OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-19

# BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 49 (CENTRAL COAST)

Paul D.K. Fraser QC, Acting Information and Privacy Commissioner

June 7, 2010

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**Summary:** Applicant requested records related to limitation expenditures. School District disclosed minutes of Board meetings in severed form and withheld several items it said related to legal accounts. Section 12(3)(b) found to apply to withheld information in minutes. Section 14 found to apply to lawyers' bills of account and some other similar information. Section 14 found not to apply to total amounts of payments to law firms.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b), 14.

**Authorities Considered:** **B.C.:** Decision F07-07, [2007] B.C.I.P.C.D. No. 8; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order No.114-1996, [1996] B.C.I.P.C.D. No. 41; Order 00-06, [2000] B.C.I.P.C.D. No. 6; **Ont.:** Order PO-2484, [2006] O.I.P.C. No. 111; Order PO-2483, [2006] O.I.P.C. No. 110.

**Cases Considered:** *B. v. Canada,* [1995] 5 W.W.R. 374 (B.C.S.C.); *Blank v. Canada,* 2006 SCC 39; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372; *British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), B.C. J. No. 2534, 143 D.L.R. (4th) 134; *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89; *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278; *Lavallée, Rackel & Heintz v. Canada (Attorney General) (*2002), 216 D.L.R. (4th) 257 (S.C.C.); *Maranda v. Richer,* 2003 SCC 67. **Ont.:** *Ontario (Attorney General) v. Ontario Information and Privacy Commissioner,* [2005] O.J. No. 941; *Ontario (Ministry of Attorney General) v. Ontario (Information and Privacy Commissioner),* [2007] O.J. No. 2769

## 1.0 INTRODUCTION

[1] This decision arises from the applicant's requests under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Board of Education of School District #49 (Central Coast) ("School District") for records relating to litigation proceedings and the expenditure of public funds, for two different time periods. The School District withheld some of the requested information under ss. 12(3)(b), 14, 17 and 22 of FIPPA. The applicant requested reviews of these decisions and during mediation the School District released some additional information. The applicant was not satisfied with this result and requested an inquiry, at which point the School District made a request, under s. 56 of FIPPA, that an inquiry not be held. An adjudicator of this Office denied that application in Decision F07-07[1] and directed that an inquiry proceed. The applicant and School District agreed to combine the two reviews into one inquiry.

## 2.0 ISSUES

[2] The issues in the inquiry are whether the School District is authorized to refuse access to some information and records under s. 12(3)(b) and s. 14 of FIPPA. Under s. 57(1), the School District has the burden of proof respecting both exceptions.

[3] Although the School District originally applied ss. 17 and 22(1) to some of the information, as discussed below, by the time of the inquiry, these exceptions had fallen away. They are thus not in issue here.

## 3.0 DISCUSSION

[4] **3.1 The Records at Issue**—Each of the applicant's requests consists of several individual requests related to litigation expenses. It appears the applicant was satisfied with the School District's response to a number of them. After these matters had been set down for inquiry, the Portfolio Officer wrote to the parties to clarify the records at issue. The applicant did not object to her characterization of the issues. The School District also later said it had determined that, as a result of further disclosures it had made during mediation, only records to which it had applied ss. 12(3)(b) and 14 remained in dispute.[2]

[5] The School District provided no sworn evidence and very little description in its submissions regarding the nature of the withheld records. From a review of the records the School District provided to me, they appear to fall into the following four categories:

[1] [2007] B.C.I.P.C.D. No. 8.
[2] Page 2, School District's initial submission.

1. Minutes of school board meetings.
2. Two pages of a computer printout labelled "G/L Account summary" which shows budget numbers and a lump sum of expenditures of an account described as "OPER-BUS ADMIN-LEG–NON". One page has the heading "2003" and the other is headed "2004".
3. Invoices for legal services provided to the School District, divided into two batches, one relating to the period between July 2002 and March 2003, and one relating to the period between March 2003 and December 2003.
4. Two computer printouts labelled "Vendor Inquiry", one dated 2003 and one dated 2004. Each has the name of the law firm who rendered the invoices handwritten on the top. They appear to be summaries of the invoices noted above in item 3. Each summary is stapled to the batch of invoices to which it relates.

[5] The School District asserts that it is authorized to refuse access to the first category of documents under s. 12(3)(b) of FIPPA and to refuse access to the other three under s. 14 of FIPPA.

[6] **3.2 Local Public Body Confidences**—Section 12(3)(b) of FIPPA reads as follows:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
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> (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[7] In Order 00-14,[3] the Commissioner held that in order to deny access to a record under s. 12(3)(b), a public body must satisfy three conditions:

(a) it must show that there is statutory authority to meet in the absence of the public;

(b) it must show that a meeting was held in the absence of the public; and

(c) it must show that the requested information would, if disclosed, reveal the substance of the deliberations of the meeting.

[3] [2000] B.C.I.P.C.D. No. 17

[8] Source documents considered at such meetings may be disclosed without revealing the substance of deliberations about them.[4] The essence of s. 12(3) is to protect what is said about controversial matters, not the source material which stimulated discussion or the outcome of the deliberations in the form of written decisions.[5]

[9] The School District asserted:

> The District has statutory authority to meet in the absence of the public pursuant to Section 69 of the *School Act* which provides as follows:
>
> **Attendance of public and secretary treasurer at meeting**
>
> 69(1) Subject to subsection (2), the meetings of the board are open to the public.
>
> (2) If, in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting.
>
> It is clear that the *in camera* meetings in question were held in the absence of the public as they are marked "in camera", and the Applicant has not contested otherwise. It is equally clear that the minutes of these meetings are a summary of the issues and resolutions that were discussed at the meetings. As such, the disclosure of the minutes would reveal the substance of the deliberations of the meetings. As a result, the District submits that the *in camera* meeting minutes of the District in question are protected under Section 12(3)(b) of *FIPPA*.[6]

[10] The applicant states that he seeks only "[F]inal documents, without attaching reasoning or argument pro or con" and the "results, not the deliberations, of *in camera* deliberation regarding legal fees".[7]

[11] The only records the School District withheld under s. 12(3)(b) are the minutes of *in camera* meetings. The School District disclosed four items that relate to the applicant and withheld the rest of the minutes. It is clear that the board of the School District has the authority to meet *in camera* and that the minutes in issue are from *in camera* meetings. I agree with the School District that disclosure of the withheld information would reveal the substance of deliberations of the board's *in camera* meetings. I find that the requirements set out in Order 00-14 are clearly met in this case with respect to these records and that the School District is entitled to withhold the rest of the minutes under s. 12(3)(b) of FIPPA. I am also satisfied that the School District exercised discretion in deciding to apply this exception.

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[4] See Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39
[5] See Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41
[6] Pages 3-4, School District's initial submission.
[7] Page 2, applicant's initial submission.

[12] **3.3 Solicitor-client Privilege—**Section 14 of FIPPA provides as follows:

> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[13] Numerous cases and orders have held that s. 14 incorporates the common law rules of solicitor-client privilege.[8] The common law recognizes two distinct types of privilege within the term solicitor-client privilege. The kind of privilege commonly referred to as solicitor-client privilege, or legal professional privilege, protects a confidential communication between a lawyer and a client that is related to the giving or receiving of legal advice, unless the client waives that privilege, either expressly or impliedly. As stated in *B. v. Canada:*[9]

> As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
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> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
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> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[14] As the Supreme Court of Canada has made clear in *Blank v. Canada*,[10] the form of privilege known as "litigation privilege" is distinct from the solicitor-client privilege discussed above. Litigation privilege protects documents that are created for the dominant purpose of preparing for, advising on or conducting litigation that is under way or in reasonable prospect at the time the record is created.

[15] **3.4 Cases on Solicitor-Client Privilege and Legal Expenses—** Numerous orders and cases have considered s. 14 as it applies to the disclosure

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[8] Order 00-06, [2000] B.C.I.P.C.D. No. 6,
[9] [1995] 5 W.W.R. 374 (B.C.S.C.).
[10] [2006 SCC 39.

of information relating to legal expenses. In *Legal Services Society v. British Columbia (Information and Privacy Commissioner*)[11] ("*LSS #1*"), a reporter requested that the Legal Services Society of BC ("LSS") disclose the total amounts paid by the LSS to a lawyer for services rendered in two cases. Justice Lowry stated, at paragraph 25:

> Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remains privileged. There is absolutely no room for compromise. Privilege has not been watered down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.
>
> Certainly the purpose of the Act as whole is to afford greater access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether the information is the subject of solicitor client privilege and whether access to a record in the hands of a government agency will serve to disclose it requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.[12]

[16] The Court held that giving access to the requested information would indirectly confirm the fact that the lawyer's retainer had been through legal aid, which was a privileged matter. As a result, the information sought was privileged.

[17] In *British Columbia v. British Columbia (Information and Privacy Commissioner)*[13] ("*Municipal Insurance Association*"), an applicant had asked that the District of North Vancouver provide him with the amount of the total legal bill incurred to date by North Vancouver in defence of a specific ongoing lawsuit. The document at issue was a one-page interim invoice from the Municipal Insurance Association to North Vancouver.

[18] Justice Holmes held that information as to the lump sum for interim legal services may relate to legal advice, at least indirectly. The court noted that communications between lawyers and clients need not contain legal advice in order to be privileged, as long as they relate to the obtaining of advice and are made in confidence. The court also noted that the terms of a solicitor-client relationship, including financial arrangements, are privileged, although the existence of the relationship itself is not privileged. The Court referred to the passages in *LSS #1* set out above and held as follows:

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[11] (1996) 140 D.L.R. (4th) 372.
[12] At pars. 24 and 25.
[13] [1996] B.C.J. No. 2534, 143 D.L.R. (4th) 134.

> I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important details in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instruction to be formulated and given.
>
> Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.
>
> Some examples, certainly not intended as exhaustive, which might be reasonably discerned from knowledge only of the type of information contained in the document record in issue here, being basically the total of interim legal fees to date in a lawsuit, could include:
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> - the state of preparation of a party for trial;
> - whether the expense of expert opinion evidence had been incurred;
> - whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
> - where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;
> - whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
> - whether legal accounts were being paid on an interim basis and whether payments were relatively current;
> - what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.[14]

[19] The Federal Court of Appeal referred to the *Municipal Insurance Association* case with approval in *Stevens v. Canada (Prime Minster)*.[15] In that case, a request had been made under the federal *Access to Information Act* for legal accounts for legal services which had been rendered to the government. The government provided accounts which showed the names of lawyers providing the services, the date the services were rendered and the time spent each day. Disbursements were listed in detail. However, the government withheld the narrative portion of the bill which described the services rendered.

[20] Linden J.A. found that the bills of accounts received a "blanket protection" such that the narrative of activities, the hours spent, the amount charged and the listing of disbursements were all protected within solicitor-client privilege.

[14] At paras. 47-49.
[15] [1998] 4 F.C. 89.

Linden J.A. held that this finding was not inconsistent with other cases which had held that a lawyer's trust ledgers, bank ledgers and reconciliation ledgers are not protected by the privilege, because such ledgers are not communications between counsel and their clients. Linden J.A. reviewed the distinction between facts and acts of counsel on the one hand and communications on the other. He held that, while a lawyer's activities are acts and statements about such activities on a bill are facts, "these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice" which, when communicated to the client, are privileged.

[21] In *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*[16] ("*LSS #2*"), the British Columbia Court of Appeal addressed the application of s. 14 of FIPPA. In that case, a reporter made a request to the Legal Services Society for a "list of 1998's top five immigration billers [to the LSS] and the top five criminal billers by names and amounts billed." She later narrowed the time frame of her request to the period from April 1 to December 31 of 1998. The LSS agreed to disclose the amounts billed, but not the names of the billers. The Information and Privacy Commissioner ordered the LSS to disclose the names of the billers and the LSS applied for judicial review of that order.

[22] The Court of Appeal noted in its decision that, in *Lavallée, Rackel & Heintz* v. *Canada (Attorney General)*,[17] the Supreme Court of Canada affirmed that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance." The Court in *LSS* #2 stated:

> …I accept that more than a merely fanciful or theoretical possibility of breach of the privilege would have to exist before withholding the information could be justified. On the other hand, the importance of retaining the privilege in its full vigour suggests that Scarth J. was correct in placing the focus not on the casual reader but on the "assiduous, vigorous seeker of information relating to clients."

[23] The Court held that an "assiduous reporter" who was familiar with relevant court proceedings could put the requested information together with the billing amounts and deduce that particular clients were funded by legal aid. As a result, the Court held that the names of the billers were properly withheld under s. 14 of FIPPA.

[24] Shortly after the release of that decision, the Supreme Court of Canada addressed the question of the privilege attaching to information about lawyers' fees and disbursements in the criminal context in *Maranda v. Richer*.[18] In that case, the police obtained authorization for a search of a lawyer's office for all

[16] 2003 BCCA 278.
[17] (2002), 216 D.L.R. (4th) 257 (S.C.C.).
[18] 2003 SCC 67.

documents relating to fees and disbursements with respect to a client who was suspected of money laundering.

[25] The Court noted that its decisions have consistently strengthened solicitor-client privilege which is now regarded, not as just an evidentiary rule, but a general principle of substantive law. The Court stated that, in the criminal context, exceptions to the principle of confidentiality established by the privilege are "clearly defined and strictly controlled." The Court noted that the aim is "to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients." The Court found that in the context of a search of a lawyer's office there is a duty to minimize interference with the privilege — the search must not be authorized if there is another reasonable solution and any authorization which is given must minimize interference with the privilege. The problem in the case before the Court was to determine how this rule of minimization "applies to information concerning lawyer's fees, in the context of a criminal investigation being conducted by the police."

[26] The Court noted that there were two lines of cases relevant to the issue. One line, relying on the distinction between a fact and communication, had held that the gross amount of fees paid to a lawyer was not subject to privilege. Another line of cases, the most important of which was *Stevens,* had held that the amount of fees was protected by the privilege.

[27] In *Maranda*, the Court held that the appropriate rule could not be based on a distinction between facts and communications. The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship and must be regarded, as a general rule, as one of its elements.

[28] The Court stressed the importance of the criminal context in its formulation of the issues before it. It determined that the appropriate rule was one which found information relating to bills of account to be presumptively privileged:

> 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.
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> Accordingly, when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this, by a careful examination of the application, subject to any review of his or her decision. In addition, certain information will be available from other sources, such as the client's bank where it retains the cheques or documents showing payment of the bills of account. As a general rule, however, a lawyer cannot be compelled to provide that information, in an investigation or in evidence against his or her client. In this case, the Crown neither alleged nor proved that disclosure of the amount of Mr. Maranda's billings would not violate the privilege that protected his professional relationship with Mr. Charron. That information therefore had to remain confidential, as the trial judge held.

[29] The impact of *Maranda* on freedom of information requests relating to legal fees has been considered in cases involving Ontario's *Freedom of Information and Protection of Privacy Act* (the "Ontario Act"). In *Ontario (Attorney General) v. Ontario Information and Privacy Commissioner)*,[19] the Ontario Court of Appeal considered an application for judicial review of two orders of an Assistant Information and Privacy Commissioner. The first order required the Attorney General to disclose the total amount of legal fees the Attorney General paid to two lawyers who acted for two intervenors in a criminal proceeding. The second required disclosure of the payments the Attorney General made to four lawyers who had acted for an accused in the appeal of his murder convictions.

[30] The Court upheld the orders for disclosure. It found that *Maranda* established that the presumption of privilege attaching to the amount of a lawyer's fees "will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the solicitor/client relationship by revealing directly or indirectly any communication protected by the privilege". The Court stated:

> 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

[19] [2005] O.J. No. 941.

> client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of that relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.
>
> While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.
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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), 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.

[31] Following that decision, an adjudicator under the Ontario Act considered a number of requests for information relating to legal expenses. In Order PO-2484,[20] Adjudicator Higgins found that the Court of Appeal's decision establishes the appropriate approach in such cases to be as follows:

> [I]n determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged

[20] [2006] O.I.P.C. No. 111

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

[32] Adjudicator Higgins considered the impact of *Maranda* on the British Columbia cases discussed above. He concluded:

> In my view, however, the Supreme Court's decision in *Maranda* implicitly limits the impact of *Municipal Insurance Assn*. and the two *Legal Services Society* cases. One common thread in all three cases is that information about a retainer is privileged, and since the payment of fees relates to the retainer, information concerning that subject is privileged. The Supreme Court could have applied this approach in *Maranda*, but did not do so. Instead, it set up a rebuttable presumption of privilege and with it, the inherent possibility that records relating to lawyers' billing information may *not*, in fact, be privileged. Therefore, in my view, it would not be appropriate to simply apply these cases to the facts before me and conclude here, as well, that the information relates to the retainer and is automatically privileged for that reason. Instead, I will apply the approach in *Maranda*, also taken by the Ontario Court of Appeal in *Attorney General # 1*. This entails asking whether the presumption of privilege has been rebutted. In my view, the principal aspect of these decisions that remains pertinent is the discussion, in both *Municipal Insurance Assn.* and the British Columbia Court of Appeal's *Legal Services Society* decision, about the "assiduous" requester.

[33] On judicial review of this order, the Ontario Superior Court of Justice held that the adjudicator had applied the correct test and did not err in finding that the presumption of privilege was rebutted.[21] The Court also confirmed that "it is clear that *Maranda* overrules *Stevens* to the extent that the latter purported to recognize a blanket privilege for billing information."

[34] **3.5 The Positions of the Parties**—In its initial submissions, the School District's only argument on s. 14 was a description of the elements of solicitor-client privilege and an assertion that "the records requested are covered by solicitor-client privilege" and were properly withheld. The School District referred to Decision F07-07,[22] which states that numerous court decisions and Orders "establish beyond a doubt that, in British Columbia, legal fees billed to a public body are protected by solicitor-client privilege and may therefore be withheld under s. 14" of FIPPA.[23]

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[21] *Ontario (Ministry of Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769.

[22] [2007] B.C.I.P.C.D. No. 8.

[23] Page 4, School District's initial submission.

[35] In its reply submissions, the School District stated:

> The decision in *Maranda, supra,* clearly states that a solicitor's bill of accounts falls prima facie within the category of solicitor client privilege. While this presumption may be rebutted, the Applicant has failed to provide any submissions on the matter.[24]

[36] The School District noted that, in the s. 56 decision in this matter, the adjudicator made reference to the two Ontario court decisions discussed above, but the applicant made no reference to these decisions in his argument. The School District states:

> The presumption of privilege is a starting point for analysis in a particular case and, as a result of the Applicant's failure to advance a reasoned argument otherwise, that presumption remains."

[37] The applicant argues that the materials he has requested "are required to be produced as a matter of law" by way of the *Local Government Act,* s. 176(1) or s. 177; the *Company Act,* ss. 33, 235, 100, 163, 164, 169 and 171; the *Business Corporation Act,* ss. 148-150; and the *School Act,* ss. 65 and 156.[25] I have examined all of these sections and do not find that any of them requires the School District to produce the documents at issue in this inquiry.

[38] The applicant's initial submission referred to the Supreme Court of Canada's decision in *Blank v. Canada*. However, most of the passages he relied on discuss litigation brief privilege and do not relate to information protected under legal advice privilege.

[39] The applicant suggested that *Maranda* holds that "attorney fees are privileged only if there is an expectation of confidentiality. There is no expectation of confidentiality in public contracts by public official expending public monies." However, what is at issue here are not public contracts but statements regarding bills for legal services. The law is clear that whatever privilege attaches to a lawyer's account is not diminished by the fact that the client is a public body.

***Findings***

[40] I share the Ontario Court of Appeal's view that context may be an important factor in assessing the privilege which attaches to information about legal fees and that the specific criminal context in which *Maranda* was decided may raise specific concerns. Moreover, like the Court of Appeal, I am prepared to accept, for the purposes of this case, that there is a rebuttable presumption that privilege does apply to information about lawyer's fees and disbursements.

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[24] Page 2, School District's reply submission.
[25] Page 3, applicant's initial submission.

I also agree that 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." I also agree with Adjudicator Higgins that the following questions will be of assistance in this regard:

(1) Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?

(2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[41] I find that this approach to the issue is consistent with the holding of the British Columbia Court of Appeal in *LSS* #2. In addition, I find that a close reading of Holmes J.'s reasons in the *Municipal Insurance Association* case demonstrates that it is consistent with an approach which looks carefully at the question of whether the release of billing information will reveal details of litigation strategy or other privileged information or otherwise prejudice the client's "right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given." *LSS #1* also pointed to the question of whether "granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege." In that case, as in the later *LSS* #2 case, it was the fact that the client was in receipt of legal aid that was found to be privileged and information which revealed that fact was thus subject to s. 14. None of these cases then requires a blanket protection for all information related to a lawyer's billing activities under the rubric of solicitor-client privilege. To the extent that the earlier cases may endorse such an approach, they must now be read in light of *Maranda.*

[42] As set out above, the School District has suggested that it is not open to me to find that the presumption of privilege has been rebutted because the applicant did not make submissions going directly to that point. In Ontario Order PO-2483,[26] discussed above, and Ontario Order PO-2484, released concurrently, Adjudicator Higgins considered a similar argument by the Ministry in that case. In PO-2483, the applicant did not make representations. Adjudicator Higgins stated:

> … while the Court of Appeal did indicate in *Attorney General # 1* 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

[26] [2006] O.I.P.C. No. 110

> 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 # 1*, 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.

[43] In Order PO-2484, the adjudicator stated:

> In my view, similar considerations apply where the appellant has provided representations on the issue, but the records themselves are a source of important information. Even if the appellant participates in the appeal, as in this case, his or her ability to provide the necessary evidence and argument to rebut the presumption is hampered by not having seen the records. In this situation, in my view, the Commissioner must review the records and consider the evidence they provide on this point, just as the Court of Appeal did in *Attorney General # 1*. Any other approach would be unfair to the appellant.

[44] I agree that the lack of submissions directly on point by the applicant cannot be determinative of the proper application of FIPPA. It is still incumbent upon me to consider the nature of the information and the circumstances and context of the case to determine whether the presumption is rebutted. In most cases, it will be the public body that has much of the information which would assist in determining whether disclosure would reveal privileged information and I would expect that the public body would make submissions in that regard, as they did in the numerous other cases referred to above.

[45] I therefore turn to the records in issue. As noted at the outset, the School District withheld three types of records under s. 14. The first category consists of the two documents labeled "G/L Account Summary."

[46] The School District did not provide any evidence regarding what the numbers in this printout represent or their connection to any information that might be privileged under s. 14. Even if the onus is on the applicant to displace a presumption of privilege, the School District must still provide a factual foundation to allow for a determination that presumption of privilege attaches to the documents in issue. In this case, in the absence of any evidence or submissions on point from the School District, I am unable to conclude that these documents disclose anything about attorney's fees at all. I certainly cannot see how the disclosure of the documents would reveal privileged communications or interfere with the ability of the government to communicate with counsel in confidence and

receive legal advice. In these circumstances, I find that the School District is not entitled to rely on s. 14 with respect to these records.

[47] The second category consists of the law firm's statements of account. These are the actual bills for services provided to the School District. They have been withheld in their entirety. In Ontario Orders PO-2483 and PO-2484, Adjudicator Higgins rejected the Ministry's contention that, because *Maranda* did not expressly overrule *Stevens*, bills of account remained privileged in their entirety. He held that the distinction between bills of account and the "amount" of fees and disbursements paid was not easily made and that any different treatment of the two would be difficult. He stated:

> Based on my review of *Maranda*, I am not persuaded that the Supreme Court endorsed a view of privilege that automatically protects solicitors' invoices in their entirety, including the amount of fees and disbursements, but applies the presumption/rebuttal approach to lawyers' fee and disbursement information in other kinds of records. A careful examination of the Court's discussion of the facts/communications distinction at paragraphs 30-33, which I have reproduced above, supports this view. The Court characterizes both "the bill of account and its payment" as a "fact" (para. 32). However, it says that the "fact" of the bill and its payment "cannot be separated from acts of communication", and then states the presumed privilege rule to deal with this type of information. In formulating the rule, the Court indicates that "[b]ecause of the difficulties inherent in determining the extent to which the information contained in *lawyers' bills of account* is neutral information, … recognizing a presumption that such information falls within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved." (para. 33, emphasis added) The Court's intention to include not only the amount of fees and disbursements actually paid in the presumptively privileged category, but also lawyers' bills of account, could not be more clearly stated.
>
> Though the Ministry has not abandoned the distinction between amounts paid and actual invoices, its final submissions suggest that what matters is the nature of the information and what it communicates:
>
> > … [the] protection of legal accounts is extended not simply because a record is labelled a "legal account" as opposed to some other kind of record. Indeed, the Supreme Court in *Maranda* rejected an approach based on whether information is labelled "a fact or an act". What is relevant is the nature of the information contained in the record, and whether it directly or indirectly would reveal information that is subject to solicitor-client privilege.
>
> I agree. In my view, a distinction in the treatment of information about legal fees and disbursements based on whether it appears in an invoice or some other kind of record is untenable. I find that the distinction drawn by the Ministry does not provide a sound basis to distinguish *Maranda* from *Stevens* and allow the latter to continue to govern the application of privilege to solicitors' invoices as the Ministry submits. For these reasons, I have concluded that the *Maranda* decision overrules *Stevens* regarding

> the application of privilege to information about legal fees and disbursements.

[48] I do not find it necessary to determine whether I agree that *Maranda* requires the same kind of analysis to be applied to the actual bills of account as is used for other documents which may contain information about lawyer's billings. Even accepting that there is no distinction between the various forms of information concerning legal fees and disbursements, the bills of account here contain detailed descriptions of the lawyer's activities and, in my view, are clearly protected by privilege. I am not prepared to find that any portion of the legal bills at issue must be disclosed.

[49] The third category of documents at issue are each labelled "Vendor Inquiry" and consist of what appears to be a summary of the amounts paid on various dates with respect to various legal matters. The applicant states, in his reply submission, that

> there is no litigation remaining between claimant and School District 49, thereby rendering solicitor client privilege either curtailed or disallowed by way of Canada Supreme Court decision(s) proffered by the claimant.

[50] This is the only information either of the parties has offered regarding the status of any legal proceedings to which the requested information may relate.

[51] As noted above, most of the applicant's references to the case law relate to litigation brief privilege which, for the most part, terminates at the conclusion of the litigation. The solicitor-client privilege which may attach to information regarding legal fees does not expire at the end of litigation, although the fact that litigation is concluded may well impact the assessment of whether disclosure of certain information will allow a party to deduce other, privileged information. Thus, the fact that the applicant's litigation with the school board has ended may be relevant. However, because the information request was not targeted at legal expenses relating to any particular matter, I must consider the impact of any disclosure on all matters in which the school board may have been advised.

[52] The documents at issue contain dates on which individual invoices were paid, the amounts of those individual payments and a description of the matters to which the services rendered relate. The documents also contain a global total for the amount spent during the period covered by the vendor inquiry. I am satisfied that the total amount expended can be released without revealing or allowing anyone to deduce any communications protected by the privilege. Rather, any speculation about how this might affect privileged information is, in the words of our Court of Appeal, only a "fanciful or theoretical possibility." Release of this figure will not provide any information about what was spent, much less what was done by counsel, on specific matters. I cannot see any realistic possibility that it would in way disclose privileged details of the

School District's relationship with its counsel or "prejudice its right to communicate with counsel in confidence."

[53] The School District has also withheld the name of the law firm from the "Vendor Inquiry". As noted by Justice Holmes in the *Municipal Insurance Association* case, the existence of a solicitor-client relationship is not usually privileged. In some cases, revealing the name of a lawyer may reveal privileged information. For example, in LSS #2 the Court of Appeal held that disclosure of the requested names of lawyers could allow someone to deduce that a particular client was funded by legal aid. In this case, there is nothing to suggest that disclosure of the name of the law firm would allow anyone to deduce privileged information. The applicant's correspondence makes it clear that he is aware of who the law firm is and it is matter of public record that the named firm represented the School District in the proceedings with the applicant during the period in question. I find that there is no presumption of privilege with respect to the name of the law firm and, if there is such a presumption, it is rebutted in this case.

[54] I am not satisfied that the presumption of privilege is rebutted with respect to the information regarding the names of the legal matters or the amounts and dates of payment of specific invoices. The fact that numerous legal matters, not just those involving the applicant, are caught by the request makes it more likely that disclosure could reveal privileged information about ongoing matters. The specific dates, and the amount paid with respect to services rendered on those dates, make it more likely that an assiduous researcher could deduce information which is subject to the privilege. Given the Supreme Court of Canada's admonition that any doubt on these matters should be resolved in favour of protecting the privilege and, in the particular circumstances of this case, I am not prepared to order the release of any information in the Vendor Inquiries other than the total amount paid and the name of the law firm.

## 4.0 CONCLUSION

[55] Under s. 58 of FIPPA, I make the following orders:

1. I confirm that the School District is authorized to withhold the information it withheld under s. 12(3)(b), that is, the minutes of the school board meetings held *in camera*.
2. I confirm that the School District is authorized to withhold the information it withheld under s. 14 in the second category of records, namely the lawyers' bills of account.
3. Subject to Para. 4 below, I confirm that the School District is authorized to withhold the information in the two pages of records called "Vendor Inquiry".

4. I require the School District to disclose the total amount of payment and the name of the law firm as they appear on the documents titled "Vendor Inquiry".

5. I require the School District to disclose the two pages titled "G/L Account Summary".

6. As a condition under s. 58(4), I require the head of the School District to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before July 20, 2010.

June 7, 2010

**ORIGINAL SIGNED BY**

Paul D.K. Fraser, QC
Acting Information & Privacy Commissioner
for British Columbia

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