

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-43

October 24, 2014

CALGARY BOARD OF EDUCATION

Case File Numbers F6085, F6086, F6087, F6088, F6089

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Summary: The Applicant made five access requests under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Board of Education (the Public Body). The first access request was for his personal information while the other four requests were for records containing information about the processing of his access requests.

Initially, the Public Body required fees to be paid and the Applicant requested review of the decision to charge fees. In Order F2009-039 the fees were waived. The Public Body then processed the Applicant's access requests. The Public Body located responsive records and provided them to the Applicant with information severed under sections 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 24 (advice from officials) and 27 (privileged information).

The Applicant requested review by the Commissioner of the Public Body's response, including whether it had conducted an adequate search for responsive records.

The Public Body subsequently determined that it was no longer relying on section 24 or 27 in relation to three records and produced them to the Applicant.

The Adjudicator confirmed that the Public Body had conducted an adequate search for responsive records in relation the Applicant's personal information. However, the Adjudicator was unable to discount the possibility that responsive information that had

not been produced was located on backup tapes with regard to the access requests for processing information. She ordered to the Public Body to search the backup tapes for responsive records unless it was able to determine through other means, that responsive records not yet produced were not located on the backup tapes.

The Adjudicator confirmed the Public Body's decisions to sever information under sections 17 and 27. As the Public Body had applied section 17 to the same information to which it had applied section 20, the Adjudicator made no determination regarding its application of section 20.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 17, 20, 27, 72, 93, 95

Authorities Cited: AB: Orders 2001-016, F2006-006, F2007-029, F2009-039, F2011-R-001

Cases Cited: *Maranda v. Richer*, [2003] 3 S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O. J. 1494 (ON. Div. Ct.); *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O. J. 941 (ON CA); *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O. J. No. 2769 (ON Div. Ct.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Canada v. Solosky* [1980] 1 S.C.R. 821; *Re Kaiser*, 2012 ONCA 838 *R. v. Cunningham*, 2010 SCC 10

I. BACKGROUND

[para 1] The Applicant made five access requests. The Public Body assigned File Number 2007-P-007 to the following request, which was made on August 20, 2007:

I request any and all information regarding any matter and specifically, but not being limited, to any evaluations, assessments, terms, placements and any and all other activities, relating to my (employment) relationship with CBE between January 1, 1991 to the present.

The request includes any documents, memoranda (internal, interdepartmental or otherwise), notes, records, photographs, evaluations, opinions, schemata or diagrams, reports prepared or reproduced in any way and any all computer records (including emailed correspondence, commentary or memoranda) as apply to these matters AND any investigation of the matter by CBE; the administration of any school under the direction and authority of CBE and any third party (including any students, parents, guardians or caregivers of any students).

(The foregoing access request is the subject of inquiry F6085.)

[para 2] The Applicant made four additional requests for access on October 17, 2007.

[para 3] The Public Body assigned file number 2007-G-008 to the following request:

I request the records pertaining to the administration of: my FOIP Request dated in or about February, 2002, being FOIP 2002-P-003.

The time frame for the request was January 24, 2002 to the date of the request. (This request is the subject of inquiry F6086.)

[para 4] The Public Body assigned file number 2007-G-009 to the following request:

I request the records pertaining to the administration of: my FOIP request dated in or about September, 2002 being FOIP 2002-P-015.

The time frame for the request was August 24, 2002 to the date of the request. (This request is the subject of inquiry F6087.)

[para 5] The Public Body assigned file number 2007-G-010 to the following request:

I request the records pertaining to the administration of: my FOIP Request dated in or about May, 2006, being FOIP 2006-P-006.

The time frame for the request was April 24, 2006 to the date of the access request. (This request is the subject of inquiry F6088.)

[para 6] The Public Body assigned file number 2007-G-011 to the following request:

I request the records pertaining to the administration of:
a) my FOIP Request dated August 20, 2007, being FOIP 2007-P-007; and
b) my request for information as presented to the CBE on August 10, 2007, supported by the Authorization and Declaration dated August 10, 2007.

The time frame for the request was August 10, 2007 to the date of the access request. (This request is the subject of inquiry F6089.)

[para 7] The Public Body requested that the Commissioner authorize it to disregard one or more of the Applicant's access requests under section 55. The Commissioner denied this request.

[para 8] The Public Body estimated that it would cost \$6152 to process these access requests and required the Applicant to pay fees prior to processing the access request. The Applicant requested a fee waiver. The Public Body declined to waive the fees and the Applicant requested review by the Commissioner.

[para 9] Order F2009-039 was issued on April 30, 2010. In that order I decided that it was appropriate to excuse the Applicant from paying the fees. I ordered the Public Body to respond to and process the Applicant's access requests.

[para 10] The Public Body processed the Applicant's access requests and provided responses to them. It produced records, but withheld some information from the Applicant under sections 17 (disclosure harmful to personal privacy), section 20 (disclosure harmful to law enforcement), 24 (advice from officials) and 27 (privileged information).

[para 11] The Applicant requested review by the Commissioner of the Public Body's responses. He questions whether the Public Body has provided him with all the records that are the subject of his access requests and requests review of the Public Body's decisions to sever information from the records.

II. INFORMATION AT ISSUE

[para 12] Information severed under sections 17, 20, and 27 of the FOIP Act is at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records from the Applicant?

Issue C: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

Issue D: Did the Public body properly apply section 27 of the Act (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 13] Section 10 of the FOIP Act states, in part:

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

[para 14] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, former Commissioner Work, then the Assistant Commissioner, said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 15] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable or adequate search for responsive records.

[para 16] In Order F2007-029, former Commissioner Work explained the kinds of evidence that must be provided in order to discharge the burden of proving that a search was conducted in a reasonable way. He said:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 17] The Applicant argues:

Under section 10 the Body has a “duty to assist”, this clearly was not their action or intent, their intent was to block, hinder and obstruct. By their own documentation, their Exhibit 7b, they did not even start their search until November 8, 2007. Clearly the extension was a ruse by their legal counsel to file the Section 55 applications and nothing more. It became CBE's counsel's method to use the shortcomings of the Act to effectively not produce what was required of them. Yet the CBE claims openness. There is an inherent imbalance between an individual and a Public Body as the Public Body always has taxpayer's dollars to finance its activities on matters like this and simply can out spend an individual applicant on matters such as these. These were not applications by a newspaper seeking government flight logs or expense billings, rather this was personal information being sought out, by an employee from an employer and as such the Duty to assist and openness is paramount.

The actions by the Body were clear; they had no intent on producing the required documents and would do whatever it took and how much ever it cost to block production.

The Commissioner denied both Section 55 applications outright.

At this point, the CBE issued a letter and a request for payment stating that there were 10,600 pages that were relevant to the request and a cost of \$6152.00 tied to the release of the 10,600 pages. The exact details and actual breakdown are found in Order F2009-039 paragraph 7 and seem quite detailed and exact, as a completed search for records. Once the number of pages was made public, there was no reason to question their accuracy although, such a number of pages relevant to the request seems excessively large. By this time it was assumed that they had completed their search and the numbers accurate as they had issued a bill.

The Commissioner through inquiry waived the fees outright.

The Applicant only found out these number[s] were not accurate when the Public Body released under 2,400 pages, 4.5 years after the original request was made. Prior to the release of the documents, the CBE terminated the employment contract of the Applicant.

The Head of the Body is accountable for all actions within FOIP, irrespective of who they blame did the work, or excuses why the work wasn't done properly. The CBE retains very expensive lawyers to do their bidding and in this case the game plan was to block production by all means necessary. Their first plan the Section 55 applications, failed, next plan a \$6,152.00 bill to the applicant, making the cost exorbitant so that the applicant who had no source of income could not afford it, failed. Next plan Judicial Review, making the applicant retain counsel, a very expensive venture. That was dropped after they saw no need for it, after they terminated the applicant's employment contract after 25 years. Nothing is done by random chance with this Public Body, all this is a well conceived plan by their very expensive lawyers, retained by a billion dollar public body, to carry out the Body's directions.

Had the bill for 2,400 pages been produced originally, rather than a bloated bill for 10,600 pages, it never would have proceeded to inquiry. The fact that the number of pages and bill was so large made the cost of attaining it by the Applicant impossible. In the spring of 2013 legal counsel of CBE at the applicant's Board of Reference hearing submitted a bundle of documents to be used at the Board of Reference tribunal. It contained personal information about the applicant WHICH HAD NEVER BEEN SEEN BEFORE BY THE APPLICANT OR RELEASED IN THE DOCUMENTS RELEASED ON FEBRUARY 12, 2012 BY THE BODY. ALL THE PERSONAL INFORMATION HELD BY THE PUBLIC BODY WAS TO HAVE BEEN RELEASED IN FEBRUARY 2012.

This begs the question did the Body release all documents as required, or did they fail to do a complete search and mislead the Privacy Commissioner. Said documents are in the possession of the Applicant's legal counsel [...] of Field Law LLP, who is also in possession of the released documents of February 12, 2012.

The Applicant questions whether the Public Body has produced all responsive records. He states that he received information from the Public Body's counsel at a Board of Reference hearing that he did not receive from the Public Body in response to his access request. He also argues that the Public Body delayed responding to his request through a section 55 application, and by calculating the fees to be paid using an inflated estimate of records.

Did the Public Body conduct an adequate search for responsive records?

[para 18] The Public Body states, with regard to the search it conducted for responsive records in relation to Inquiry F6085:

The search request for file F6085 was broad, covering records spanning a 17 year period. The CBE has provided evidence of four internal memos that the search for records was adequate. The memos provide evidence of: (a) the content of the search request; (b) the deadline for the response to the request; (c) the requirement to locate and retrieve records of the addressee, as well as other staff, and (d) the need to send the memo on to others who may have records. The memos emphasize the responsibilities placed on CBE staff members to respond to the access request. [...]

A review of F6085 located four search memos. The first search memo, dated September 28, 2007, requested all records including "hard copy and electronically produced or stored documents, such as email, fax and records created in any form on a computer, network, hard drive, floppy disks, etc." It was sent to 6 persons within the CBE. The initial search was suspended pending disposition of the CBE's section 55 application. [...]

A second email went out on November 8, 2007 and specifically requested service units preserve all records including "documents, electronic records, and evidence of every kind..." pending the outcome of the section 55 application. This email was sent to all members of the Board [of] Trustees, the Office of the Chief Superintendent, 3 additional Superintendents, all 5 Area Office Directors, 6 Directors within the CBE, and 13 additional administrators within CBE. [...]

As deposed by the current FOIP Coordinator, there are two additional memos ("third memo" and "fourth memo") on F6085 that indicate the scope of the search. [...]

The third memo was addressed to 25 people, including Chief Superintendent, the Deputy Chief Superintendent, 5 Directors in Human Resources, General Counsel, all five Area Office Directors, 4 Principals and 8 other administrators within the CBE. This memo reflected a more concise list of information requested by the Applicant and set a deadline for the records to be sent to the former FOIP Coordinator. It included all "hard copy and electronically produced or stored documents such as email, fax and records created in any form on a computer, network, hard drive, floppy disks, etc."

The fourth memo dated the same day was addressed to 45 people, including all the senior officials identified in the third memo. This memo was similar in content to the second and third memos in that it directed all "hard copy and electronically produced or stored documents such as email, fax and records created in any format on a computer, network, hard driver, floppy disks, etc."

The CBE does not have delivery confirmation for the third or fourth memo. However, the CBE has provided evidence that it received records from personnel in service units listed on the third and fourth search memos. It is, therefore, submitted that on a balance of probabilities it is likely that at least one of these two memos were distributed to staff.

The search on file F6085 produced approximately 7,000 pages of records. The CBE has provided evidence that 15 service units, 4 schools and 3 area offices produced records responsive to the request. Based on the search criteria outlined in the search memos, the records produced by the search request, and the number of service units and schools responding to the search request, the CBE submits that the search was adequate and responsive to the Applicant's access request. [...]

[para 19] The Public Body's FOIP Coordinator swore an affidavit regarding her review of the responsive records and her role in preparing the Public Body's response to the Applicant. She states:

During my review of the records I determined it was reasonable to conclude that the searches produced all responsive records. I was not directly involved in the search for records for any of

the Applicant's five access requests. On assuming responsibility for the Applicant's requests, I reviewed the files for information related to the search to satisfy myself that the search had produced the responsive records.

On file F6085, I located four search memos in relation to the request for records. Two of the memos have emails with delivery receipts attached. The first search memo, dated September 28, 2007 is attached hereto as EXHIBIT "A". The email attached to this memo confirms the search went to 6 staff members. The second memo, dated November 8, is attached hereto as EXHIBIT "B" is a memo requesting that all records be preserved pending the CBE's application under section 55 of the Act. The email attached to the memo confirms it was sent to 28 staff members. The third memo located on the file, dated April 15, 2008, and attached hereto as EXHIBIT "C", lists 25 addressees. There was no covering email or delivery receipt attached to the memo. The fourth memo located on the file is also dated April 15, 2008, and is attached hereto as EXHIBIT "D". It was addressed to 45 persons. I did not locate an email cover sheet or delivery receipt for this memo.

The search requests on file F6085 produced approximately 7,000 records. I reviewed all the records and personally saw records from the following CBE departments:

- a. Labour Relations including records in relation to teacher transfer appeals, teacher placements, Alberta Human Rights Complaints, and investigation records;
- b. Human Resources including the departments of Talent Management, Teacher Staffing, Employee Health Resource Centre, and TSSI (third party contractor for HR Transactions);
- c. Legal Affairs;
- d. Corporate Security;
- e. CBE's Corporate Secretary;
- f. Office of the Chief Superintendent;
- g. Corporate Risk Management;
- h. Area III Office;
- i. Area IV Office;
- j. Area V Office; and
- k. Student Services Support

I also saw records from teachers and principals at the following schools:

- a. E.P. Scarlett High School;
- b. Louis Riel School;
- c. Bishop Pinkam Jr. High; and
- d. Sir Wilfred Laurier Middle School.

I also saw that the service units that produced the records were also the service units listed in memos three and four attached hereto as EXHIBITS "C" and "D".

Based on the records produced by the search, the number of persons listed in the search memos, the fact that 15 service units, staff from four schools and 3 area offices produced records, I

concluded that no additional search was required. I am personally aware that all CBE employees are under an obligation to perform their responsibilities to the best of their abilities, including responding to search requests in an accurate, open and timely manner. I have no reason to believe that the persons involved in the search did not perform their responsibilities to the best of their abilities.

Based on all of the above, I believe that the CBE conducted an adequate search for records and that it is reasonable to conclude that the search produced all records responsive to the Applicant's access request.

[para 20] With regard to the searches conducted in relation to inquiries F6086, F6087, F6088, and F6089, the Public Body states:

The CBE submits the search in relation to the four general access requests, namely F6086, F6087, F6088, and F6089, are also adequate and reasonable. The access requests relate to the administration of previous access requests and those documents are stored in the FOIP Office and under the control of the FOIP Coordinator and / or Privacy and Access Officer. The records considered responsive to these requests are records that document "the procedures or steps followed by an individual or individuals who processed the original requests". They do not include the records that form part of the original access request.

The former FOIP Coordinator completed the initial search for records. The CBE has provided evidence that the current FOIP Coordinator also searched physical files and electronic files in the FOIP Office and the Legal Affairs service unit in relation to the processing of the original FOIP requests. There is no evidence that a search of records in other service units was required as all records in relation to administration of FOIP requests are stored in the FOIP Office. [...]

The CBE also took additional steps to search the former FOIP Coordinator's hard drive to ensure there were no additional electronic records. The current FOIP Coordinator deposed that she believed the former FOIP Coordinator may have stored some documents on her hard drive. This hard drive was found to be corrupted and most of the information stored on it was lost. The CBE took steps to recover the hard drive. The information that was recovered was not readable and did not relate to the Applicant's request. As a result, the search of the hard drive did not produce any records.

[para 21] The affidavit of the current FOIP Coordinator, referred to in the excerpt above, provides further detail regarding the nature of the searches conducted and the results of the searches. The FOIP Coordinator also states in the affidavit:

It is my belief that the CBE does back-up electronic records, however these are limited to point-in-time back-ups only so that the servers are backed up to tapes of 24 hours. Our I.T. department advised me, and I do believe, that the backed-up information is stored off-site in the event they are needed for disaster recovery. CBE does not consider the backed-up electronic records as a form of centralized storage that can be readily searched. The recovery process and searching of all electronic records that existed at a particular point in time would require several days and many hours of work. It is my belief that this would constitute an unreasonable use of CBE resources.

[para 22] The current FOIP Coordinator further states:

In addition, [...] and I were informed by CBE General Counsel that the 5 files had been processed and prepared for release to the Applicant, but that the records had been held in abeyance pending a judicial review. All records pertinent to the 5 files had been preserved and stored in Legal Affairs pending commencement of the judicial review process. [...] and I

decided to review the records at issue in F6085, F6086, F6087, F6088 and F6089. The original records for F6085 were stored in 6 boxes. Original responsive to the remainder of the files (F6085, 6086, 6087, 6088 and 6089) were stored in 2 boxes. There were 20 additional boxes of records consisting of copies of originals, processing records, duplicates and non-responsive records.

In reviewing the records, I concluded that the records had been processed but that they were not organized in a consistent manner. It also appeared to me that the redactions were inconsistent. I noted that much of the severing and redactions had been completed by outside counsel. My review of the records led me to believe that there may have been more than one person involved in applying the Act. I also saw that some exceptions under the legislation were applied inconsistently. I believed it necessary to review the records again to ensure that the broadest possible documents were released to the Applicant. In consultation with [...] I decided that the best way to ensure consistent processing was for [...] and me to review the records from a fresh perspective and to apply the Act anew.

[...] and I took a “team” approach to the records. At the time of our initial review there were approximately 10,000 records. Except where otherwise indicated, I believe that at all material times, [...] and I took a similar approach to the processing of records. We agreed that all records would be reviewed, non-responsive records and duplicates would be removed, all documents would be uploaded into Adobe Redax, and information would be assessed and severed in accordance with the Act.

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[para 23] The current FOIP Coordinator did not conduct the search for responsive records. However, she was responsible for preparing the Public Body’s response to the Applicant. In order to respond to the Applicant, she reviewed 7000 records that had been located as part of the search for records responsive to the access request for inquiry F6085. She reviewed these records for responsiveness and duplication, and removed non-responsive and duplicate records. As a result, fewer records were produced than stated in the Public Body’s initial estimate. In her affidavit, the FOIP Coordinator explains the types of records that were located, where the search for records was conducted, and her reasons for concluding that all likely locations were searched and all responsive records located.

[para 24] The current FOIP Coordinator did not conduct the search for responsive records, but went through the records to determine from where they originated and to determine whether the search was complete. She was satisfied that records from all the areas likely to contain responsive records had been produced. She was also satisfied from her review of the records produced, and the memos that had led to the search, that it was likely that all responsive records had been searched for and produced.

[para 25] The Applicant’s primary concerns with this search are the fact that fewer records were produced than set out in the initial estimate, and the fact that the Public Body produced records to his counsel at a hearing that the Applicant had never seen before. With regard to the first concern, the Public Body has explained that once duplicate and non-responsive records were removed, the number of records was reduced. With regard to the Applicant’s statement that the Public Body provided his counsel with records he had not seen before, the Applicant has not provided sufficient detail about the

particular records, or provided copies of these records, such as would establish that the records in question would have been in the custody or control of the Public Body at the time of his access request, or responsive to his access request.

[para 26] For the reasons above, I find that the Public Body has established that it conducted a reasonable search for responsive records.

[para 27] The Applicant also argues that the Public Body's decision to charge fees, which I ordered the Public Body to waive in Order F2009-039, resulted in delays in processing his access request. He argues that the delays in processing his access request resulting from the decision to charge fees, amount to a failure to assist him. I do not accept this argument. Section 10 of the FOIP Act does not refer to fees or specific time frames for responding to an access request. Rather, it creates a duty to respond to a requestor openly, accurately, and completely. The fact that a public body decides to charge fees as authorized by sections 93 or 95 of the FOIP Act, but is unsuccessful at an inquiry into the matter, does not mean that the public body responded in bad faith or has otherwise failed to meet the requirements of section 10.

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[para 28] The Public Body's current FOIP Coordinator acknowledges that it is possible that the former FOIP Coordinator's hard drive may have contained additional information that would be responsive to the Applicant's access requests for records relating to the administration of access requests (F6086 – F6089). However, the hard drive became corrupt and information could not be retrieved from it without restoring information from backup tapes. The FOIP Coordinator states that reconstituting the missing information from its backup tapes would require several days and many hours of work. The Public Body argues that doing so would amount to an unreasonable use of CBE resources.

[para 29] It is unnecessary to search backup tapes to locate responsive records in cases where other versions of the record are readily available. Whether it is reasonable to search the backup tapes will depend on the likelihood of their containing responsive information that cannot be accessed in any other way. In this case, it is unknown whether the backup tapes contain responsive information that has not yet been produced, but the Public Body has raised this as a reasonable possibility and it appears that this possibility cannot be dismissed until the backup tapes are searched.

[para 30] As discussed in Order F2011-R-001, the duty to create an electronic record under section 10(2) of the FOIP Act is distinct from the duty to provide copies of responsive records under section 13 of the FOIP Act. This order states:

As set out above, in my view, section 10(2) should not be seen as limiting the duty to provide copies under section 13.

Section 13 assumes that records are going to be disclosed, and specifies that the mode by which access is to be given, is the provision of copies. The provision has its own limitation, which is

that copies are to be provided if they can “reasonably be reproduced”, (and if they cannot, section 13(4) sets out what other steps are to be taken).

In contrast, section 10(2), which is a subclause under the heading “the duty to assist”, specifies one particular way in which assistance is to be given to the applicant. This particular duty is, in my view, superadded to the duty to provide access to records to which applicants have a right (which is to be done by providing copies). Even in situations in which there is no duty to give this particular type of assistance, because the terms of section 10(2) are not met, I do not believe this is meant to obviate the duty of public bodies to provide copies under section 13. If it were, the legislature would have made section 13 subject to section 10(2) – which it did not do. I do not believe the use of the term “create a record” in section 10(2) can be taken as intended to limit the separate duty in section 13 to reproduce copies just because the words “create a record” could be used to refer to reproduction of an original. The fact that “create a record” was used in one of the provisions and “reproduce a copy” was used in the other further supports the idea that there was no intention for the provisions to overlap.

Further, the limitation of “reasonableness” in section 13 differs in kind from the limitation in section 10(2). The latter depends in part on objective facts as to what computer equipment and technical expertise the public body has, as well as on the nature of its particular operations. A conclusion as to whether or not records can be created depending on whether the terms in section 10(2) can be met may or may not coincide with whether it is “reasonable” to create them in the circumstances. (For example, even if the public body’s computer resources were adequate to the task and performing it would not compromise the public body’s operations, other factors might make it unreasonable to create records in particular circumstances. Conversely, one is not obliged to ask under section 10(2)(a) whether it is reasonable for a public body to not have resources adequate for the task.) The fact that the tests are different for each provision is another indication that the two provisions address different questions.

Section 13 contains a provision as to what is to be done if it is not reasonable to produce copies, while section 10(2) has no such provision. Again, this is an indicator that the two duties (producing copies and creating records) are different and do not overlap.

In view of the foregoing considerations, I believe the better interpretation of the phrase “create a record” in the context of section 10(2) is that it does not relate to or limit the duty of a public body under section 13 to produce copies of records that it has decided to disclose. Rather, it creates a separate duty to assist applicants, when the terms of the provision are met, by manipulating data existing in electronic form so as to produce it in a form more usable or more economical for the applicant – for example, where a small data element is being sought from a larger database, or where unresponsive parts of documents could be removed electronically to reduce the size of the document that contains responsive data. However, even where this cannot be done because the limitations in section 10(2) do apply, this does not obviate the duty of the public body to provide copies of as much of the database or document as it is necessary to provide, in order to satisfy the request, subject to the “reasonableness” limitation and the payment of fees.

[para 31] Order F2011-R-001 found that whether there must be a search for responsive records among backup files does not form part of the duty set out in section 10(2), with the attendant limitations on the duty under that provision that records need to be created only in described circumstances. Rather, whether backup files must be searched is to be considered under the duty to make a reasonable effort within the terms of section 10(1).

[para 32] If information can be produced without reconstituting it from backup tapes, then the duty to assist does not require a public body to reconstitute the information

from backup tapes; however, if the only source of responsive information is backup tapes, then the duty under section 10(1) is engaged and the Public Body must search the backup tapes.

[para 33] If the Public Body is able to determine that it has produced all responsive records likely to be contained on its backup tapes then it need not search the backup tapes; however, if it determines that it is likely that there may be records on the backup tapes that have not yet been produced to the Applicant, then it must conduct a search of its backup tapes.

[para 34] I will order the Public Body to determine whether there are responsive records that have not been produced on its backup tapes, and to produce such records if it decides that there are. (In making this determination, it would be open to the Public Body to contact employees or former employees who might be familiar with the types of information stored on the former FOIP Coordinator's hard drive.) If the Public Body determines that the backup tapes are not likely to contain responsive information which has not yet been produced, the Public Body should communicate this determination, with reasons, to the Applicant. The new decision would be reviewable by this office.

Conclusion

[para 35] To summarize, the Public Body has established that its search for records in relation to inquiry F6085 was reasonable.

[para 36] With regard to inquiries F6086 – F6089, I cannot discount the possibility that responsive records are located on the Public Body's backup tapes. However, the Public Body has not yet searched for the records or attempted to reproduce them. While I agree with the Public Body that its Legal Affairs area is the primary area to be searched for responsive records, I am unable to confirm the adequacy of the Public Body's search unless it either searches the backup tape for responsive records, or establishes that it is unlikely that responsive records which have not yet been produced are located on the backup tapes.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records from the Applicant?

[para 37] The Public Body has applied section 17 to withhold the names and contact information of individuals whose names appear in the records. In some cases, it has redacted the contents of letters written by third parties to express their views regarding disclosure of their personal information.

[para 38] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 39] Section 1(n) of the FOIP Act defines personal information. It states:

I In this Act,

(n) “personal information” means recorded information about an identifiable individual, including

(i) the individual’s name, home or business address or home or business telephone number,

(ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual’s age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual’s health and health care history, including information about a physical or mental disability,

(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else’s opinions about the individual, and

(ix) the individual’s personal views or opinions, except if they are about someone else;

[para 40] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 41] The name of an individual and the individual’s contact information fall within the terms of section 1(n)(i) of the FOIP Act. I therefore find that the information severed by the Public Body is personal information.

[para 42] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party[...]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 43] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 44] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an

unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5) (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 45] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. [17(4)] lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. [17(5)] and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. [17(1) and (4)].

In my opinion, that is a reasonable and correct interpretation of those provisions in [s. 17]. Once it is determined that the criteria in s. [17(4)] is [sic] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. [17(5)]. The factors in s. [17(5)] must then be weighed against the presumption in s. [17(4)]. [my emphasis]

[para 46] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 47] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

[para 48] The Public Body severed the names of individuals from the records and provided the remainder of the information to the Applicant. The question is whether it would be an invasion of the individuals' privacy to disclose their names to the Applicant.

[para 49] I find that the names of the individuals fall under section 17(4)(g), as the names appear in the records in the context of other information about them. The information is therefore subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it.

[para 50] Under section 1(n) of the FOIP Act, personal opinions about someone else are the personal information of the subject of the opinion and not the personal information of the opinion holder. However, the fact that an individual holds an opinion

about another individual may be the personal information of the opinion holder. This point was made in Order F2006-006, where the Adjudicator stated:

A third party's personal views or opinions about the Applicant - by that reason alone - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the substance of the view or opinion of a third party about the Applicant is not third party personal information, but the identity of the person who provided it is third party personal information.

[para 51] Where individuals express opinions about the Applicant in the records, the opinions are the personal information of the Applicant. However, the fact that the individuals hold these opinions or expressed them, remain their personal information. From my review of the opinions to which the Public Body applied section 17, I agree that the individuals who expressed the opinions could be identifiable from the content of the opinions, and could be identified as holding those opinions. I agree that this information is personal information within the term of section 1(1)(n).

[para 52] The Public Body argues:

In considering 17(5), CBE Staff determined that 17(5)(e) and (f) weighed in favour of not disclosing the information to the Applicant. In relation to section 17(5)(f), the current FOIP Coordinator has provided evidence that the information in the original records was obtained in the course of an internal sexual harassment investigation and was provided in confidence. Given the sensitive nature of sexual harassment investigations confidentiality can be presumed in the circumstances. It is also submitted that the affected third parties in this matter had a reasonable expectation that the information would be kept confidential. Accordingly, the CBE properly applied this section to the information.

CBE Staff also considered section 17(5)(e) and weighed the potential harm to individuals resulting from disclosure of names and other personal information. The potential for “unfair exposure to harm” and harassment weigh against disclosure of personal information. The current FOIP Coordinator has provided evidence that she believed there was a potential for harm. The information arose in the context of a sexual harassment investigation, it involved a number of people under the age of 18, and the Applicant’s conduct led the CBE to reasonably believe that there was a potential for the Applicant to make contact with some of the third parties. On a balance of probabilities, it was appropriate for CBE Staff to consider this factor when deciding not to disclose the information.

[para 53] The current FOIP Coordinator states in her affidavit:

In applying section 17 to file F6086, I considered the definitions of personal information under the Act in that it contained names, addresses or other information that could identify the third parties. Accordingly, I believe the information falls under section 17(4)(g). I also considered 17(4)(d) but did not include it in the list of applicable sections.

I was mindful that much of the information related to youth under the age of 18 and that the Applicant, as a classroom teacher, was in a position of authority over the youth. I believed, and continue to believe, that the fact that many of the affected parties were youth was a relevant factor to be considered when deciding whether to release information to the Applicant.

My review of the entire record for F6086 led me to conclude that the information was provided in confidence. I determined that pursuant to section 17(5)(f) this weighed against disclosure. I assessed whether the information could be severed to allow for some disclosure to the Applicant. Wherever possible, I tried to sever portions of the record to allow for the release of information.

I was also concerned that releasing the information might expose the affected third parties to unfair harm. This belief is based on my review of the records on F6086. The records included the responses to the section 30 notices requesting consent to release their personal information. Most of the third parties did not consent and I took that into consideration when applying redactions and severing. Some of the responses included statements from the affected third parties that it was their belief the Applicant would make unwanted contact or complaints against them. I believe the statements to be a true reflection of the third parties' beliefs. Based on this information, I determined that 17(5)(e) weighed against disclosing this information.

[para 54] I acknowledge that some of the records record the objection of third parties to disclosure of their personal information in relation to a different access request. However, I do not believe that this necessarily means that sections 17(5)(e) and (f) are engaged in relation to all the records responsive to subsequent access requests or even to some of them. The relevance of the fact that some of the third parties were youths at the time of the investigation to which the records refer was taking place is not clear without explanation. That being said, it does not appear that any factors weighing in favor of disclosure are engaged.

[para 55] The Applicant does not argue that section 17(5)(c), or any other factor weighing in favor of disclosure, applies. (Section 17(5)(c) is a factor weighing in favor of disclosure in circumstances where the personal information of a third party is relevant to a fair determination of an applicant's rights.) Rather, the Applicant's evidence is that the Board of Reference has provided disclosure of such information to the Applicant's counsel. I am therefore unable to say that the Applicant requires any of the personal information in the records for a fair determination of his rights.

[para 56] As there are no factors weighing in favor of disclosure, I find that the presumption that it would be an unreasonable invasion of personal privacy to disclose the information in the records is not rebutted. I therefore find that section 17(1) requires the Public Body to withhold the information to which it applied this provision, and I will confirm the Public Body's decision to do so.

Issue C: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 57] As the Public Body limited its application of section 20 to information that it also withheld under section 17, and as I find section 17 requires the Public Body to withhold this information from the Applicant, I need not address whether the Public Body was correct to apply section 20.

Issue D: Did the Public body properly apply section 27 of the Act (privileged information) to the information in the records?

[para 58] Section 27(1)(a) authorizes public bodies to withhold privileged information and other kinds of information prepared by lawyers and agents of a public body. It states:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege[...]

[para 59] The Public Body applied section 27(1)(a) to withhold records 380 – 405, 411 – 418, and 424 – 425 of Inquiry F4086 from the Applicant.

[para 60] The test for determining whether solicitor-client privilege applies to records is that set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. According to this case, a record is subject to solicitor-client privilege if it is a communication between solicitor and client, which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

[para 61] With the exception of records 424 – 425, I find that the records are communications between a solicitor and client which entail the seeking or giving of legal advice. That the Public Body sought advice from external legal counsel, and that legal counsel provided advice, is documented in the records. I therefore find that section 27(1)(a) applies.

[para 62] Record 424 is a letter from external counsel to the Public Body stating that he is submitting a bill of account to the Public Body. Record 425 is the bill of account. In *Maranda v. Richer*, [2003] 3 S.C.R. 193, the Court determined that the information contained in a lawyer's bill of account may have the effect of revealing information that is subject to solicitor-client privilege. In that decision, Lebel J., writing for the majority, concluded:

However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, §14.53):

The distinction between “fact” and “communication” is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for

resolving disputes that arise in that respect (*Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 75; *By-law respecting accounting and trust accounts of advocates*, R.R.Q. 1981, c. B-1, r. 3; *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03 and 3.08.05; *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates*, (1994) 126 O.G. II, 4691). The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.

In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5.

[para 63] In other words, the Supreme Court of Canada found that there is a presumption that the information contained in lawyers' bills of account is subject to solicitor-client privilege because they arise from the solicitor-client relationship.

[para 64] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2004] O. J. 1494 (ON. Div. Ct.) Carnwath J. speaking for the Divisional Court noted that *Maranda* addresses the situation in which a search warrant was executed at a lawyer's office as part of a criminal investigation. The Court also noted that the presumption of privilege is rebuttable and said:

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

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

[para 65] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O. J. 941 (ON CA), the Ontario Court of Appeal dismissed the Attorney General's appeal of the Divisional Court's decision. The Court adopted the following approach to determining when legal fees are protected by privilege:

We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda v. LeBlanc*, *supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

Maranda arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of that relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.

While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* 2003 BCCA 278, 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.

We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

The Divisional Court did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to client/solicitor privilege.

[para 66] Similarly, in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769, the Ontario Divisional Court upheld the decision of the Office of the Ontario Information and Privacy Commissioner to order disclosure of the aggregate totals on legal bills paid by the Ministry of Community and Social Services in relation to two civil actions.

[para 67] In *R. v. Cunningham*, 2010 SCC 10 the Supreme Court of Canada confirmed that information regarding payment of lawyers' fees is subject to a rebuttable presumption of privilege. The Court said:

To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McClure* and *Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, [page347] or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

[para 68] In *Re Kaiser*, 2012 ONCA 838, to which the Public Body drew my attention, the Ontario Court of Appeal stated:

More recently, in *Cunningham* the Supreme Court emphasized that the question of whether or not fee information is protected by solicitor-client privilege should be answered contextually.

The narrow issue in *Cunningham* was whether a court could refuse a request by defence counsel to withdraw from a case on the basis of the client's failure to pay his legal bills. For purposes of this discussion, the important question was whether it would breach solicitor-client privilege for the lawyer to disclose to the court that the client had not paid.

Writing for a unanimous court, Rothstein J. held, at para. 30, that this information may be privileged "[w]here payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client". However, where these conditions are not met, the "sliver" of information that the client is in arrears does not attract privilege in the first place.

From these developments in the jurisprudence, I take the law to be that administrative information relating to the solicitor-client relationship -- including the identity of the person paying the lawyer's bills -- is presumptively privileged. The presumption may be rebutted by evidence showing (a) that there is no reasonable possibility that disclosure of the requested information will [page317] lead, directly or indirectly, to the revelation of confidential solicitor-client communications (*Maranda*, at para. 34; and *Ontario (Assistant Information and Privacy Commissioner)*, at para. 9); or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client (*Cunningham*, at paras. 30-31).

I note that the "confidential communication" and the "merits/prejudice" lines of reasoning from *Maranda* and *Cunningham*, respectively, do not necessarily define the same body of information. The reason is that not all information a client tells his lawyer in confidence will be relevant to the merits of the case for which the lawyer is retained: see *Descôteaux*, at p. 877 S.C.R.

[para 69] In the foregoing case, the Ontario Court of Appeal set out two questions to be answered when determining whether information in a lawyer's bill of account is privileged:

1. Is there a reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications?
2. Is the requested information linked to the merits of the case, such that disclosure would prejudice the client?

If the answer to either of these questions is yes, then the information may be privileged. If the answer to both these questions is no, then the information is not privileged.

[para 70] I find that disclosure of the contents of records 424 and 425 would indirectly reveal the legal advice sought and received from a solicitor. I therefore find that the presumption in relation to the two records is not rebutted. They are therefore subject to section 27(1)(a).

Exercise of Discretion

[para 71] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada discussed the extent to which decisions to exercise discretion to withhold information under solicitor-client privilege should be reviewed. The Court said:

We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.] (See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

[para 72] The Court held that the public interest in protecting solicitor-client privilege will almost always outweigh any competing interests in disclosing information that is subject to this privilege. As a result, exercising discretion to withhold information that is subject to solicitor-client privilege does not require balancing interests on a case-by-case basis.

[para 73] As the Public Body withheld records 380 – 405, 411 – 418, and 424 – 425 on the basis that the records are subject to solicitor-client privilege, and as it is in the public interest for solicitor-client privilege to be near absolute, I am satisfied that the Public Body appropriately exercised its discretion when it withheld these records under section 27(1)(a).

Records 33, and 422 - 423

[para 74] Although the Public Body originally withheld these records on the basis of section 27(1)(a), it noted in its submissions that it was no longer relying on this provision. The Public Body stated:

In preparing for this inquiry, the CBE reviewed its application of section 27(1)(b)(iii) to page 33 of the records in F6089 and 27(1)(a) to pages 422 – 423 of the records in F6086, and upon reconsideration determined that the records fall outside the scope of solicitor-client privilege. Prior to applying section 27, CBE staff applied section 24 to the records. The CBE believes it applied this section appropriately. The application of section 24 is not before the inquiry, and therefore, will not form part of the CBE's submissions.

The Public Body subsequently reconsidered its decision to apply section 24 and decided that it would produce these records to the Applicant in the interests of promoting transparency.

[para 75] As the information initially severed from records 33, 422, and 423 is no longer at issue and has been disclosed to the Applicant, I need not address these records further.

V. ORDER

[para 76] I make this Order under section 72 of the Act.

[para 77] I order the Public Body to search its backup tapes for records responsive to inquiries F6086, F6087, F6088, F6089, unless it is reasonably able to exclude the possibility that records responsive to these access requests which have not yet been produced are located on its backup tapes. The Public Body must communicate the results of its search or its determination to the Applicant.

[para 78] I confirm the decision of the Public Body to apply section 17 to withhold personal information from the records.

[para 79] I confirm the decision of the Public Body to withhold information under section 27(1)(a), with the exception of records 33 and 422 – 423, which it has already disclosed.

[para 80] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Teresa Cunningham
Adjudicator

