Company
11. Journal Header
12. Invoice from Harris & Company
13. Journal Header
14. Invoice from Harris & Company
15. Journal Header
16. Invoice from Harris & Company
17. Journal Header
18. Invoice from Harris & Company
19. Journal Header
20. Invoice from Harris & Company
21. Email from an employee of the Department of Justice to an employee of the Public Service Commission

**Record #1 – Not in the Custody or Under the Control of PSC**

- [34] Record #1 on Schedule of Records is the printout of webpage search results.

The heading at the top of the page indicates it is a “List of Contracts Resulting from Registry Search.” The record is a printout of a web search on the Highways and Public Works contract registry website. Record #1 was not in the custody or under the control of the Public Service Commission and was therefore not a record responsive to the Applicant’s Access Request. Therefore, it should not have been listed as a responsive record on the Schedule of Records. No further determination is required with respect to Record #1.

**Record #2 – Not Responsive to the Access Request**

- [35] The affidavit filed on behalf of the Public Service Commission provided some additional details of the records listed on the Schedule of Records without revealing their content. The affidavit classified the records into four (4) categories and provided some description of each of the categories. The categories are: SOFT Printout General Ledger Report, Email of April 1, 2008, Journal Headers and Invoices.
- [36] Record #2, a SOFT Printout General Ledger Report is described in the affidavit as a print out of financial information, the purpose of which is to keep track of the amount of money spent on legal retainers by the PSC. It notes that the Applicant’s matters are indistinguishable from other matters included in this record and questions whether the record is in fact responsive to the Access Request.
- [37] I accept that if it is impossible to distinguish which fees were paid to Harris & Co. for the matters involving the Applicant, then this record is not in fact responsive to this Access Request and should not have been included on the Schedule of

Records as a responsive record. No further determination is required with respect to Record #2.

### **Record #21 – Out of Scope of the Access Request**

[38] The Access request was dated February 6, 2008. Record #21 is described as an Email dated April 1, 2008. Record #21 was created after the Access Request. The email record therefore is not within the scope of the Access Request and should not have been included on the Schedule of Records. No further determination is required with respect to Record #21.

[39] Had a Schedule of Records been prepared at the time of the initial search for responsive records, this record would not have appeared on it. The timely preparation of a Schedule of Records helps avoid the inclusion of records outside the scope of an Access Request.

### **Records At Issue**

[40] The remaining records on the Schedule of Records are at issue in this Inquiry and are reviewed below. They are described as Journal Headers (Records #3, 5, 8, 11, 13, 15, 17 and 19) and Invoices (Records #4, 6, 7, 9, 10, 12, 14, 16, 18 and 20).

## **IV BURDEN OF PROOF**

[41] In this Inquiry, the Public Service Commission has the burden of proof pursuant to section 54 of the ATIPP Act. It must prove that solicitor client privilege applies to the each of the records in issue.

## **V ISSUES**

[42] The issues to be determined in this Inquiry are:

1. Did the Public Service Commission properly apply section 18(a) of the ATIPP Act to the records it refused to disclose?
2. Does section 5(2) of the ATIPP Act operate in relation to the records?

## **VI DISCUSSION OF ISSUES**

### **Did the Public Service Commission properly apply section 18(a) of the Act to the records it refused to disclose?**

[43] Section 18(a) of the Act gives a public body the discretion to withhold information that is subject to solicitor client privilege. The section states:

18. A public body may refuse to disclose to an applicant a record  
(a) that is subject to solicitor client privilege;

### **The Test to Determine Solicitor Client Privilege**

[44] Section 18(a) incorporates the common law on solicitor client privilege. In **Solosky v. The Queen** 1979 CanLII 9 (S.C.C.), the Supreme Court of Canada established the elements that must be made out for solicitor client privilege to apply to a record. The Court upheld the lower court decision and found:

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.<sup>6</sup>

### **Journal Headers**

[45] The affidavit filed to provide factual information about the records in issue states that Records #3, 5, 8, 11, 13, 15, 17 and 19 are Journal Headers and describes the records as documents that:

- are internal financial records that are used to move costs from the Department of Justice to its client departments to pay bills for outside counsel contracts;
- are prepared by the Department of Justice, as the contracting department, to have funds transferred so it can recover costs from other departments for outside legal fees, to which invoices or parts of invoices from lawyers are attached;
- may have invoices attached that include costs for more than one case or matter;
- may contain entries for the transfer of funds for more than one legal case;
- each contain the description of “recovery outside counsel” and contain dates and various number entries;
- are addressed to Patricia Daws, Public Service Commissioner, with her mail code and are signed by officials from the Department of Justice;
- all have Harris & Co. noted in the Explanation Column; and
- reference the Applicants name and matter in the Explanation Column.

[46] It is unclear how the PSC considered section 18(a) to apply to the Journal Headers. Attached to the affidavit was a blank sample of a Journal Header. It is apparent from factual details provided in the affidavit provided by PSC that these records are not communications between a solicitor and a client, they do not entail the seeking or giving of legal advice and they were not intended to be confidential by the parties. Therefore I find that the Journal Headers are not subject to solicitor client privilege.

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<sup>6</sup> Solosky v. The Queen 1979 CanLII 9 (S.C.C.), page 838

[47] I find that the PSC did not properly apply section 18(a) to the records identified as Journal Headers and it is not entitled to refuse access to Records #3, 5, 8, 11, 13, 15, 17 and 19.

[48] I find that the Public Service Commission is not authorized to withhold, from the Applicant, Records #3, 5, 8, 11, 13, 15, 17 and 19 identified as Journal Headers, as they are not subject to solicitor client privilege.

### **Invoices**

[49] The remaining records in issue are called Invoices in the affidavit. Records #4 and 6 are noted to be incomplete invoices. Records #4, 6, 7, 9, 10, 12, 14, 16, 18 and 20 are described as documents that are:

- all printed on Harris & Co. letterhead;
- all marked Private & Confidential and addressed to the Public Service Commission;
- most were signed by the lawyer named by the Applicant;
- the two incomplete invoices did not include a final signed page;
- contain details of services provided, dates of service and the amount of time spent whether the record is a complete or part of a larger invoice;
- are communications to provide brief details of the legal advice and representation provided; and
- the amounts due for it.

[50] It is clear from the description of these records that they are lawyers' bills of account and are presumptively protected by solicitor client privilege.

### **The Law of Solicitor Client Privilege and Legal Bills of Account**

#### **The Applicant's Submission**

[51] The Applicant submits that the amount the lawyer was paid is not subject to solicitor client privilege. The Applicant states:

I understand that I will not be granted access to the content of discussions between the Public Service Commission and the firm they are using. My request was for the fees that have been paid to this firm.

To ensure accountability I believe taxpayers should be able to know the amount of money being expended for legal services. The retainer agreement and details about the content between the firm and P.S.C. will not be accessible to me but the amount they have been paid I would argue is not.

I am requesting an analysis of the record that I am requesting and whether solicitor client privilege applies to the amount being expended for legal services.<sup>7</sup>

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<sup>7</sup> Applicant's Request for Review, paragraph 3

### The PSC Submission

- [52] The PSC applied section 18(a) to refuse access to the records in their entirety.
- [53] The PSC's written submission argued that, with the exception of Record #1, solicitor client privilege applies to lawyer billing information and amounts billed. The PSC relies on **Maranda v. Richer** 2003 SCC 67 [2003] 3 S.C.R. 193 and **Stevens v. Canada** (Prime Minister), 1998 CanLII 9075 (F.C.A.) as authority for this position.
- [54] The submission states:
- ...an almost unanimous court in *Maranda* stated that a lawyer's billings are protected by privilege and that the scope of the privilege is broad... and further,
- ...the court in *Maranda* also affirmed the approach taken by the Federal Court of Appeal in *Stevens v. Canada*...<sup>8</sup>
- [55] The PSC concludes:
- ...any other records responsive to the Applicant's request are subject to solicitor client privilege on the grounds set out in *Maranda*...<sup>9</sup>
- [56] The PSC also states that it is relevant that the legal matters, for which billing information was sought, are still being actively pursued by the parties.
- [57] In refusing access to the records at issue, the PSC relies on the Supreme Court of Canada decision in **Maranda**. This case generated a debate about the privileged nature of lawyers' billings for fees and disbursements.
- [58] The **Maranda** decision makes clear that lawyers' bills of account, are presumptively protected by solicitor client privilege. However, it also clearly states that that presumption can be rebutted if the information is neutral and does not reveal, directly or indirectly, privileged information. It is not the record itself that is determinative. What matters is the nature of the information contained in the record, and whether it directly or indirectly would reveal privileged information.
- [59] The PSC submission also references an Ontario Court of Appeal case **Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)**, 2005 CanLII 6045 (ON C.A.), also known as **Mitchinson**, in support of its position.
- [60] In **Mitchinson**, the Court of Appeal considered the application of **Maranda** in the context of an access to information request. The Court of Appeal stated that **Maranda**:
- ...holds that information as to the amount of a lawyers 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

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<sup>8</sup> PSC Submission, page 2

<sup>9</sup> *Ibid*, page 4

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.<sup>10</sup>

[61] A case, not referenced by PSC, but very useful here is **Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)** 2007 CanLII 65615 (ON S.C.D.C.) The information requested in that case is very similar to that sought by the Applicant. The Ontario Divisional Court upheld the decision of the Office of the Ontario IPC to order disclosure of the total lines on legal bills paid by the Ministry of Community and Social Services in relation to two civil actions.

[62] In coming to that conclusion, the Court accepted that **Maranda** adopted a rebuttable presumption of privilege test, effectively overruling **Stevens** to the extent that **Stevens** held that lawyers bills of account are subject to a blanket privilege.

[63] At paragraphs 17 and 18, the Court said:

Lebel J in *Maranda* at paras. 28-34 in effect abandoned the absolutist approach taken by each line of cases and, instead, developed the ‘rebuttable presumption of privilege’ test when disclosure of a lawyers’ billing information is sought.

It is clear that *Maranda* overrules *Stevens* to the extent the latter purported to recognize a blanket privilege for billing information.<sup>11</sup>

[64] If the PSC is relying on **Maranda** and **Mitchinson**, for the proposition that there is a distinction between disclosing an aggregate amount in an “isolated record” as opposed to figures contained in numerous statements of account, the Division Court in **Ontario v. Ontario**, dismissed any such distinction.

[65] The Court stated:

Neither *Maranda* nor *Mitchinson* draw any such distinction between disclosing legal fees in the form of severed information from existing documents, creating a new composite record, or disclosing a document in its entirety. The distinction advanced by the Applicant is artificial and I see no meaningful distinction, depending on how the bottom line of financial information is generated.<sup>12</sup>

[66] It is clear from review of these cases that the records at issue are not subject to a blanket privilege as submitted by the PSC. I accept that the information is presumptively protected by privilege, but the question becomes whether or not the presumption has been rebutted.

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<sup>10</sup> *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON C.A.), par. 9

<sup>11</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* 2007 CanLII 65615 (ON S.C.D.C.), par. 17 and 18

<sup>12</sup> *supra*, par. 21

### **Has the presumption been rebutted?**

[67] In **Mitchinson**, the Ontario Court of Appeal explains the test for rebuttal of the presumption as follows:

If there is a reasonable possibility that the 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, then the information is protected by the solicitor client 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 solicitor client privilege.<sup>13</sup>

[68] The Ontario Court of Appeal applied the **Maranda** approach, and held that:

We see no reasonable possibility that any solicitor client communication could be revealed to anyone by the information 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 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 solicitor client privilege.<sup>14</sup>

[69] The PSC has failed to put forward any argument or explanation as to how, in this case, access to the requested information would reveal a privileged communication.

### **Is the information neutral?**

[70] The Applicant confined the request to the total amounts paid to a particular lawyer at Harris & Co. in relation to certain legal matters. I must determine if the presumption has been rebutted in relation to requested information in the circumstances of this case.

[71] To determine whether or not the presumption has been rebutted I must ask if there is any reasonable possibility that the assiduous inquirer, aware of the background information, could use the information requested, about the amount of fees paid, to deduce or otherwise acquire communications protected by the privilege. If the

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<sup>13</sup> Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner) 2007 CanLII 65615 (ON S.C.D.C.), par. 12

<sup>14</sup> Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON C.A.), par. 13 and 14

information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor client communications to be deduced, the privilege remains.

- [72] In my view, disclosing the total amount of fees due on each invoice could not, on its own, reveal any information regarding the legal advice given or strategy employed. The Applicant is, however, familiar with the circumstances of the matter(s) which must be considered, and the question becomes: Would providing the Applicant with the total amounts due on ten (10) invoices, together with current knowledge, reveal or permit deduction of any solicitor client communications?
- [73] I cannot see how this is the case. The Applicant is already aware of the name of the lawyer, the name of the firm and aware that PSC is the client receiving legal services. I cannot see how the addition of the total amounts paid would reveal anything other than the amount of money paid by PSC to a particular lawyer over an undisclosed period of time.
- [74] Lastly, the PSC asserts that it is relevant that the legal matters for which billing information was sought are still being actively pursued by the parties. That fact that the case(s) may be ongoing does not affect my finding that the information sought is neutral and cannot reveal any legal advice, strategy or privileged communication. This position is supported by **Maranda** where the analysis was undertaken as if the proceedings were ongoing in order to address the serious issues raised.
- [75] I am satisfied that the name of the lawyer, the name of the firm, and PSC as the addressee, is neutral information and therefore the presumption that the information is privileged is rebutted.
- [76] I find that the PSC has not properly applied section 18(a) to information in Records #4, 6, 7, 9, 10, 12, 14, 16, 18 and 20.

**Does section 5(2) of the ATIPP Act operate in relation to the records?**

- [77] With respect to section 5(2), the PSC submits:
- ...the clear language in the opening of section 18 means that the exceptions in s.18 apply to the entire record, not to information contained in the record. In any event, by severing the information the public body views as privileged, it would be severing the very information that the Applicant seeks. Namely, how much the Yukon Government has spent defending itself against [his/her] claims.<sup>15</sup>
- [78] Section 5 of the ATIPP Act sets out an applicant's right of access to information in a record as follows:

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<sup>15</sup> PSC Submission in response to the Interim Report, page 3

Right to information

5(1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.

[79] The operation of section 5(2) of the ATIPP Act has been considered by the Yukon Supreme Court in **Avoleo v. The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission**, 2003 YKSC 10.

[80] In that case, Mr. Justice Veale describes the operation of section 5(2) as follows:

I am of the view that the ATIPP Act makes no provision for non-disclosure on a blanket basis for a particular type of record or information. Section 5(1), in fact, creates a right of access to any record unless it can be excepted from disclosure under section 5(2). Section 5(2) is quite explicit in stating that if such excepted information can be reasonably separated or obliterated from the record, the applicant has a right of access to the remainder of the record. In my view, section 5 sets out the procedure to be followed in any of the sections of Part 2 of the ATIPP Act, which includes both sections 19 and 25.<sup>16</sup>

[81] The **Avoleo** decision confirms that section 5(2) applies to records contained in Part 2 of the Act, including to section 18(a).

[82] This decision is also supported by the ruling in **Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)**<sup>17</sup>.

[83] I find that the application of section 5(2) of the ATIPP Act requires the PSC to sever the records and give access to the parts of the records not subject to solicitor client privilege.

[84] I find that the Public Service Commission is not authorized to withhold from the Applicant the total amounts due, the name of the lawyer, the name of the law firm and reference to the PSC as addressee on Records #4, 6, 7, 9, 10, 12, 14, 16, 18, 20, identified as Invoices, as that information is not subject to solicitor client privilege.

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<sup>16</sup> *Avoleo v. The Commissioner of the Yukon Territory and Government of Yukon as represented by the Public Service Commission*, 2003 YKSC 10, par. 46

<sup>17</sup> *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* 2007 CanLII 65615 (ON S.C.D.C.), par. 25 and 27

## **VII RECOMMENDATIONS**

- [85] For the reasons set out above, I recommend that, pursuant to section 57(2)(a) of the ATIPP Act, the Public Service Commission provide the access to which the Applicant is entitled by providing copies of Records #3, 5, 8, 11, 13, 15, 17 and 19, identified as Journal Headers.
- [86] For the reasons set out above, I recommend that, pursuant to section 57(2)(b) of the ATIPP Act, the Public Service Commission provide the access to which the Applicant is entitled by severing all information from Records #4, 6, 7, 9, 10, 12, 14, 16, 18 and 20, except the total amounts due, the name of the lawyer, the name of the law firm and reference to the PSC as addressee.

## **VIII PUBLIC BODY'S DECISION AFTER REVIEW**

- [87] Section 58 of the Act requires the Public Service Commission to decide, within 30 days of receiving this report, whether to follow my recommendations and to give written notice of its decision to me and the persons who were given a copy of my report. In order to meet this requirement, the distribution list below identifies the persons who were given a copy of this report.
- [88] If the Public Service Commission does not give notice of its decision within the time required, it is deemed to have refused to follow the recommendation.
- [89] If the Public Service Commission does not follow my recommendation, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

## **IX APPLICANT'S RIGHT OF APPEAL**

- [90] Section 59(1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Public Service Commission does not follow my recommendation to give access.

Tracy-Anne McPhee  
Yukon Information and Privacy Commissioner

April 26, 2010

### Distribution List:

- Public Body – Public Service Commission
- Applicant
- Records Manager
- Office of the Information & Privacy Commissioner