

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-2994

Appeal PA10-3

Legal Aid Ontario

September 19, 2011

**Summary:** This appeal addresses a request for access to records that were generated as a result of the requester's complaint regarding a legal aid clinic funded and monitored by Legal Aid Ontario. The records at issue were held to fall within the scope of the confidentiality provision at section 90(1) of the *Legal Aid Services Act* and in accordance with section 67(2) 7.0.1 of the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), the *Act* is not the controlling statute for protecting the confidentiality of this information. As a result, Legal Aid Ontario's decision not to disclose the records was upheld.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 67(1) and 67(2) 7.0.1; *Legal Aid Services Act*, ss. 2, 4(d), 14, 14(1)(c), 14(3), 37(1), 38(1), 89(1), 89(2), 89(3), 90(1), 90(2) and 96.

**Orders and Investigation Reports Considered:** Orders PO-26 and PO-2083.

### BACKGROUND:

[1] Under section 4(d) of the *Legal Aid Services Act* (*LASA*), one of the objects of Legal Aid Ontario (LAO) is to monitor and supervise legal aid services provided by legal clinics and other entities that it funds. In particular, Section 37(1) of *LASA* provides that LAO is required to monitor the operation of a clinic funded by it to determine whether the clinic is meeting LAO's standards for the operation of clinics. Section 38(1) contains sanctions for a legal clinic failing to comply with the provisions of *LASA* or to meet the terms and conditions of its funding.

[2] LAO takes the position that the records at issue in this appeal were generated in the context of the requester's concerns regarding the funding, management and administration of a specific legal clinic.

[3] The request at issue in this appeal was for access to copies of all records about the requester in LAO's custody and control.

[4] LAO identified records responsive to the request and granted partial access to them. LAO agreed to provide the requester with copies of correspondence exchanged between the requester and LAO, upon payment of a photocopying fee. LAO relied on section 90(1) of *LASA* to deny access to the remaining portion it withheld. Specifically, LAO took the position that since the information at issue in this appeal was received in the context "of the receipt, investigation and resolution of a complaint" about a particular legal clinic, it falls within the scope of section 90(1) of *LASA* and that section 67(2) 7.0.1 of the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) provides that the confidentiality provision in section 90(1) of *LASA* prevails over *FIPPA*.

[5] The requester (now the appellant) appealed the decision.

[6] At mediation, the appellant confirmed that he was not interested in receiving correspondence between LAO and himself. Accordingly, these records are no longer at issue in the appeal.

[7] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced the inquiry by sending a Notice of Inquiry to LAO setting out the facts and issues in the appeal and inviting their representations. LAO provided representations in response. I then sent a Notice of Inquiry to the appellant along with a complete copy of LAO's representations. The appellant provided responding representations. I determined that a portion of the appellant's representations raised issues to which LAO should be given an opportunity to reply. Accordingly, I sent a letter to LAO inviting it to respond to the appellant's submissions on jurisdiction and the applicability of section 90(1) of *LASA*. LAO provided reply submissions.

## **RECORDS:**

[9] LAO initially divided the records into three categories. The first category consists of correspondence between the appellant and LAO. These records are not at issue in this appeal.

[10] The second category of records is described in the Mediator's Report as being "Correspondence between the Appellant and Persons Outside Legal Aid Ontario".

[11] The third category of records is described in the Mediator's Report as being "Additional Records related to the Appellant". LAO submits that this third category of records further falls into the following three sub-categories:

- Documents created by persons external to LAO and sent to LAO employees
- Documents created by LAO employees and sent internally to other LAO employees
- Correspondence created by LAO employees and sent to third parties other than the appellant

[12] LAO provided highlighted copies of the third category of records with its representations. LAO submits that if section 90(1) is found not to apply, the highlighted information should not be disclosed because it is information that is not responsive to the request and/or information pertaining to identifiable individuals, some of which might qualify as these other individuals' personal information under section 2(1) of *FIPPA*.

[13] Only the second and third categories of records remain at issue in the appeal.

## **DISCUSSION:**

### **Section 67 of *FIPPA***

[14] Section 67(1) of *FIPPA* sets out that *FIPPA* prevails over a confidentiality provision in any other Ontario statute, unless section 67(2) of *FIPPA* or the other statute specifically provides otherwise.

[15] The relevant portions of section 67 of *FIPPA* read:

67(1) This *Act* prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this *Act*:

...

7.0.1 Sections 89, 90 and 92 of the *Legal Aid Services Act, 1998*.

...

## **Sections 89 and 90 of *LASA***

[16] For the purposes of the analysis that follows it is helpful to set out the wording of both sections 89 and 90 of *LASA*.

[17] Section 89 of *LASA* states:

89. (1) All legal communications between the Corporation [LAO], an officer or employee of the Corporation, an area director or member of an area committee and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(2) All legal communications between a lawyer, student or service-provider at a clinic, student legal aid services society or other entity funded by the Corporation, or any other member, officer or employee of a clinic, student legal aid services society or other entity funded by the Corporation and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(3) Disclosure of privileged information to the Corporation that is required under this Act does not negate or constitute a waiver of privilege.

[18] Section 90(1) of *LASA* provides:

90. (1) A member of the board of directors, an officer or employee of the Corporation, an area director, a member of an area committee, a lawyer, a service-provider or a member, officer, director or employee of a clinic, student legal aid services society or other entity funded by the Corporation shall not disclose or permit to be disclosed any information or material furnished to or received by him or her in the course of his or her duties or in the provision of legal aid services.

[19] Section 90(1) is, however, subject to the exception at section 90(2) of *LASA*, which sets out that:

A person referred to in subsection (1) may disclose information or allow it to be disclosed in the performance of his or her duties or in the provision of legal aid services or with the consent of the applicant or if authorized by the Corporation.

[20] Section 96(1) of *LASA* makes it an offence for any person to intentionally contravene or fail to comply with section 90.

## **The representations of LAO**

[21] As set out above, only the category two and three records remain at issue in the appeal. LAO submits that all of these records consist of material furnished to or received by LAO employees in the course of their duties and/or in the provision of legal aid services. It submits that the records were generated in the context of a complaint filed with the LAO Complaints Office. LAO's representations were organized around the category, or sub-category, of the record at issue. An affidavit of LAO's Manager of Complaints was provided in support of its position.

### ***Category two records: correspondence between the appellant and persons outside Legal Aid Ontario***

[22] LAO submits that none of the information in the second category of records at issue in this appeal was created by LAO. LAO submits that this is because the records consist of correspondence initiated by the appellant or received by the appellant. LAO submits:

Therefore, it is quite clear that these records, and the material and information contained in them, were furnished to LAO employees or received by them, after the records were created by third parties or the appellant. In these circumstances, it is submitted that there can be no question that this set of records consists of material furnished to or received by an LAO employee in the course of his or her duties. The records have been provided by persons outside LAO to LAO employees. The only purpose these documents were provided to LAO employees was in the context of the complaint and to allow them to fulfill their duties as LAO employees in resolving the complaint.

### ***Category three records: additional records related to the appellant***

[23] As set out above, LAO divided the category three records into three sub-categories. LAO's position with respect to each record depends on their particular sub-category.

*a) Sub-category a records: documents created by persons external to LAO and sent to LAO employees*

[24] With respect to the first sub-category, LAO submits that these records are subject to the same analysis as that applicable to the correspondence between the appellant and third parties. LAO submits that this is because the records were wholly created outside LAO and there can therefore be no question that they, and the information contained in them, were received by LAO employees.

[25] LAO further submits that the content of the records and the context in which they were received demonstrates that in each case the record was received by the recipient in the course of their duties, either directly in the context of resolving the complaint raised by the appellant, or in the course of resolving the larger management issues associated with the legal clinic that was the subject of the complaint.

*b) Sub-category b records: documents created by LAO employees and sent internally to other LAO employees*

[26] With respect to the second sub-category, LAO submits that all of these records fall into the category of "information furnished to or received by" an LAO employee in the course of his or her duties. LAO submits that this is because in each case the records were received by an LAO employee, namely that employee to whom the document was addressed or copied.

[27] LAO submits that although the records were also created by another LAO employee, it does not change the fact that they were received by an LAO employee in the course of his or her duties. Nor, LAO submits, does it alter the fact that the information or material contained in each record was received by an LAO employee in the course of his or her duties.

[28] LAO states that it does not take the position that a document created by an LAO employee is automatically subject to section 90(1) of *LASA* by simply sending it to another LAO employee. Rather, it is LAO's position that if:

... the sending of the document to another employee (or one of the named other persons in section 90, such as a Board member, Area Committee member, etc.) was a bona fide exercise of duties, this brings the records within section 90 as the information contained in the records was received in the course of duties or the provision of legal aid services.

[29] LAO submits that an examination of the records in sub-category b shows that there was a clear business purpose for the sending of each record to another LAO employee. It submits that all of this correspondence took place in the context of dealing with the complaint and involved both the complaints department and its Central Programming and Innovations department, which has oversight of the legal clinic that is the subject of the complaint. It submits that all of the correspondence was received in the course of an LAO employee's duties and in the provision of legal aid services.

[30] LAO submits that its position is reinforced by the wording of section 90(1) which lists members of the Board of Directors among those covered by the confidentiality provisions of section 90(1). LAO submits that:

Information received by the Board of Directors of LAO flows through the executive of LAO, with few exceptions. The Board materials are prepared by LAO staff and presented to the Board. Therefore, it is clear that section 90 was not intended to exempt material or information received by a Board member, simply by virtue of its origin being from an LAO employee.

[31] LAO submits that, accordingly, the issue is not whether a document was created by an LAO employee but whether the information or material in a record ultimately is received by one of those persons named in section 90(1) of *LASA*.

*c) Sub-category c records: Correspondence created by LAO employees and sent to third parties other than the appellant*

[32] With respect to this sub-category, LAO repeats its submission that even records which are created by LAO employees fall within the ambit of section 90(1) of *LASA*. LAO submits that since section 90(1) refers to information and material, where a record that is created by an LAO employee contains information which came to the LAO employee in the course of his or her duties, or in the provision of legal aid services, then it falls within the scope of section 90(1). LAO submits, therefore, that it is not only the author or origin of the document that must be examined, but whether the information it contains consists of information or material which came to the LAO employee initially in the course of his or her duties.

[33] LAO explains:

Although this may appear circular, it is not. An example will clarify the argument. An LAO employee may receive a phone call or a letter in which he is advised that a meeting is taking place imminently. The notice of that meeting is information received by the LAO employee in the course of his duties. He may then email an external third party asking him to be present at the meeting and advising of the time and place. Although the LAO employee is creating that email, its contents consist of information which was received by the LAO employee in the course of his or her duties.

[34] LAO submits that this analysis applies equally to the other two sub-categories of the category three records, discussed above.

[35] LAO specifically identifies correspondence identified as records 6, 7, 8, 9, 20, 21 and 26 as containing information received by the writer, who is an LAO employee, in the course of her duties.

## **The Representations of the Appellant**

[36] The appellant acknowledges that LAO has jurisdictional authority over issues of governance and financial management of the legal clinic referred to in the records, but that section 90(1) of *LASA* is not applicable, because there was no "provision of legal aid services" to him. He states that he "was not and had never been a client of Legal Aid Ontario."

[37] The appellant also takes the position that LAO did not even have the jurisdiction to address the matter set out in the records. He states that the:

... LAO Complaints Process - Initial Stage, dated September 5, 2002, clearly states: "Advising Clients of the Right to Complain" (page 1) and on pages 5 - 7, it lists the kinds of complaints that may be brought forward.

...

I submit to you that none of the descriptors fits my case. My association with Legal Aid Ontario was fortuitous. It was based solely on the fact that the Federal government's [identified initiative], for which I was the [specified position], was under the auspices of [an identified legal clinic]. Authority for the Project's staff and direction were not automatically transferred to LAO.

[38] The appellant further submits that the "inconsistent manner in which information was released undermined the jurisdictional authority of LAO". He provides as an example that information pertaining to a third party was released to him by LAO "without apparent authorization". He also submits that LAO "was inconsistent with information received from third parties" and that the Manager of the LAO Complaints Department "was unsure of the provisions of [*LASA*] because she kept asking the Interim Chair of [a specified organization] for permission to disclose information to me." He submits that "[i]f the provisions of [*LASA*] covered the non-disclosure from third parties, why would [the Manager of the LAO Complaints Department] want to contravene the provisions of [*LASA*]?"

## **Reply Representations of LAO**

[39] LAO submits in reply that the wording of section 90(1) of *LASA* does not limit its application only to information received from its clients and that section 14 of *LASA* provides for various ways that it could provide legal aid services. It states that section 14(1)(c) lists one of those ways as "the funding of clinics". LAO further submits that section 14(3) of *LASA* provides that:

The Corporation shall provide legal aid services in the area of clinic law having regard to the fact that clinics are the foundation for the provision of legal aid services in that area.



[40] It submits, therefore, that the funding of clinics and their management is part of the "provision of legal aid services", within the meaning of those words in section 90 of *LASA*.

[41] LAO states that, in any event, section 90(1) refers to information or material furnished to or received in "the course of his or her duties or in the provision of legal aid services". LAO submits:

This is a disjunctive test. Even if the IPC accepts the appellant's submission that the information was not received in the provision of legal aid services, it is LAO's submission that the information and material was furnished to LAO employees "in the course of his or her duties". The appellant has acknowledged in his submissions that LAO has jurisdictional authority over issues of governance and financial management of clinics. On this basis, it is submitted that where a complaint is made which touches on this area, as it did in this case, the information collected pursuant to an investigation of that complaint is provided to LAO employees in the course of their duties.

[42] With respect to the appellant's submission that the LAO Complaints Process, Initial Stage, does not apply to his case, because the types of complaints referred to in the document were not of the same nature as the complaint he brought to LAO, it submits:

The Complaints Policy sets out the role of the Complaints Department, which is where the appellant's concerns were referred, when [he] brought his complaint to LAO. The role of the Complaints Department is to deal with complaints at the second stage, not the initial stage of the complaint. The initial stage is described in detail in the Complaints Policy dated September 2002, as this document was intended to assist the Area Offices of Legal Aid Ontario in establishing their complaints process. The initial stage of a complaint may be at an area office, a provincial department of LAO, or a clinic. In the clinic context, the Complaints Department of LAO becomes involved only after a clinic Board has dealt with a matter and the person is not satisfied and that person brings their concerns to LAO.

[43] LAO submits that the appellant in this case was referred to the Complaints Department of LAO in accordance with this policy. LAO acknowledges that the appellant's complaint was not in the initial stage of the complaints process. It states that the complaint was referred to the Complaints Department as a second stage complaint, as the appellant was not satisfied with the response from the legal clinic's Board of Directors and that "this referral was appropriate within the policy of LAO and in no way affects the applicability of Section 90 of *LASA*".

[44] With respect to the appellant's assertion that it lacked the jurisdiction to address the matters raised in the complaint, LAO submits that section 4(d) of *LASA* provides that one of the objects of LAO is:

to monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation.

[45] In addition, LAO states that section 37(1) of *LASA* provides that:

the Corporation shall monitor the operation of a clinic funded by it to determine whether the clinic is meeting the Corporation's standards for the operation of clinics, and the Corporation may conduct audits of such clinic, as it considers necessary for that purpose.

[46] And that section 38(1) of *LASA* reads:

If a clinic fails to comply with this Act or to meet the terms and conditions of its funding, the board of directors of the Corporation may direct the clinic to do anything that the board of directors of the Corporation considers appropriate to ensure that the clinic complies with this Act and the terms and conditions of its funding and, generally, for the more effective operation of the clinic.

[47] LAO submits that, in accordance with these legislative obligations, it has a responsibility to investigate complaints about legal clinics and, in particular, complaints regarding the operation and management of legal clinics, which were part of the concerns of the appellant in this case. LAO submits that until the complaint was investigated and fully understood, it could not summarily dismiss the complaint and still meet its statutory mandate. LAO submits that it had jurisdictional authority to deal with the issues raised by the appellant and that his continued insistence throughout the process that LAO had an obligation to act in the matters he complained about undermines his current submission that LAO had no authority.

[48] LAO further submits that whether it had jurisdictional authority to investigate the complaint brought to it by the appellant "had no bearing on whether or not the information was received by the employees of the Corporation in the course of their duties or the provision of legal aid services, within the meaning of section 90 of *LASA*." LAO submits that:

... even were the employees acting with the mistaken impression that they had authority (which LAO denies), the employees would be acting within the course of their duties as legal aid employees, as long as they had a genuine belief that they were performing their duties, as they did in this case. It is LAO's submission that the information received in this case was

all received in the context of the complaint and subsequent investigation and that this is a function which falls within the scope of the duties of the LAO employees involved in the receipt of these records.

### **Section 90(2) of *LASA***

[49] Relying on Order PO-2083, LAO submits that if section 90(1) applies it is up to LAO, not this office, to determine whether disclosure of the records is permitted under section 90(2).

[50] LAO submits that this is supported by the language of section 90(2) of *LASA*:

... which confers a discretion on LAO, rather than mandating the disclosure of information which falls within the exception under 90(2). Specifically, the section states that the person referred to in subsection (1) "may" disclose information or allow it to be disclosed, not "shall". This makes clear that it is at the option of the person referred to in subsection (1) whether the information or material is disclosed. It is respectfully submitted that the IPC should not order disclosure in these circumstances.

[51] LAO argues in the alternative that if this position is not accepted, it appropriately exercised its discretion under section 90(2) of *LASA*.

[52] In support of this submission LAO points to its complaints policy and the content of the affidavit of the Manager of its Complaints Department and submits that in determining whether or not it is "in the performance of his or her duties or in the provision of legal aid services" to disclose information or material, it is appropriate for LAO staff and other persons named in 90(1) of *LASA* to have reference to LAO policies and practices. LAO submits that, in the absence of an existing policy or practice of disclosure of information or material to third parties, there is no authority upon which an LAO employee can rely to disclose records that contain information or material received in the course of his or her duties. LAO submits:

Further, [*LASA*] provides a scheme of legislation which enables the Board, under section 12 to create policies for the Corporation. The current complaints policy was approved by the Board of Directors pursuant to that section. It is LAO's submission that a person named in section 90(1) of *LASA* must have authority in established policy or practice in order to make a disclosure. This is particularly required, given the consequences of breach of section 90 of *LASA*. Section 96 of *LASA* makes it an offence for any person to intentionally contravene or fail to comply with section 90 of *LASA*. There is, therefore, a heavy onus on a person named in section 90 of *LASA* to ensure that the person has appropriate authority to release information or material described in that section.

Where no established policy or practice exists which could allow disclosure, the intent of section 90 and the strict confidentiality provisions of *LASA* would not allow disclosure. In the circumstances of this case, an established policy and practice exist, under which disclosure in complaints is limited. The appellant in this case was accorded disclosure in accordance with existing policy and practice. Therefore, it is LAO's submission that the exception in section 90(2) does not apply to allow further disclosure.

[53] The appellant did not make specific representations on the application of section 90(2) of *LASA*.

### **Analysis and Finding**

[54] To be clear, section 67(2) is not a jurisdiction-limiting provision that excludes certain categories of records from the *Act's* application. Rather, it simply provides that the *Act* is not the controlling statute for protecting the confidentiality of information that falls within the scope of one of the listed confidentiality provisions of another statute [Orders PO-2029, PO-2083 and PO-2411-I]. Section 67(2) 7.0.1 specifically includes section 90 of *LASA* among the listed confidentiality provisions that prevail over the *Act*.

[55] In Order P-26 former Commissioner Sidney Linden held that where a "confidentiality provision" exists which bars the application of *FIPPA* there is no authority under *FIPPA* to order the release of records.

[56] In Order PO-2083, where LAO was the institution, former Assistant Commissioner Tom Mitchinson commented on the impact of the confidentiality provision at section 90(1) of *FIPPA* and the exception at section 90(2). In his analysis of section 90(2) of *LASA* he recognized that the exercise of discretion clearly rests in the LAO, writing:

Section 90(2) contains exceptions, specifically the consent of the applicants or the authorization of LAO. The application of these exceptions is not established in this case, and in my view it would defeat the purpose of the provision to require LAO to seek consent or authorization in response to receiving a request under the *Act*.

[57] I will now apply this analysis to the category two and three records remaining at issue in this appeal.

***Section 90(1)***

[58] In contrast to the wording of section 89(1) which is limited to legal communications, section 90(1) is a very broadly worded statutory provision which prohibits those listed in the section from disclosing "any information or material" furnished to or received in the course of their duties or in the provision of legal aid services. Under section 2 of *LASA* "legal aid services" is defined to mean "legal and other services provided under" *LASA*. In my view, the wording of the provision is intentionally broad and meant to capture all types and forms of information and materials, including records that originated with or were exchanged within LAO.

[59] As set out above, under section 4(d) of *LASA*, one of the objects of LAO is to monitor and supervise legal aid services provided by clinics and other entities that it funds. In particular, Section 37(1) of *LASA* provides that LAO is required to monitor the operation of a clinic funded by it to determine whether the clinic is meeting LAO's standards for the operation of clinics. Section 38(1) of *LASA* contains sanctions for a clinic failing to comply with the provisions of *LASA* or to meet the terms and conditions of its funding.

[60] I find that all of the records remaining at issue in this appeal were generated in the context of concerns regarding the funding, management and administration of a specific legal clinic. In my view, the investigation of a complaint regarding the funding, management and administration of a specific legal clinic, which are the circumstances in which the responsive records were generated, falls within the scope of the definition of legal aid services in section 2 of *LASA*.

[61] Furthermore, I have carefully reviewed all of the records at issue in this appeal which consist of letters, emails, memoranda, minutes and related documents. All of the information is related to LAO's investigation of the complaint and/or the operation of a legal clinic that it funds. Although at times it is not entirely clear who furnished the records or for that matter, the information, based on the broad wording of section 90(1), I have concluded that, the evidence is sufficient for me to find that the disclosing the records at issue would reveal "information or material" that was furnished to or received by one or more individuals listed in section 90(1) of *LASA* in the course of his or her duties or in the provision of legal aid services.

[62] Furthermore, in my view, in the circumstances of this appeal the application of the exceptions in section 90(2) have also not been established. Finally, if this office has a role in reviewing the exercise of LAO's discretion under section 90(2) of the *Act*, I have been provided with no evidence that its exercise of discretion was based on any improper principles or considerations.

[63] Accordingly, I find that the records at issue fall within the scope of the confidentiality provision at section 90(1) of *LASA*. In accordance with section 67(2)

7.0.1 of *FIPPA*, section 90(1) of *LASA* prevails over *FIPPA*, and I therefore uphold LAO's decision to deny access on that basis.

**ORDER**

I uphold LAO's decision and dismiss this appeal.

Original Signed By: \_\_\_\_\_ September 19, 2011  
Steven Faughnan  
Adjudicator