



## **REVIEW REPORT 280-2016 & 281-2016**

### **Saskatchewan Government Insurance**

**February 1, 2017**

**Summary:** The Applicant requested invoices for legal services provided to Saskatchewan Government Insurance (SGI). SGI applied subsection 22(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) to 32 pages of invoices and denied access to the record because they were subject to solicitor-client privilege. The Commissioner found that subsection 22(a) of FOIP applied to the record.

#### **I BACKGROUND**

- [1] On September 7, 2016, Saskatchewan Government Insurance (SGI) received two access to information requests from the same Applicant. Both requests were for invoices for legal services provided by McDougall Gauley LLP to SGI. Each request referenced a different court case in which McDougall Gauley LLP represented SGI.
- [2] SGI later clarified with the Applicant that he was seeking records from the years 2015 for one request and 2015 and 2016 for the other.
- [3] On October 26, 2016, SGI responded to both of the Applicant's requests. SGI indicated that access to responsive records was denied pursuant to subsection 22(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[4] The Applicant was dissatisfied with SGI's response and requested reviews by my office. On December 5, 2016, my office provided notification to both SGI and the Applicant of our intention to undertake the reviews.

## **II RECORDS AT ISSUE**

[5] SGI has identified four pages of records responsive to one request and 28 pages of records responsive to the other request. All pages are invoices for legal services from McDougall Gauley LLP. SGI has applied subsection 22(a) of FOIP to all 32 pages.

## **III DISCUSSION OF THE ISSUES**

[6] SGI qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

### **1. Does subsection 22(a) of FOIP apply to the record?**

[7] Subsection 22(a) of FOIP provides:

**22** A head may refuse to give access to a record that:

(a) contains information that is subject to solicitor-client privilege;

[8] My office has established the following test for subsection 22(a) of FOIP:

1. The record must be a communication between solicitor and client;
2. The communication must entail the seeking or giving of legal advice or legal assistance; and
3. The communication must be intended to be confidential.

[9] The invoices meet the first part of the test as they are communications between a solicitor and a client.

- [10] Federal Court of Appeal decision *Stevens v. Canada (Prime Minister)*, (1998) 4 FCR 89 recognizes that invoices of lawyers constitute communications for the purpose of giving advice and solicitor-client privilege applies. I am satisfied that the second part of the test is met.
- [11] Finally, as I discussed in my Review Report 052-2013, in the Supreme Court of Canada (SCC) decision *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC67 (*Maranda*), the court asserted that there is a presumption of privilege for lawyers' bills of account as a whole in order to ensure that solicitor-client privilege is honoured. I am satisfied that the invoices were intended to be confidential.
- [12] All three parts of the test have been met.
- [13] In my Review Report 052-2013, I also discussed that the presumption of privilege for lawyer's invoices can be rebutted if the Applicant can provide persuasive arguments that the disclosure of information, namely the fees detailed in the invoice, will not result in the Applicant learning of information that is subject to solicitor-client privilege. My discussion considered *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] OJ No 941 and *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), [2003] BCJ No 1093 (QL).
- [14] SGI's submission also recognized the ability of the Applicant to rebut the presumption of privilege. It drew my attention to recent Order F15-16 from the Information and Privacy Commissioner of British Columbia which lays out a test for determining whether the presumption of privilege has been rebutted:

The parties agree that the correct approach for determining whether the presumption of privilege has been rebutted is the one cited in *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner)* [*Central Coast*]. *Central Coast* states that "the presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator" that the answer is "no" to the two following questions:

(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? and

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

[15] The Applicant, in this case has proposed that “any description of actions within the invoice be redacted but that the time and monetary values associated with the accounts be readable.”

[16] In its submission, SGI opposed releasing severed information from the invoices. It indicated that the Applicant has intimate knowledge of the issues and concerns of the court cases related to the invoices and stated that release of the redacted information could also reveal preparedness and potential litigation strategies, which would qualify as privileged communications.

[17] The Applicant also suggested that the Courts have drawn a distinction between a lawyer’s bill in the context of criminal allegations and in the context of a civil matter. He drew attention to the British Columbia Court of Appeal decision *Donnel v. GJB Enterprises Inc*, 2012 BCCA 13. However, this case dealt with a trust account ledger and not specifically lawyers invoices. At paragraph 114, the decision states: “This general rule applies to all information arising out of solicitor-client relationships whatever may be their legal context. Accordingly, I would reject the appellant’s submission that *Maranda* is applicable only to lawyers’ bills delivered in criminal cases.”

[18] I am not persuaded that the Applicant has rebutted the presumption of privilege in the context of the record. Subsection 22(a) of FOIP applies to the record.

#### **IV FINDING**

[19] I find subsection 22(a) of FOIP applies to the entire record.

**V RECOMMENDATION**

[20] I recommend that SGI take no further action in regard to the record.

Dated at Regina, in the Province of Saskatchewan, this 1st day of February, 2017.

Ronald J. Kruzeniski, Q.C.  
Saskatchewan Information and Privacy  
Commissioner