

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4405

Appeal PA21-00308

Legal Aid Ontario

June 19, 2023

Summary: Legal Aid Ontario (LAO) received a request under the *Act* for records about a named individual that the requester believes is receiving legal aid services from LAO. LAO issued an access decision to the requester denying access to any responsive records relying on the privilege and confidentiality provisions set out the *Legal Aid Services Act, 1998 (LASA)*.

In this order, the adjudicator upholds LAO's decision that any responsive records fall within the confidentiality provisions in *LASA*, such that these provisions in *LASA* prevail over the *Act*. Therefore, she upholds LAO's decision to deny access on that basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 67(1), and 67(2) 7.0.1; *Legal Aid Services Act, 1998*, sections 40 and 42.

Orders Considered: Orders P-26, and PO-2083.

OVERVIEW:

[1] This order concerns whether any records of legal aid services being provided to a named individual is not subject to disclosure under the provisions of the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* as the confidentiality provisions in another statute prevail over *FIPPA*.

[2] Legal Aid Ontario (LAO) received a request under the *Act* for records relating to a named individual that the requester believes is receiving legal aid services from LAO.

LAO issued an access decision to the requester advising that:

Under the privilege and confidentiality provisions set out the *Legal Aid Services Act, 1998* [(*LASA*)], LAO cannot disclose whether another individual is legally aided. Section 67(2) 7.0.1 of FIPPA provides that these confidentiality provisions prevail over FIPPA. These provisions are attached to this letter.

Alternatively, if FIPPA did apply, under section 21[(5)]¹ of FIPPA, LAO may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

Therefore, as a result, LAO is not able to confirm or deny the existence of any records in response to your request.

[3] The requester, now the appellant, appealed LAO's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[4] The parties were unable to resolve the issues under appeal through the process of mediation. Accordingly, the file was referred to adjudication where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought LAO's representations initially. These representations were withheld from the appellant due to confidentiality concerns.

[5] I then sought the appellant's representations. The appellant did not provide representations.

[6] In this order, I uphold LAO's decision that any responsive records would be not be subject to disclosure under the *Act* as the confidentiality provisions in *LASA* prevail over *FIPPA*. Therefore, there is no authority under *FIPPA* for me to order the disclosure of any responsive records.

DISCUSSION:

[7] The sole issue in this appeal is whether any responsive records fall within the confidentiality provisions in *LASA*, such that these provisions in *LASA* prevail over *FIPPA*.

[8] 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

¹ Incorrectly cited by LAO as section 21(3). Section 21(5) provides that:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

As I find in this order that the confidentiality provisions in *LASA* prevail over *FIPPA*, there is no need for me to consider whether section 21(5) of *FIPPA* applies, and I decline to do so.

statute specifically provides otherwise.

[9] 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 40 and 42 of the *Legal Aid Services Act, 2020*.

...

[10] Section 67(2) is not a jurisdiction-limiting provision that excludes certain categories of records from the *Act's* application. Rather, it 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.² Section 67(2) 7.0.1 specifically includes sections 40 and 42 of *LASA* among the listed confidentiality provisions that prevail over the *Act*.

[11] LAO has raised the application of sections 40 and 42 of the *LASA*, which read:

40 (1) All communications between an individual receiving or requesting to receive legal aid services and the Corporation, an officer or employee of the Corporation or a service provider are deemed to be privileged in the same manner and to the same extent as if the communications had been between the individual and a solicitor under a solicitor- client relationship.

(2) In the case of a service provider that is an entity, subsection (1) applies with necessary modifications with respect to each board member, officer and employee of the service provider, as applicable.

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

42 (1) A member of the board, an officer or employee of the Corporation or a service provider shall not disclose or permit to be disclosed any information or material furnished to or received by the person in the exercise or performance of the person's powers, functions or duties under this Act or in the provision of legal aid services.

(2) A person referred to in subsection (1) may disclose information or allow it to be disclosed,

² Orders PO-2029, PO-2083 and PO-2411-I.

(a) in the exercise or performance of the person's powers, functions or duties under this Act or in the provision of legal aid services;

(b) with the consent of the individual receiving or requesting to receive legal aid services; or

(c) if authorized by the Corporation.

(3) A person referred to in subsection (1) may, for the purpose of assisting a court or tribunal, disclose to the court or tribunal information as to whether an individual has requested to receive legal aid services and the status of any such request.

(4) In the case of a service provider that is an entity, this section applies with necessary modifications with respect to each board member, officer and employee of the service provider, as applicable.

[12] In order to decide whether section 67(2) 7.0.1 applies, I must determine whether sections 40 and 42 of the *LASA* apply to the records and that these sections prevail over *FIPPA*.³

[13] The appellant sought access to records related to legal services being provided to a named individual held by LAO. LAO in response advised the appellant in its decision letter that:

Under the privilege and confidentiality provisions set out the *Legal Aid Services Act, 1998*, LAO cannot disclose whether another individual is legally aided. Section 67(2) 7.0.1 of *FIPPA* provides that these confidentiality provisions prevail over *FIPPA*. These provisions are attached to this letter.

[14] 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 any responsive records.

[15] I agree with LAO that it cannot disclose any responsive records to the appellant, as that would disclose to the appellant whether the individual who is the subject matter of the request is a legal aid services recipient. The confidentiality provision in section 40(1) of *LASA* applies to disclosure of any responsive records where disclosure would disclose privileged "...communications between an individual receiving or requesting to receive legal aid services and the [LAO]...".

[16] Section 42(1) and (2) contain exceptions to section 40(1) of *LASA*. In Order PO-2083, also an order with LAO, the former assistant Commissioner commented on the

³ Orders PO-1930, and PO-2029.

impact of sections 90(1) and 90(2) in *LASA* (currently sections 42(1) and 42(2) in *LASA*). In his analysis he recognized that the exercise of discretion clearly rests on LAO to consider whether to apply the exceptions, writing:

Section 90(2) [42(2) of the current statute] 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*.

[17] I agree with the findings in Order PO-2083. When section 40(1) applies, as it does here, it would defeat the purpose of this provision if I were to require LAO to either seek the consent of the individual who the appellant has identified in her request under *FIPPA* as a legal aid recipient or the authorization of LAO to disclose any information it has related to this request. Finally, even if the IPC had the power to order disclosure where another exception in section 42(2) applies, I have not been provided with evidence that any other exception applies here.⁴

[18] Therefore, I find that, in the circumstances of this appeal, section 40(1) of *LASA* applies and the applicable exceptions in section 42(2) do not apply.

[19] Accordingly, as the records requested by the appellant fall within the scope of the confidentiality provision at section 40(1) of *LASA*, in accordance with section 67(2) 7.0.1 of *FIPPA*, section 40(1) of *LASA* prevails over *FIPPA*. Thus, I am upholding LAO's decision to deny access on that basis.

ORDER

I uphold LAO's decision and dismiss this appeal.

Original signed by: _____

Diane Smith
Adjudicator

June 19, 2023

⁴ See Order PO-4359.