OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-019

August 17, 2018

Legal Aid Commission of Newfoundland and Labrador

Summary: The Applicant requested from the Legal Aid Commission invoices and details of payments to lawyers from the private bar who represented clients on behalf of the Legal Aid Commission from June 2008 to the present. The Legal Aid Commission refused disclosure of the records relying on sections 30(2) (solicitor-client privilege) and 40 (disclosure harmful to personal privacy). The Commissioner recommended disclosure of the annual aggregate totals paid to the lawyers or their firms.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c.A-1.2, sections 30, 40. *Legal Aid Regulations, CNLR 1010/96*

Authorities Relied On: *Maranda v. Richer*, 2003 SCC 67; Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON CA); Ontario Order PO-3245; British Columbia Order F17-55; Ontario Order PO-2484; *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 CanLII 83886 (NL SC);

I BACKGROUND

[1] On April 20, 2018, the Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* ("the *ATIPPA, 2015*" or "the *Act*") to the Legal Aid Commission of Newfoundland and Labrador ("the Commission") seeking the following records:

> *Invoices from and details of payments made to private lawyers/law firms hired for cases under Subsections 31(3.1), (3.2) and 3.3 of the Legal Aid Act. Date range of request is June 1, 2008, to present. Please include name of lawyer/law firm and court file # and/or name of client for associated case.*

[2] The Commission refused the request citing the solicitor-client privilege exemption under section 30(2); section 40(1) as being an unreasonable invasion of the personal privacy of clients whose lawyers were paid by the Commission; and section 146 of the *Legal Aid Regulations* as preventing disclosure of services provided to clients.

[3] The Applicant subsequently filed a complaint with this Office. As informal resolution was unsuccessful, it proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] The Commission submits that the responsive records contain information related to legal aid clients, individual lawyers, the law firms that employ those lawyers, the court file numbers, particulars about the offences, as well as detailed information about the time spent providing legal services and the amount of legal fees incurred to represent legal aid clients.

[5] The Commission takes the position that legal invoices, on the whole or any part of them, are subject to solicitor-client privilege and that the privilege is not rebutted in this case. Further, the disclosure of this information would constitute an unreasonable violation of legal aid clients' personal privacy. The Commission also states that the *Legal Aid*

Regulations prevent them from revealing details of services provided by lawyers to their clients.

III COMPLAINANT'S POSITION

[6] The Complainant takes the position that the overarching purpose of the *ATIPPA, 2015* favours transparency when it comes to public body spending. He submits that information contained within the responsive records does not fall under the solicitor-client privilege as it does not reveal communications between the lawyers and the clients. The Complainant also submits that disclosure of personal information is not an unreasonable violation when the information reveals financial information related to supplying services to a public body, per section 40(2)(g) of the *ATIPPA, 2015*. The Complainant argues that the Commission cannot rely on the *Legal Aid Regulations* to withhold the information as the *ATIPPA, 2015* prevails over the *Legal Aid Act* and any regulations pursuant to it.

IV DECISION

[7] There are three issues in this complaint that must be addressed to determine whether the responsive records were properly withheld:

1. Are the responsive records subject to solicitor-client privilege under section 30(2) of the *ATIPPA, 2015*?
2. Would the disclosure of the responsive records amount to an unreasonable invasion of privacy under section 40(1) of the *ATIPPA, 2015*?
3. Does section 146 of the *Legal Aid Regulations* apply?

Are the responsive records subject to solicitor-client privilege under section 30(2) of the *ATIPPA, 2015*?

[8] The first issue is whether the responsive records were appropriately withheld under section 30(2) of the *ATIPPA, 2015*:

30.(1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

[9] The legal invoices cover a ten-year period, from June 2008 to April 2018. In 2008, amendments to the *Legal Aid Act* permitted legal aid clients charged with murder, manslaughter, or infanticide to request to choose representation by counsel from the private bar (an amendment repealed in March 2018).

[10] The issue of legal fees and invoices has been considered by this Office and by Courts across Canada. *Maranda v. Richer*, 2003 SCC 67 is a leading decision, holding that there is a presumptive privilege over legal invoices:

[33] 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.

[11] Following the *Maranda* decision, the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* devised a test to determine how the solicitor-client privilege might be rebutted:

[11] 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.

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

[12] Application of this test is the subject of several decisions from Information and Privacy Commissioners across Canada.

[13] Ontario Order PO-3245 found that legal invoices paid for by the Ministry of Community Safety and Correctional Services for two specifically named clients of a law firm were presumptively privileged, but privilege over the total amount that the Ministry paid for the two clients was rebutted:

[38] On my review of the information in the record at issue in this appeal, I find that the descriptors, dates, and amounts for each of the four identified payments is presumptively privileged information. Furthermore, based primarily on the information in the withheld portions of the ministry's representations, I am not satisfied that the presumption of privilege which applies to this information has been rebutted. Applying the approach taken in Order PO-2484 to the descriptors, dates, and amounts at issue, I find that this information is solicitor-client privileged information and qualifies for exemption under branch 1 of section 19.

[39] However, I make a different finding for the total amount contained in the record. As identified by the ministry, this amount represents the total payment made to the named law firm for its work in representing the two named individuals. After removing the dates, descriptors and breakdowns of the payments from the record, the only portion of the record remaining at issue is

the total amount paid by the ministry. Although the ministry argues that disclosure of the total amount would enable the requester to subtract certain publicly available payments from the total, based on the information provided, I am not satisfied that this is possible. I acknowledge that some information about payments to the named law firm may be publically available; however, in the absence of additional information, I find that disclosing only the total amount of the payments would result in the disclosure of neutral information only, and would not reveal any solicitor-client privileged information.

[14] Ontario Order PO-2484 concerned the total dollar amount on a number of legal invoices. It found that the total amount on each of the nine legal invoices was neutral information and subject to disclosure:

In my view, the Ministry is correct when it submits that if the records were disclosed in full, minus non-responsive information, they would still provide the appellant with an opportunity to infer privileged information. For example, disclosing the dates covered by each of the nine invoices, particularly accompanied by the number of hours spent by counsel during each period, would allow some inferences to be drawn about the nature of the activities and/or strategies during the period, particularly if that information is combined with detailed knowledge of the history of the case. As the Ministry points out, the appellant's counsel was involved in the litigation before the HSARB referred to in the request. In my view, the ability to draw inferences from the records is unaffected by the fact that, as the appellant points out, litigation has concluded. I therefore find that the presumption of privilege is not rebutted with respect to the dates or other information in the records, other than the total dollar figure being charged in each invoice.

However, if the only information to be disclosed is the total dollar figure on each invoice, and nothing else (which is the closest thing before me to the information the appellant has repeatedly said she wants), the situation is different. With dates and number of hours severed, I am unable to conclude that the appellant could infer privileged information.

[15] British Columbia Order F17-55 concerns the refusal by a Public Body to disclose certain information listed within legal invoices on the basis of solicitor-client privilege. The adjudicator determined, at paragraphs 34-36, that "the presumption of privilege was rebutted when the legal fee information was a total or aggregate amount and no other detailed billing information had been disclosed":

[34] In my view, it would be difficult to acquire or deduce privileged communications based on the disclosure of this limited legal fee information which is in an aggregate amount. No detailed information about the legal services provided will be disclosed to the Applicant since I have already

determined that this information is protected by privilege and the City's own evidence establishes that the legal advice sought during this period pertains to a wide range of freedom of information matters.

[35] A series of OIPC orders and court decisions have considered whether the disclosure of legal fees would reveal privileged communications. The presumption of privilege was rebutted when the legal fee information was a total or aggregate amount and no other detailed billing information had been disclosed. Other OIPC orders and court decisions have found that the presumption of privilege was not rebutted when the access applicant had in depth knowledge as a former employee and had some legal training or when he or she had background information about the specific dispute for which legal advice was sought.

[36] In this case, there is evidence the Applicant has some familiarity or access to publicly available information regarding freedom of information requests submitted to the City during the requested time period. However, the Applicant is not being given access to a description of the legal services provided or pricing breakdowns or specific date ranges for the legal services. Further, even though the Applicant has some general knowledge about freedom of information requests dealt with by the City during the requested time frame, I find there is no reasonable possibility that he would be able to deduce for which specific matters the City sought legal advice since the City sought advice for a wide range of freedom of information matters during this time.

[16] Order F17-55 also addresses disclosure of a particular law firm or lawyer. The name of the law firm in that situation was redacted. The Adjudicator determined at para 39, "I conclude that there is no reasonable possibility that disclosing the name of the law firm in the September 30, 2015 invoice will reveal, or allow an assiduous inquirer to deduce or acquire, privileged communications."

[17] The Commission argues that, based on the context of the request and considering assiduous inquirers, it appropriately applied the section 30(2) exemption in refusing to disclose the responsive records to the Complainant.

[18] In its submission to this Office, the Commission stated:

In addition, as indicated in Ontario v Ontario, the Responsive Records, and the presumption of privilege around them, must be analyzed in the context of other information available to the public. In this regard the Commission notes that this province is a relatively small jurisdiction with a small population.

> *Charges for murder, manslaughter or infanticide are serious, highly newsworthy and relatively infrequent. Such cases would be highly reported in the news media. This province also has a relatively small number of criminal law lawyers, who generally practice as sole practitioners or in smaller firms, thereby making it easier to link the practitioners with particular clients and cases.*

[19] It would not be difficult, the Commission submits, for an assiduous inquirer to draw inferences from information available in the responsive records and connect the information to publicly available information.

[20] Among responsive records submitted to the OIPC, the Commission included summarized lists of information. The summarized lists, divided by fiscal year, contain the names of clients, lawyers, invoice dates, and amounts on each invoice.

[21] Disclosing the names of clients with invoice dates may allow an assiduous inquirer to determine privileged information. Justice Orsborn addresses this in *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 CanLII 83886 (NL SC):

> *[30] The decision goes on to refer to other British Columbia authority which sets out some of the types of information that may potentially be gleaned from the disclosure of legal fees – paragraph 133:*
>
> *133. Justice Holmes described a number of examples of the types of conclusions that could reasonably be discerned from the fact of the total of interim fees to date in a lawsuit (at para. 49). In his view, these could include:*
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> - *the state of a party's preparation 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.*

[22] Based on the relevant authorities, I find there is no reasonable possibility that the Complainant (or any assiduous inquirer) would be able to deduce any privileged communications from the disclosure of the list of lawyers or law firms and the total aggregate amount paid per annum over a ten-year period. Aggregate amounts without individual invoices, dates of invoices or client names makes it exceedingly difficult for any assiduous inquirer to acquire or deduce privileged communications.

[23] The Commission is correct in that the criminal bar in this Province is relatively small; however, consequently, multiple clients retained many of the lawyers/firms on the list over the 10-year period. Unfortunately, the Commission is not correct, especially in recent years, that these serious crimes are relatively infrequent in our Province. Additionally, some of the cases involved multiple accused persons.

[24] Of the lawyers/firms on the list, there are 5 with far more limited involvement than the remainder. For those 5 lawyers, disclosure of the amount paid to them should be limited to the entire amount paid over the 10 year period.

[25] While the Applicant requested the names of individual lawyers, subsequent to 2014 the Commission generally made payment to the lawyers' firms, not individual lawyers. As such, from 2014 onwards, only firm names are responsive, making it even more unlikely that an assiduous inquirer could deduce any privileged communications.

Would the disclosure of the responsive records amount to an unreasonable invasion of personal privacy under section 40(1) of the *ATIPPA, 2015*?

[26] The second issue is whether the disclosure of the information contained within the responsive records would be an unreasonable invasion of the legal aid clients' personal information.

[27] The Commission points out that "personal information" is defined in section 2(u) of the *ATIPPA, 2015* as:

(u) "personal information" means recorded information about an identifiable individual, including

(vii) information about the individual's educational, financial, criminal or employment status or history,

[28] In its submission, the Commission highlights information about an individual's educational, financial, criminal or employment and any identifying numbers, symbols or particulars assigned to an individual as being especially relevant to this request. It submits that disclosure of information that reveals an individual was charged with a serious offence and then sought assistance from the Commission would constitute an unreasonable invasion of privacy. It then takes the position that in its application of section 40(5), it has appropriately analyzed the context of the situation in making its determination to withhold the information.

[29] The Commission is correct that criminal and financial status does fall under the definition of personal information. Section 40(5) examines whether that information would "constitute an unreasonable invasion of the third party's personal privacy". Section 40(5)(a) states:

(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 shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;...

[30] The administration of the justice system is a matter of significant public interest. The Commission plays an integral role in the justice system. Facilitating public scrutiny of these expenditures informs the public on issues surrounding counsel of choice, a subject of debate in the House of Assembly on March 5, 2018:

So we look at what's been spent over the last eight, nine years, and it actually adds up to, under choice of counsel for these charges, $1.338 million, which is a lot of money. It's not ridiculously huge, but it's a lot of money. Now, just so people know, Legal Aid often and will continue to still refer matters to outside counsel for any number of matters. It could be conflict of interest. In fact, in some cases, if they feel that it falls outside there area of expertise, they have

> *that ability to refer out. They've done that in the past; they'll continue to do that. Depending on where the matter's heard, depending on the roster of lawyers, there are a whole number of things. They control that; they make that choice.*
>
> *So what I would like to point out, though, I just gave that number. Right now, on the books for the current choice of counsel, individuals that we have the certificates out for, we're currently on the hook for $1.395 million. So right now, at this exact moment, we're on the hook for more than was spent in the last eight years on it. That's a tremendous, tremendous amount of money.*
>
> *Like I said, we cannot control that. Anybody looking at the court docket or watching the news will note that we've had, unfortunately, a number of high-profile, serious cases of murder and manslaughter, which nobody likes to see. There is no statistical basis or analysis for this as of yet. This is something I've discussed on many occasions with our director of public prosecutions. I've discussed it with our police; but, the fact remains, these people need counsel. They do need a lawyer. We would never want to see anybody not have the right to counsel, especially in a serious charge.*
>
> *If anybody says: Why would you do this? Every other province in Canada seems to have moved down this route. I don't know why we went there in 2008. All I can say is while we're here, while we're making decisions, this is one we're making in the best interest of not just taxpayers, but even within the court system. I'd like to think that in many cases people will tell you that the choice of counsel provision "because we also had, from an inquiry we had, the Lamer report, we also have usually two counsels.*[1]

The names of the clients, however, are not essential to informing public scrutiny and as such, in this case, considering all of the relevant circumstances as referenced in section 40(5), the client names were appropriately withheld.

Does section 146 of the *Legal Aid Regulations* apply?

[31] The Commission cites section 146 of the *Legal Aid Regulations* as requiring it to withhold the responsive records:

> *146. A solicitor or articled student providing services under the Act shall not reveal to a person, other than an employee of the commission, or to a court that his or her services are being provided under the Act.*

[1] Honourable Andrew Parsons, Minister of Justice and Public Safety, Hansard (https://www.assembly.nl.ca/HouseBusiness/Hansard/ga48session2/18-03-05.htm).

The *ATIPPA, 2015* applies to records in the control or custody of public bodies, and in the event of a conflict with other legislation, section 7(1) provides that the *ATIPPA, 2015* prevails. A limited number of provisions in other acts and regulations are listed in Schedule A of *ATIPPA, 2015*, and only those provisions are designated as prevailing over the *ATIPPA, 2015* in the event of a conflict. Section 146 of the *Legal Aid Regulations* is not listed in Schedule A and it therefore does not prevail over the *ATIPPA, 2015*.

V CONCLUSIONS

[32] With the exception of the 5 lawyers with far more limited involvement discussed above, disclosing the aggregate amount paid per annum to lawyers or firms over the ten-year period requested by the Complainant would not allow an assiduous inquirer to deduce privileged information.

VI RECOMMENDATIONS

[33] I recommend under section 47 of the *ATIPPA, 2015* that the Commission provide the Complainant, with the exception of the 5 lawyers/firms that I have identified in a list provided to the Commission with this Report, the following records pertaining to payments made pursuant to sections 31(3.1), (3.2) and (3.3) of the *Legal Aid Act*:

I. the names of the lawyers that received payment from the Commission between 2008 and 2014, listing the aggregate amount each lawyer received from the Commission during each year of that period;

II. the names of the law firms that received payment from the Commission between 2014 and April of 2018, listing the aggregate amount each law firm received from the Commission during each year of that period; and,

III. the names of the 5 identified lawyers/firms that received payment from the Commission between 2008 and April 2018, listing only the aggregate amount each lawyer/firm received from the Commission for the entirety of that period.

[34] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Commission must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of August 2018.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador