

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3669

Appeal PA13-113

Legal Aid Ontario

November 30, 2016

Summary: The requester, a community legal services clinic, submitted a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* to Legal Aid Ontario (LAO) for records related to the plan for transition to a different model of providing legal services to that community. LAO identified over 4,000 pages of records as responsive to the request and issued an access decision claiming that all of the records fit within section 90(1) of the *Legal Aid Services Act, 1998* (the *LASA*) – a confidentiality provision listed in section 67(2) of *FIPPA*. On this basis, LAO claimed that the records are not subject to disclosure under *FIPPA*. The requester appealed LAO's decision to this office.

In this order, the adjudicator concludes that section 90(1) of the *LASA* does not apply. Section 90(1) is intended to regulate the information handling practices of individuals acting in the listed capacities under the *LASA*, rather than the obligations of LAO, the Corporation, at large, including in response to an access request under *FIPPA*. The adjudicator does not uphold LAO's access decision and orders LAO to issue a new one.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(a)(ii), 10(1), 10(2), 24, 38, 42, 62, 67(1), 67(2)7.0.1; *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, as amended, sections 1, 2, 3(4), 4, 14(1)(d), 14(3), 84, 89, 90(1), 90(2), 92, 96.

Orders and Investigation Reports Considered: Orders P-353, PO-2083, PO-2312, PO-2811, PO-2976, PO-2994, PO-3114, and MO-2439; BC IPC Order F15-02.

Cases: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 405; *Gombu v. Ontario (Assistant Information and Privacy Commissioner)*, 2002

CanLII 53259 (ON SCDC); *Municipal Property Assessment Corporation v. Mitchinson*, 2004 CanLII 17632 (ON SCDC); *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366 (CanLII); *Ministry of Community and Social Services v. Doe*, 2014 ONSC 239 (Div. Ct.); aff'd 2015 ONCA 107; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Fernandes v. Araujo*, 2015 ONCA 571.

OVERVIEW:

[1] In October 2012, the Clinic Committee of the Board of Directors of Legal Aid Ontario (LAO) reached a decision to cease funding West Toronto Community Legal Services (WTCLS). In February 2013, WTCLS submitted an access request to LAO under the *Act* for records related to the funding decision. This order is issued to address WTCLS's appeal of LAO's decision in response to the access request, which sought, for the two-year period preceding the date of the request:

(a) copy of the "transition plan" referred to [in the funding decision], (b) any briefing notes, memos, emails or other records which discuss a poverty law service centre as a method of delivering legal services to West Toronto, and (c) any briefing notes, memos, emails or other records which compare the continued operation of the West Toronto Community Legal Services with other options (such as the planned poverty law service centre) in terms of factors such as cost, client service, etc.

[2] LAO issued a decision letter to WTCLS four days later stating that the information requested was covered by section 90 of the *Legal Aid Services Act* (the *LASA*) and was, therefore, not subject to disclosure under the *Act*.

[3] WTCLS (also known as the appellant) appealed LAO's decision to this office and a mediator was appointed to explore resolution. A mediated resolution of this appeal was not possible and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[4] Given the voluminous nature of the records and her preliminary review of them, the adjudicator originally responsible for the appeal asked LAO to comment on their responsiveness to the request. The parties were also asked to provide representations on the past orders of this office that addressed the interpretation of section 90 of the *LASA* and the principles that would be relevant to the specific circumstances of this appeal. Representations were received from both parties and shared in accordance with the confidentiality criteria outlined in the IPC's *Practice Direction 7*. Following review of the representations, the adjudicator invited the parties to submit further representations on an alternate interpretation of section 90 of the *LASA*. The appeal file was then transferred to me for disposition.

[5] In this order, I conclude that it is not necessary for me to determine the responsiveness of the records identified by LAO in its decision given my finding on section 90 of the *LASA*. Specifically, I find that section 90(1) is intended to regulate the information handling practices of individuals acting in the listed capacities under the *LASA*, not the obligations of LAO, the Corporation, at large, including in response to an access request under *FIPPA*. I do not uphold LAO's access decision, and I order it to issue a new decision to the appellant in accordance with the interpretation of section 90(1) of the *LASA* set out in this order and the provisions of the *Act*.

RECORDS:

[6] The records at issue include a transition plan, memoranda, briefing notes, a project charter, other project planning documents, correspondence, emails, agendas, minutes, and other records.¹ The total volume of records identified as responsive by LAO was not provided, but it appears that there are approximately 4,000 pages, including duplicates.

ISSUES:

- A. Are the records identified by LAO responsive to WTCLS's request?
- B. Does the information withheld by LAO fall within section 90 of the *Legal Aid Services Act*, such that the confidentiality provision in that act prevails over the *Freedom of Information and Protection of Privacy Act*?

DISCUSSION:

Background

[7] According to its website, WTCLS provides advice, services and representation in matters relating to social assistance, housing, workers' rights and consumer law in the area of Toronto it serves. WTCLS also "works with community partners to deliver public legal education, to advocate for change in our justice system, and to act as a voice for vulnerable, low-income people in our community."²

[8] LAO provided the following background information on the circumstances of this

¹ LAO provided the records in CD format and these electronic records were categorized into the following eight folders: Briefing Notes, Correspondence with WTCLS, Project Planning Documents, [Named staff member's] Archived Emails, Meetings, Metrics and Demographics, [Second named staff member's] Archived Materials, and Internal Correspondence.

² www.wtcls.org

appeal. The Clinic Committee of LAO's Board of Directors met in the fall of 2012 to consider WTCLS's funding application. Due to concerns about WTCLS's financial management, as well as human resources and board governance issues, the Clinic Committee did not approve the funding application. WTCLS was notified of that decision and of the fact that LAO was preparing a transition plan to continue the delivery of "poverty law" services on an interim basis. The transition plan involved establishing an LAO office in downtown Toronto, with satellite locations in west Toronto.

[9] LAO indicated that in working towards the implementation of the transition plan, its staff communicated with each other about various related matters, such as:

- Leasing and facilities, including equipment and furniture;
- Staffing and union issues;
- Client intake and referrals;
- Case management;
- File management and reporting;
- Development of policies and procedures regarding client eligibility, legal services and other operations;
- Data collection;
- Communications and stakeholder outreach; and
- Budget and staff planning, including the holding of a staff planning day.

[10] The WTCLS Board of Directors requested a reconsideration of the decision to deny the funding application. Eventually, LAO's Clinic Committee accepted a joint proposal to adjourn the funding hearing for a period of two quarters on specified terms and conditions. The transition plan for WTCLS was placed on hold due to that agreement. As of the writing of this order, there is no indication that LAO has proceeded any further with the 2012 transition plan. WTCLS remains open and active.

Issue A: Are the records identified by LAO responsive to WTCLS's request?

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.³ To be considered responsive to the request, records must "reasonably relate" to the request.⁴

[13] LAO's position is that it adopted a liberal approach to the request and that all of the identified records are responsive to the appellant's request, with the exception of eight emails, which were created after the date of the request. LAO provides the following details about the records it claims are responsive to the request:

- A briefing note to the Clinic Committee, setting out options for dealing with LAO's concerns about the management of WTCLS and ways of ensuring that legal aid services would be available to clients;
- A transition plan, which sets out plans to establish a staff office in the district office to provide poverty law services to the low-income residents of west Toronto [a Poverty Law Service Centre, or PLSC];
- Briefing notes regarding budget, management, salaries, record-keeping, status updates, leasing costs and next steps;
- Emails regarding collective bargaining, staffing, and successor rights;
- A project charter, including draft implementation plans, transition planning, communications plans, financial eligibility of clients, minutes of meetings with human resources and finance;

³ Orders P-134 and P-880.

⁴ Orders P-880 and PO-2661.

- Emails regarding salaries, financial eligibility of clients, scripts for staff when interviewing applicants, solution codes for electronic record keeping, leasing information, interpretation service needs, financial costs, performance measures and equipment;
- Meeting agendas and minutes, including discussions around the planning and operation of the PLSC; and
- Records containing information about the level of service provided by WTCLS and the demographics of its clientele.

[14] All of these records, LAO argues, are relevant, and therefore responsive, to the appellant's request for records about a poverty law service in west Toronto, particularly because they include comparisons regarding the continued operation of WTCLS and other options.

[15] On this issue, the appellant states that he is not in a position to comment on the responsiveness of the records since he has not seen them. However, the appellant suggests that because LAO responded to the request so quickly – four days after it was submitted – it could not have carefully considered whether the disclosure of each record was prohibited under section 90(1) of *LASA* and if so, whether the record could nevertheless be disclosed under section 90(2).

Analysis and findings

[16] When LAO's FOI staff received WTCLS's access request, they responded in accordance with section 4 of the LAO Privacy Policy ("Guidelines"), which provides that "If a request is made for information not covered in the guidelines, a *FIPPA* request form should be given to the requester." This is what happened, suggesting that FOI staff were themselves not certain what to make of the request and, in turn, that it was not a foregone conclusion that all of the records identified as responsive fit within section 90(1) of the *LASA*. Ultimately, however, on the basis of section 90(1) of the *LASA*, LAO withheld all of the records identified: entire folders of records including, "Correspondence with WTCLS," records that originated from, or were provided to, the appellant.⁵

[17] Further, based on my own review of the records, I am not convinced that all of the many records LAO claims to be responsive are, in fact, "reasonably related" to this access request. While not wanting to seem critical of an institution responding quickly to a request under the *Act*, the timing of the response in this instance, where the records number in the thousands of pages, does raise the possibility that insufficient

⁵ Other withheld records include an area catchment map, job postings/descriptions for the planned new clinic, and a presentation to a local college.

consideration may have been given to the responsiveness of each individual record identified by the electronic searches conducted.

[18] By extension, I share the appellant's concern regarding whether LAO had the opportunity in the four days between receipt of the request on Monday and issuing the decision letter on Friday to adequately consider whether section 90(1) applied to each and every one of them. However, in view of my analysis of the disclosure prohibition in section 90(1) of *LASA* and the resulting findings, I conclude that it is not necessary to determine the issue of responsiveness at this point.

Issue B: Does the information withheld by LAO fall within section 90 of the *Legal Aid Services Act*, such that the confidentiality provision in that act prevails over the *Freedom of Information and Protection of Privacy Act*?

[19] Section 67(1) of *FIPPA* provides that the *Act* prevails over a confidentiality provision in any other Ontario statute, unless section 67(2) or the other statute specifically provides otherwise. Section 67(2) lists the various confidentiality provisions that prevail over the *Act*. Past orders of this office have established that section 67(2) is not a jurisdiction-limiting provision that operates to exclude 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.⁶

[20] Paragraph 7.0.1 of section 67(2) refers to "Sections 89, 90 and 92 of the *Legal Aid Services Act, 1998*." At issue is section 90, which provides that:

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.

(2) 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 services or with the consent of the applicant or if authorized by the Corporation.

LAO's initial representations

[21] LAO submits that pursuant to section 67(2) of the *Act*, once records are found to

⁶ Orders PO-2929, PO-2083, PO-2411-I, PO-2994 and PO-3114.

fit within the confidentiality provision in section 90 of the *LASA*, the provisions of the *Act* must yield to the *LASA*. LAO argues that because the records relate to the management of a legal aid clinic⁷ and the provision of poverty law services, the subject matter clearly falls within LAO's mandate to provide legal aid services.⁸ LAO explains that it is mandated to "monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation,"⁹ and that it shall provide "legal aid services" by any method it considers appropriate, including the funding of clinics and the establishment of legal aid services staff offices.¹⁰ LAO explains further that:

Section 37(1) of *LASA* requires LAO to monitor the operation of a clinic funded by it to determine whether the clinic is meeting the standards for the operation of clinics, and permits LAO to conduct audits of clinics where necessary for that purpose. Section 38(1) of *LASA* provides that if a clinic fails to comply with ... [*LASA*] or to meet the terms and conditions of its funding, the Board of Directors of LAO may direct the clinic to do anything that it considers appropriate to ensure that the clinic complies with ... [*LASA*]. Finally, section 39(4) of *LASA* provides that if the LAO Board of Directors is of the opinion that a legal aid clinic is not complying with ... [*LASA*] or with the terms and conditions attached to its funding, or with a direction issued under s. 38 or is not meeting the operational standards established by the Corporation, the Board may reduce or suspend the funding of the clinic.

[22] LAO argues that in the context of this scheme, any records that relate to the management of WTCLS or the development of the PLSC alternative would contain information relating to the provision of legal aid services. As an example, LAO notes that the transition plan is an appendix to a memorandum provided to the Board of Directors of LAO by its President and CEO. According to LAO, this record was prepared by LAO staff in the course of their duties and contains the plan for the provision of legal aid services in west Toronto in the event that funding was denied to WTCLS. LAO adds that all of the records (described on pages 5 and 6, above) contain material similarly furnished to or received by legal aid employees respecting legal aid services in west Toronto in case funding was denied to WTCLS. Consequently, LAO submits that all of the records fall within the parameters of section 90(1) of *LASA* because they contain information furnished to or received by legal aid employees or officers in the course of their duties or in the provision of legal aid services. In support of its position, LAO relies

⁷ A "clinic" is defined in section 2 of the *LASA* as an independent community organization structured as a corporation without share capital that provides legal aid services to the community it serves on a basis other than fee for service.

⁸ "Legal aid services" is defined in section 2 of the *LASA* as "legal and other services provided under this Act."

⁹ Section 4(d) *LASA*.

¹⁰ Section 14(1) *LASA*.

on Orders PO-2083, PO-2994 and PO-3114.

[23] LAO acknowledges that a record created by an LAO employee is not subject to section 90 of the *LASA* simply by virtue of it being sent to another LAO employee; however, LAO contends that if the employee sent the record to another employee, officer or board member in the exercise of his/her duties, the record is brought within section 90(1) of the *LASA*. LAO argues that in this appeal, "there was a clear business purpose for the sending of each record to another LAO employee."

[24] LAO relies on the following excerpt from its Privacy Policy to support the position taken on section 90:

... [A]ll of our records that are subject to solicitor-client privilege or to the very broad confidentiality provision in s. 90 are not subject to access under *FIPPA* and may be disclosed only with the consent of the client (s. 89) or in accordance with s. 90(2) of *LASA*, that is, when necessary in the performance of legal aid duties, with the consent of the client or by authorization by the Corporation. The guidelines appended to this policy will tell you when you may disclose this information.

[25] According to LAO, the current guidelines appended to the Privacy Policy¹¹ prohibit the disclosure of the type of information contained in the records at issue. Further, since there is no existing policy or practice of disclosure of information to third parties, there is no authority under LAO's governing legislation for individuals listed in section 90(1) of the *LASA* to make a disclosure. In other words, the appropriate authority to disclose must exist and does not. LAO submits that while a person referred to in subsection (1) may disclose information or allow it to be disclosed in the performance of his/her duties or in the provision of legal aid services, there is no obligation to do so. LAO maintains, however, that section 90(2) does not create an exception that confers discretion to disclose the information to the appellant.

[26] Additionally, LAO argues that if the records at issue are found to contain information or material described in section 90(1) of the *LASA*, this effectively ends any inquiry (by the IPC) into the issue because the *Act* would not be the controlling statute for the purpose of determining disclosure. LAO also argues, therefore, that I should not undertake a review of LAO's decision that there is no basis for an exercise of discretion under section 90(2) of *LASA*. LAO submits, in the alternative, that its decision not to exercise discretion under section 90(2) was a proper one.

[27] Lastly, LAO's position with respect to severing the records is that the severance provisions of the *Act* do not apply because the records are subject to a scheme of

¹¹ LAO policies are created by the Board, pursuant to the authority in section 12 of the *LASA*.

confidentiality that prevails over the *Act*.

The appellant's initial representations

[28] The appellant's position is that section 90(1) of *LASA* protects the information that legal aid applicants are required to provide to LAO but does not prohibit the disclosure of operational materials that are prepared by staff for purposes unrelated to an applicant. The appellant submits that the responsive records here are not subject to section 90(1) of the *LASA* because they do not contain personal information and were not generated in the course of carrying out any statutory duties. The appellant refers to other confidentiality provisions listed in section 67(2) of the *Act*,¹² noting that while they prohibit the disclosure of personal information received by institutions in the course of their duties, they do not prohibit the disclosure of operational or planning materials of a non-personal nature. The appellant argues that section 90(1) of the *LASA* should be interpreted in the same manner, adding that the words "furnished to or received by" in section 90(1) and the provision for the applicant's consent in section 90(2) are strong indications that section 90 is not intended to apply to materials prepared by LAO staff for operational purposes unrelated to a particular applicant.

[29] According to the appellant, LAO's Privacy Policy supports this interpretation. First, there is the definition of "confidentiality" in the policy: "... the requirement that personal information not be disclosed to anyone outside LAO, except in accordance with the legislative requirements of FIPPA and *LASA*." Second, section 12 of the policy identifies the following records as not subject to either solicitor-client privilege or the confidentiality provisions, with the effect being that their disclosure is determined under the *Act*:

- Manuals, directives and guidelines prepared for officers as to how to determine the application by a person for a privilege or benefit administered by the institution;
- Notices and bulletins sent to service-providers¹³ are public documents; notices and memoranda sent to staff *may* be disclosable;
- Staff records;
- Records about service providers and consultants; and

¹² With citations omitted here, the examples given are homeowner financial information received by MPAC (section 53(1) of the *Assessment Act*), individual responses to government surveys (section 4(2) of the *Vital Statistics Act*), adoption records (section 28(2) *Vital Statistics Act*), the identities of certain individuals specified in sections 45(8) and 116 of the *Child and Family Services Act*, section 68 of the *Colleges Collective Bargaining Act* and section 32(4) of the *Pay Equity Act*.

¹³ Section 2 of the *LASA* defines a "service provider" as a person, other than a lawyer, who provides legal aid services. As noted, "legal aid services" means "legal and other services provided under this Act."

- Opinion letters authored by an applicant's lawyer.

[30] The appellant states that "operational notices and memoranda sent to staff" and "records about service providers" are disclosable, subject only to the exemptions in sections 18 and 21 of the *Act*.¹⁴ The policy also lists information that is available in area offices for public inspection, namely: annual report, business plan, guide to coverage and financial eligibility, area office procedures manual, human resources policies and procedures manual, financial eligibility criteria, policy and procedures manual, duty counsel manual, and payment agreement policy.

[31] The appellant acknowledges that materials prepared by LAO staff may include personal information furnished by or received from an applicant or an individual outside LAO and, in this case, section 90(1) would prohibit disclosure. However,

... where the information originates solely with a staff person, subsection (1) does not prohibit that staff member who prepared, and did not receive, the information, from disclosing it. Had the legislature intended to prohibit the disclosure of information *prepared* by LAO staff, it would have done so with express wording.

[32] WTCLS observes that the information at issue in Orders PO-2083 and PO-3114 that was found to fit within section 90(1) of *LASA* consisted of the personal information of applicants. Regarding the latter, the appellant notes that LAO disclosed the requested Committee meeting minutes with personal information about other legal aid applicants severed; "there was no suggestion in PO-3114 that the records should have been withheld in their entirety." To WTCLS, this represents an implicit acknowledgement by LAO and this office that materials of an operational and non-personal nature are not subject to section 90(1). WTCLS also cites *R. v. Pizzuro*¹⁵ where the Court referred to section 90 of *LASA* as a privilege that belongs to legal aid applicants.

[33] The appellant argues that Order PO-2994 can be distinguished on the facts. WTCLS notes that the records there related to an LAO investigation of a legal aid clinic and it would be reasonable to assume that they included information received from individuals outside LAO, including the complainant, witnesses and the clinic; whereas, the records at issue here appear to have originated solely from LAO staff. According to the appellant, even if the circumstances of the appeal in Order PO-2994 were

¹⁴ Section 18 protects an institution's economic or other interests; section 21 protects personal privacy.

¹⁵ [2000] O.J. No. 4047 at para. 6.

analogous to this appeal, it ought not to be followed.¹⁶

[34] The appellant submits that if section 90 of the *LASA* was interpreted so broadly as to encompass the records in this appeal, all of LAO's records would be similarly rendered exempt from disclosure. This outcome, WTCLS submits, would be contrary to the fundamental principle of *FIPPA* that exemptions from disclosure should be limited and specific and the fundamental principle of *LASA* that LAO should be accountable for its expenditure of public funds.¹⁷

[35] The appellant asserts that the records were not generated in the course of LAO's statutory duties. The appellant refers to LAO's indication that the records do not relate to WTCLS, but to its own plan to establish a staff office to deliver poverty law services to the west Toronto community. The appellant argues that section 14 of *LASA*, read in its entirety, establishes that independent clinics are the foundation for the provision of poverty law services.¹⁸ Consequently, the appellant concludes, because LAO has not identified any statutory authority for its proposed staff office model, the records relating to that model cannot have been generated in the course of its statutory duties or in the provision of legal aid services.

[36] With respect to the possible application of section 90(2) of *LASA*, the appellant submits that the provision grants clear discretion to disclose records irrespective of existing policy and LAO has failed to exercise its discretion as required. The appellant states that LAO has already disclosed similar records, such as the transition plan that was an appendix to a briefing note prepared by LAO staff and submitted to the Clinic Committee. The appellant states that LAO has not explained why it exercised its discretion to disclose the briefing note, but not the transition plan. Further, the appellant argues that even if LAO does not consent to disclosing the records, WTCLS itself can provide that consent. Relying on section 35 of the *LASA*, which sets out the application process for clinics to follow to qualify for funding, the appellant argues that this provision makes it clear that clinics are applicants for the purposes of section 90(2), particularly given LAO's submission that the records "deal with the administration of a clinic."

¹⁶ The appellant relies on the Ontario Court of Appeal decision in *R. v. Transcanada Pipelines Limited*, (2000 CanLII 5713 at para. 129) for the principle that administrative tribunals are not bound by the principle of *stare decisis* and may depart from their own past decisions.

¹⁷ Section 1(a)(ii) of *FIPPA* and section 1(d) of *LASA*.

¹⁸ Specifically, section 14(1), which states that: "Subject to subsections (2) and (3), the Corporation shall provide legal aid services by any method that it considers appropriate, having regard to the needs of low-income individuals and of disadvantaged communities, the need to achieve an effective balance among the different methods of providing legal aid services, the costs of providing such services and the Corporation's financial resources, including, ... (d) the establishment and operation of legal aid services staff offices; ... [and] (3) 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."

[37] Finally, the appellant submits that the records can be severed and the portions that are not subject to section 90 of the *LASA* can be disclosed. The appellant relies on Order P-353 in which former Assistant Commissioner Tom Mitchinson found that portions of records that did not fit within a provision listed in section 67(2) remained subject to disclosure under the *Act*.

LAO's reply representations

[38] In reply, LAO points out that section 89 of the *LASA* already protects the confidentiality of legal information provided by applicants for legal aid funding. LAO submits that the appellant's assertion that section 90 is limited to the personal information of applicants should be rejected on that basis. Section 90 refers to any information or material furnished to, or received by, the enumerated personnel in the course of their duties or in the provision of legal aid services. LAO argues that the principles of statutory interpretation dictate that these words should be given their plain and ordinary meaning in the absence of any reason to modify or reject that interpretation.

[39] LAO acknowledges that administrative tribunals are not bound by the principle of *stare decisis*, but counters that there is still a requirement that they exercise their statutory powers and make decisions in accordance with consistently-applied policies and principles, including reference to previous decisions, such as Order PO-2994, where the adjudicator concluded that section 90 of the *LASA* is "intentionally broad and is meant to capture all types of information."

[40] With respect to its Privacy Policy, LAO submits that it establishes two categories of records to which section 90 does not apply: first, policy and operational notices and memoranda sent to staff (limited to operational materials that are disseminated broadly to all LAO employees) or to service providers, which are public; and second, records about service providers or consultants, which are disclosable, except for legal billing information. LAO asserts that the introduction to the policy clearly establishes that almost all of its records are subject to solicitor-client privilege in section 89 or the confidentiality provision in section 90, and that these provisions prevail over the *Act*.

[41] Responding to the appellant's claim that there is no statutory authority to establish a staff poverty law office, LAO states that section 14(1)(d) of the *LASA* provides the authority to establish staff offices and staff duty counsel; section 14(3) only establishes clinics as the foundation of poverty law services, not as exclusive providers. LAO argues, therefore, that since the establishment of a staff office falls within the statutory authority of section 14(1), records created regarding a staff model for the delivery of poverty law services are records generated in the course of LAO's statutory duties, as well as in the provision of legal aid services.

[42] Regarding the assertion that WTCLS can provide consent under section 90(2),

LAO states that because the records are not WTCLS's as an applicant, the appellant cannot consent to their disclosure. As to why the briefing note, but not the transition plan, was disclosed, LAO explains that the briefing note formed part of the materials put before the Clinic Committee and all attendees at its meeting, including the appellant, were provided with a copy of it.

[43] Lastly, LAO maintains that records that fall with section 90(1) of the *LASA* cannot be severed. Respecting Order P-353, relied upon by WTCLS in this regard, LAO maintains that because the record at issue in Order P-353 did not fit within the confidentiality provision, it could be severed prior to disclosure under the *Act*.

The appellant's sur-reply representations

While WTCLS agrees that the words in a statute should be given their ordinary meaning, it argues that LAO has proposed an interpretation of section 90(1) that is anything but ordinary, explaining as follows:

Subsection (1) prohibits an employee from disclosing "information or material furnished to or received **by him or her**" in the course of his or her duties. On its face, the subsection prohibits the individual recipient from disclosing the information or material that he or she received; it does not prohibit disclosure by the author of the information or material received.

[44] Further, the request named two individuals and WTCLS submits that although it has not viewed the requested records, "it appears that these individuals are authors, and not recipients, of most of the requested records." The appellant mentions the Transition Plan, which was prepared by one of the two named individuals, and submits that when the author employee is not a recipient, but the source of the information, subsection (1) does not prohibit disclosure, since that information has plainly not been "furnished to or received by him or her." The appellant adds that the Supreme Court of Canada has emphasized, and this office has confirmed, that the ordinary words of a statute must be read in context, and in light of their purpose.¹⁹ The appellant argues that the wording of section 90 of *LASA* suggests that it is meant to control the conduct of individual LAO employees by prohibiting the unauthorized disclosure of information received by LAO from third parties; it is not meant to shield LAO from responding to requests for information under the *Act*.

[45] The appellant also provided the *Compendium*, a document prepared by the Ministry of the Attorney General which was tabled in the Ontario Legislature on October

¹⁹ The appellant relies on *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21, followed in Orders PO-2693 and PO-3222.

6, 1998 when Bill 68 (the *LASA, 1998*) was first introduced.²⁰ WTCLS states that the Standing Orders that govern the Legislative Assembly require that a *compendium* be prepared when a government bill is introduced to explain and summarize its provisions. *Compendia* are public legislative documents, which provide an explanation of the legislation by the government that wrote, introduced and passed it. The appellant notes that *compendia* have been relied on by the Ontario Court of Appeal and this office.²¹

[46] The *Compendium* prepared for Bill 68 describes section 90 (then numbered 89) as follows:

Section 89 [now 90] prohibits disclosure of any information concerning a client received in the course of the duties of any Board member, or employee of the Corporation, as well as any entities funded by the Corporation. Subsection 2 provides an exemption for disclosure which is made in the course of the person's duties, with the consent of the applicant, or with the authorization of the Corporation.

Based on the description provided in the *Compendium*, the appellant concludes that section 90 is intended to protect clients' personal information, and is not intended to capture all types and forms of information, including records that originated with or were exchanged within LAO, contrary to LAO's assertion.

[47] With respect to the discretion in section 90(2) to disclose information, the appellant argues that LAO's Privacy Policy does not contain language limiting the type of operational or service provider-related records that can be disclosed and notes that the records at issue are not among those listed in the policy as records that cannot be disclosed.

[48] Lastly, the appellant submits that section 90 only prohibits the disclosure of "information or material;" not entire records. That is, where information or material is contained within a larger record, the remainder of the record is not subject to section 90 of the *LASA*, but remains subject to the *Act*, including the severance provisions. The appellant states:

If LAO is suggesting that the requested records *in their entirety* constitute information or material received, then [the appellant] submits that this would take s. 90 much farther than in past cases. In past cases, records were withheld on the basis that disclosure would reveal the identity of legal applicants. In other words, it was the contents of the records that attracted the protection of s. 90, and not the records themselves. Were s.

²⁰ Sessional Paper No. 131, 2nd Session, 36th Parliament.

²¹ *M. v. H.* (1996), 31 O.R. (3d) 417 (Ont. C.A.) and Order PO-2775-R.

90 interpreted to encompass entire records, there would be virtually no limit to the types of material that could be withheld by LAO.

[49] In the appellant's view, adopting LAO's interpretation of section 90 would significantly undermine the public's ability to ensure an efficient, effective legal aid system.

LAO's sur sur-reply representations

[50] LAO submits that according to the "golden rule" of statutory interpretation, where the statute in question is undeniably clear in its ordinary meaning, a tribunal is not obligated to consider extraneous interpretive aides respecting legislative intent. According to the "golden rule," it is only where legislation is uncertain or where genuine ambiguity arises between two or more plausible meanings, each equally within the intentions of the statute, that resort should be made to external interpretive aides.²² LAO further submits that the ambiguity must be real and arises where the words of a provision are reasonably capable of more than one meaning.

[51] In this instance, LAO submits that the ordinary meaning of section 90 of *LASA* is clear and its language presents no ambiguity, an interpretation this office has also supported. Given the absence of ambiguity in section 90, it is not reasonably capable of more than one meaning and reliance on the *Compendium* is not necessary; it is simply a summary of what the legislation intends to achieve that is provided to critics so they may respond to it. LAO also seeks to distinguish the authorities relied upon by the appellant, stating that in neither case was a compendium used to narrow the interpretation of a clearly-worded legislative provision. LAO submits that the appellant is relying on an extraneous document to restrict the plain wording of a statute and impose limitations absent any evidence of legislative intent to restrict the provision in that manner. LAO maintains that if the Legislature had intended the section to apply to applicants only, it would have clearly stated so in the provision.

[52] Even if one does accept that extraneous interpretive aides should be consulted, LAO argues that legislative intent here can more clearly be inferred by the government's response to a certain recommendation made by the IPC. The IPC was concerned that the prohibition on disclosure in section 89 (now section 90) was too broad in scope, and recommended that the section be confined to privileged or confidential information or material relating to an applicant. LAO notes that although the Legislature adopted the IPC's recommendation that clinic board members be included in the provision,²³ it did not act on the recommendation that the provision be limited to privileged or confidential

²² LAO cites *Canadian Oxy Chemicals Ltd. v. Canada (A.G.)*, [1999] 1 S.C.R. 743, at para. 14, and *Bell ExpressVu Limited Partnership v. R.*, 2002 SCC 42 at para. 29.

²³ LAO provided a copy of the IPC's November 1998 submission to the Standing Committee on Administration of Justice.

information or material about an applicant. LAO argues that this shows a clear legislative intent that section 90 not be limited to applicant information.

[53] LAO adds that a broad provision like section 90 is needed because LAO is an independent agency under the jurisdiction of the Ministry of the Attorney General: section 3(4) of the *LASA* provides that LAO shall be independent from, but accountable to, the Government of Ontario and maintaining independence would be difficult without a strong provision like section 90. LAO also submits that section 90 was included to:

... allow LAO to develop its policies, implement pilot projects and bring innovation in the delivery of legal aid services without interference. This provision is intended to cover more than applicant information; it ensures the independence of LAO and its decision-making.

[54] Lastly, with respect to the appellant's argument that WTCLS is an "applicant" for the purpose of section 90(2), LAO submits that it is not, because the definition of an "applicant" in the *LASA* is "a person who applies for or receives legal aid services."

Supplementary Representations – new direction

[55] As previously stated, this office sought supplementary representations from the parties on an alternate interpretation of section 90 of *LASA*, writing to them, as follows:

... [S]ections 89, 90 and 92 of *LASA* appear to distinguish between the confidentiality obligations of LAO (the "Corporation") in its own right and individuals working within or in association with the Corporation. For example, section 89(1) refers separately to the "Corporation, an officer or employee of the Corporation" and other persons in describing the privilege attaching to legal communications. Sections 92(6) and (7) refer separately to the "Corporation" and its "employees" in setting out the duty of confidentiality in relation to a quality assurance audit. Section 90(1) itself, on the other hand, does not appear to impose any duty of confidentiality on the Corporation in its own right, but applies to the categories of individuals listed. Further, section 90(2) indicates that the prohibition against disclosure at section 90(1) is not absolute, but permits a "person" referred to at section 90(1) to disclose information or allow it to be disclosed "with the consent of the applicant or if authorized by the Corporation."

[Further], the right of access at s. 10(1) of the *Act* applies to records in the custody or under the control of an "institution" which in this case is LAO or the "Corporation".

[56] LAO and WTCLS were asked to respond to the following questions:

Question 1: Does the above indicate that section 90(1) is intended to prohibit the disclosure of information by the persons listed, subject to the exceptions at s. 90(2), but that the general prohibition against disclosure does not apply to the Corporation itself?

Questions 2 (a) and (b): If the answer to Question 1 is “yes”, (i.e., the prohibition against disclosure does not apply to the Corporation in its own right):

(a) How does section 90(1) affect the obligations of the head of the institution - who is designated by General Regulation R.R.O. 1990, Reg. 460, Schedule I to be the President of Legal Aid Ontario - when making decisions on behalf of the Corporation under the *Act*? Can it be said that section 90(1) applies to the President of LAO when performing his duties in that capacity under *LASA*, but that it is not intended to apply when the same person is exercising his or her authority as head of the institution under the access provisions at Part II of the *Act*?

(b) How does the authority of the Corporation referred to at section 90(2) relate to or affect the authority of the head to make disclosure decisions under the *Act* on behalf of the Corporation? If the Corporation in its own right is not subject to the prohibition at section 90(1):

(i) Does the head require the authorization of the Corporation under section 90(2) to disclose information on its behalf under the *Act*?

(ii) Is the Corporation obliged to authorize the head of the institution to comply with the disclosure requirements of the *Act*?

[57] Both parties provided representations in response to these supplementary questions.

LAO's supplementary representations – question 1

[58] LAO maintains that a proper interpretation of this provision means that information that falls within the scope of section 90(1) shall not be disclosed except where at least of one of the four preconditions in subsection (2) is met. Therefore, sections 90 and 103²⁴ of *LASA*, together with section 67(2) of the *Act*, establish in unambiguous terms that where information falls within the scope of section 90 of the *LASA*, *LASA* is the controlling statute respecting its disclosure. This interpretation, LAO argues, reflects the intent of the Legislature and is most consistent with the plain

²⁴ This reference appears to be erroneous as the *LASA* does not have a section 103.

wording of the provision, the statutory context, and section 67(2) of the *Act*. LAO also argues that a proper interpretation of section 90 does not result in the Corporation having independent disclosure obligations under the *Act* and that any other conclusion is unsupported by the plain language of the provisions, incongruous with the statutory context, and would undermine the clear purpose of the legislation.

[59] LAO refers to the modern rule of statutory interpretation formulated by Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) and endorsed by the Supreme Court of Canada:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, the intention of Parliament.²⁵

[60] Next, LAO states that statutory interpretation is informed by a number of presumptions, including the principle against absurdity articulated by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd.* (cited above):

It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to [Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed. 1991)] an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to some interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes* supra at p. 88).

[61] LAO describes the presumption of coherence, as explained in *Sullivan on the Construction of Statutes*, 5th ed. (2008):

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. ... The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies,

²⁵ LAO also refers to section 64 of Ontario's *Legislation Act, 2006*, (S.O. 2006, c. 21, Sched. F), which states that: "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

that each provision is capable of operating without coming into conflict with any other.²⁶

[62] Consequently, LAO argues that interpreting section 90 of the *LASA* as creating independent disclosure obligations for the Corporation and for individuals working within the Corporation would offend the presumption that legislative provisions are intended to work together, would create an internal conflict and ultimately would be inconsistent with other provisions of *LASA*. LAO also submits that no inconsistency can exist between two provisions that deal with the same subject matter. Quoting from Sullivan, LAO submits that: "Where inconsistency occurs, either the drafter has made a mistake which the court must correct, or the law must be interpreted in a way that eliminates the discrepancy."²⁷

[63] LAO argues that the plain wording of section 90(1) sets out a broad, mandatory prohibition against engaging in, or permitting, the disclosure of any information or material furnished to or received by a person in the course of his or her duties or in the provision of legal services except in accordance with subsection (2). In turn, subsection (2) grants discretion to disclose the aforementioned information or materials, provided that at least one of the enumerated preconditions is met. Regarding the precondition involving disclosure being authorized by the Corporation, LAO notes that this may be done specifically or by virtue of an applicable policy or practice. LAO submits that as with all statutory grants of discretion, any decision to disclose information or materials under section 90(2) must be based on a weighing of considerations pertinent to the objects of the *LASA*.²⁸

[64] According to LAO, the wording of section 67(2) of the *Act*, particularly the use of "prevail," demonstrates the Legislature's awareness of the "near-inevitability of conflict" between section 90 of the *LASA* and *FIPPA*'s access regime. LAO maintains, therefore, that the provision unambiguously establishes that whenever information falls within the scope of section 90 of the *LASA*, that provision is the governing provision with respect to the confidentiality and disclosure of the information. LAO goes on to argue that neither the *Act* nor the *LASA* contains any express language that would support an alternate interpretation because neither statute expressly places independent disclosure obligations on the Corporation; nor does the *Act* appear to contemplate the possibility of conflict between the duties of the head and those of the Corporation.

[65] LAO also submits that there is no express language in either the *Act* or the *LASA* to the effect that:

²⁶ Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (2008) at p. 223. See also: *Bell ExpressVu Limited Partnership v. Rex*, [2002], 2 S.C.R. 559 at para 27 (S.C.C.).

²⁷ Sullivan, *ibid*, at p. 225.

²⁸ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140.

- the Corporation's disclosure obligations under the *Act*, if they exist, are unaffected by section 90 of the *LASA*;
- the president is not bound by section 90 of the *LASA* when carrying out his functions as head under the *Act*;
- the scope of section 90 of the *LASA* is limited in any way; or
- the information fitting within the scope of section 90 of the *LASA* is subject to disclosure under the *Act*.

[66] LAO submits that if the Legislature did, in fact, intend an alternate interpretation, then it is reasonable to expect that the drafters of the legislation would have made an effort to signal their intention more clearly, particularly in light of what LAO calls the “extraordinarily far-reaching implications” of such an interpretation. Furthermore, LAO submits that it is reasonable to expect that the drafters would have acknowledged and addressed the many questions, conflicts, and other problematic implications that would flow from the alternate interpretation.

[67] LAO submits that the wording of section 90, when read in its entire context and in the grammatical and ordinary sense, shows that the legislature's intention is to prohibit the disclosure of any and all information generated by either of the two methods identified in section 90(1), unless discretion is permitted, and is, exercised under section 90(2). The prohibition on disclosure arises whenever information or material is furnished to or received by the persons enumerated in section 90(1) in the course of his or her duties or in the provision of legal aid services, with the enumerated persons being prohibited from either disclosing information or permitting information to be disclosed. The importance of protecting this information and material, and the Legislature's intention that disclosure should only be permitted in limited circumstances, is supported by section 96(1) of the *LASA*, which makes it an offence for any person to intentionally contravene or fail to comply with section 90.

[68] In LAO's view, section 90 of the *LASA*, in the context of s. 67(2) of the *Act*, reflects an unambiguous intention on the part of the Legislature to comprehensively regulate the disclosure of a broad category of information in LAO's custody. LAO maintains that the interpretation it is proposing in this appeal is consistent with the purpose and the effect of section 67(2) of the *Act*; it does not limit jurisdiction, but establishes 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.²⁹ LAO submits that the interpretation it proposes aligns more closely with the overall framework of the *Act*, under which rights of access and exemptions

²⁹ LAO refers to paragraph 54 of Order PO-2994 and Orders PO-2929, PO-2083, PO-2411-I and PO-3114.

from disclosure are determined primarily with reference to the nature or category of information at issue. Further, LAO submits that in the context of section 67(2), it would be unreasonable to suppose that the Legislature intended for section 90 of the *LASA* to preserve an independent duty of disclosure on the part of the Corporation.

[69] Describing the statutory context of LAO's obligation to provide legal aid services under the *LASA*, including the objects listed in section 4,³⁰ LAO elaborates on the importance of institutional independence while operating under the jurisdiction of the Ministry of the Attorney General.³¹ LAO claims that within this structure, it is accountable to the same government and overseen by the same ministry that prosecutes LAO's criminal clients and brings Crown wardship applications and child protection proceedings against LAO's family clients. LAO argues that it is critical that there be no ambiguity respecting LAO's independence at the organizational level because it is necessary for LAO to maintain the confidence of the public, including the confidence of its vulnerable clientele, and to properly fulfill its statutory obligations. Regarding the latter, LAO submits that robust protection of information under section 90 of the *LASA* enables LAO to maintain the requisite degree of institutional independence and to permit the persons listed in section 90(1) to carry out their duties and provide legal aid services pursuant to the *LASA*. According to LAO, an interpretation that reads down the confidentiality protections under section 90 would undermine the objectives of the statute.

[70] LAO claims that although the Corporation is not listed in section 90(1), the prohibition against disclosure effectively applies to it because the provision comprehensively identifies all individuals with the potential capacity to act on behalf of the Corporation. LAO explains that a corporation is a legal entity only capable of acting through its human actors and if these individuals are prohibited from either disclosing or permitting disclosure of certain information, the Corporation is effectively stripped of its ability to disclose that information without causing a breach of the statute. LAO submits that the Legislature could not have intended for section 90 of the *LASA* to preserve a duty on the part of the Corporation to disclose information under the *Act*, while depriving the Corporation of all legal means of performing that duty. To interpret section 90 of the *LASA* in such a manner would contradict the fundamental purpose of the provision, circumvent clear legislative intent, and result in "needless confusion."

³⁰ The objects are listed as: (a) to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario; (b) to establish policies and priorities for the provision of legal aid services based on its financial resources; (c) to facilitate coordination among the different methods by which legal aid services are provided; (d) to monitor and supervise legal aid services provided by clinics and other entities funded by the Corporation; (e) to coordinate services with other aspects of the justice system and with community services; (f) to advise the Attorney General on all aspects of legal aid services in Ontario, including any features of the justice system that affect or may affect the demand for or quality of legal aid services.

³¹ LAO cites sections 4(f), 5(2), 63(3), 66 and 67 of the *LASA*.

LAO's supplementary representations – question 2

[71] LAO submits that the interpretation of the provision suggested by question 2(b)(ii)³² cannot be justified by the legislation's wording and would undermine the intent of the Legislature, because it could not have intended section 90 to not apply to LAO's president when carrying out duties as head under the *Act*. Such an interpretation would frustrate the clear purposes of both section 90 of the *LASA* and section 67(2) of the *Act* and result in the president routinely finding himself in an irreconcilable conflict of interest, unable to simultaneously comply with his duties under both statutes. It is equally untenable to construe section 90(2) of the *LASA* as enabling the president to disclose records pursuant to his duties as head under the *Act*. LAO explains that a proper exercise of discretion under section 90(2) of the *LASA* requires that a decision to disclose be based on considerations relevant to the objects of the *LASA*; where disclosure would be required under the *Act*, an impermissible fettering of discretion would result.

[72] According to LAO, the purpose of section 67(2) of the *Act* is to establish a clear hierarchy between *FIPPA*'s confidentiality and disclosure requirements and those in other statutes to avoid conflict and uncertainty where information falls within two distinct and overlapping regimes. In this context, the interpretation, proposed would replace a clear rule with an ambiguous one and lead to confusion and uncertainty.

[73] LAO maintains that the Legislature cannot have intended for section 90 of the *LASA* to cease applying to LAO's president when that individual exercises her or his duties as institutional head under the *Act*. Beyond the absence of any explicit evidence of such an intention, this alternate interpretation would invariably lead to unworkable results. Explaining this concern further, LAO notes that the powers and duties of LAO's president essentially flow from statute: the office of the president is constituted by section 64 of the *LASA*, while the duties are defined by *LASA* and its regulations, by-laws and resolutions enacted by the LAO board of directors, by other statutes such as the *Act*, and, to a limited extent, by the common law of corporate governance. LAO argues that because the president's office is a creation of statute, the powers and duties of the president must be interpreted in accordance with the principles of statutory interpretation — broadly and purposively in light of the statutory context. In other words, where the Legislature has imposed duties on the president under the two acts (*LASA* and the *Act*), it must be presumed that the legislators did not intend for these duties to conflict and that if a conflict did arise, it would be resolved by reference to the conflict-of-law provisions.

³² Question 2(b)(ii) reads: How does the authority of the Corporation [in] section 90(2) relate to or affect the authority of the head to make disclosure decisions under the *Act* on behalf of the Corporation? If the Corporation in its own right is not subject to the prohibition at section 90(1), ... is the Corporation obliged to authorize the head of the institution to comply with the disclosure requirements of the *Act*?

[74] LAO explains further that in the course of his duties, the president may be permitted or required to act on behalf of LAO in various contexts, including, for example, entering into contracts. Such mandates are common and necessary in the context of corporate governance. LAO submits that since the authority to act on behalf of LAO forms part of the president's role, that authority is necessarily and implicitly subject to all other duties and constraints imposed on the president. In other words, the mere fact of acting on behalf of LAO does not give the president license to disregard the other duties of his office. Accordingly, LAO argues that even if it were to be found that the president does act on behalf of LAO in fulfilling his duties as head under the *Act*, LAO's position would be that the president remains subject to the duty of confidentiality under section 90 of the *LASA* when doing so.

[75] An alternate interpretation, LAO submits, disregards the Legislature's intent to avoid conflict by effectively requiring the president to vacillate between fulfilling duties under the *LASA* and under the *Act*, even when those duties are in direct conflict. This alternate interpretation artificially treats the roles of institutional head and president of LAO as isolated "watertight compartments," despite the fact that the Legislature deliberately defined these roles as coterminous. In reality, says LAO, where a conflict exists between the confidentiality provisions in the *LASA* and the disclosure provisions in the *Act*, it would be impossible to fulfill all obligations without breaching the former statute because they all rest with the same individual. LAO reiterates that disclosing information under the *Act* could mean risking prosecution under section 96(1) of the *LASA* and that the avoidance of such conflicts is precisely why the Legislature enacted section 67(2)7.0.1 of the *Act*.

[76] LAO also maintains that this conflict cannot be resolved by reading in a duty on the part of the president to seek the Corporation's authorization to disclose the information, which is what question 2(b) (posed by the IPC) implies. LAO suggests that the question presupposes an interpretation under which the president/head of LAO would effectively be required to exercise discretion under section 90(2) of the *LASA* in accordance with the *Act* in response to every request under Part II. LAO relies on Order PO-2083, where former Assistant Commissioner Tom Mitchinson rejected a similar argument, as follows:

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*.³³

[77] LAO submits that the reasoning applies in this context as well because reading in

³³ Order PO-2083 at p. 11.

an obligation for the president to seek authorization for disclosure in response to every request under the *Act* would defeat the purpose of section 90 of the *LASA*, particularly the discretion that section 90(2) confers upon LAO. In LAO's view, this would ultimately force LAO to authorize the head to disclose all information and materials otherwise subject to disclosure under the *Act*, thereby nullifying the discretion in section 90(2) of the *LASA*. LAO also submits that mere authorization by the Corporation would not fulfill the requirements of section 90(2) because decision-makers may not fetter their discretion by exercising it mechanically without considering the relevant factors in each case.³⁴

[78] LAO maintains that its interpretation of section 90 of *LASA* is consistent with the three cases identified by this office in the request for supplementary representations. First, LAO argues that the *MPAC* decision³⁵ supports its position that section 90 of the *LASA* and section 67(2) of the *Act* do not create independent disclosure obligations under the *Act* for LAO. LAO notes that the Court granted *MPAC*'s judicial review application, concluding that section 39 of the *Assessment Act* did not oblige or authorize *MPAC* to disclose the requested information and that *MPAC* must have express authorization to disclose.³⁶ LAO relies on paragraph 19 of the *MPAC* decision, which states that:

In our view, in finding that *Gombu*³⁷ was indistinguishable from this case, the Commissioner erred by failing to properly consider the differing contexts of the two cases and the very different purposes of the legislative scheme under consideration. In *Gombu*, the court emphasized the importance of transparency in the democratic process, and observed that the legislative scheme under consideration "constitutes a policy that recognizes that public accountability in the election process should, where necessary, override individual privacy interests". In contrast, there are no compelling public policy considerations that override the privacy interests at stake in the case before us.

[79] Regarding *Ontario (Attorney General) v. Holly Big Canoe*,³⁸ LAO points out that the issue in that case was the interpretation of section 19 of the *Act*; however, unlike section 19, where the *Act* is the controlling statute, section 67 of the *Act* provides that the *LASA* is the controlling statute. Moreover, LAO states that section 19 of the *Act* identifies the head as the decision-maker responsible for exercising discretion, while

³⁴ See *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.).

³⁵ *Municipal Property Assessment Corporation v. Mitchinson*, 2004 CanLII 17632 (ON SCDC); 71 O.R. (3d) 303.

³⁶ *Ibid.* at para. 18.

³⁷ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)*, 2002 CanLII 53259 (ON SCDC); 59 O.R. (3d) 773.

³⁸ *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC); 80 O.R. (3d) 761.

section 90(2) of *LASA* lists neither the head nor the Corporation as persons able to exercise their discretion to disclose information.

[80] LAO seeks to distinguish the *Ministry of Community and Social Services v. Doe*³⁹ from the present appeal, observing that the Court in *Doe* was called upon to determine whether two valid decisions by separate administrative tribunals were in operational conflict.⁴⁰ LAO submits that there is no operational conflict at issue in this case: section 67(2) of the *Act* affirms that the purposes of the *Act* and the values that it is designed to protect may conflict with the purposes and values protected by confidentiality provisions in other legislation. In other words, section 67 of the *Act* serves as the means for resolving confidentiality conflicts with other legislation. As a result, there is no operational conflict since the use of section 90 of the *LASA* by LAO to protect confidential information is part of the operation of the *Act* by virtue of section 67. Unlike the Grievance Settlement Board in *Doe*, the Legislature considered the important public policy goals *FIPPA* is designed to protect when it chose to include a specific section providing that in certain cases it is not the controlling statute.

The appellant's supplementary representations – question 1

[81] The appellant submits that the “core and determinative” factor in this appeal is that section 90 of the *LASA* does not apply to material merely by virtue of the material being sent to one LAO staff from another. The appellant submits that section 90(1) is intended to prohibit the disclosure of information only by the listed individuals, and not by the Corporation itself. The appellant argues that sections 89, 90 and 92 clearly differentiate between the Corporation and LAO’s employees, officers, etcetera; therefore, it must be assumed that the Legislature intended to exclude the Corporation from the prohibition in section 90(1). The appellant goes on to argue that LAO is effectively asking this office to read “the Corporation” into section 90(1) and, moreover, that LAO’s reading of sections 90(1) and (2) together would mean that the Corporation is prohibited from disclosing certain information except with the Corporation’s consent, which would be absurd.

[82] WTCLS states that LAO acknowledges that its proposed interpretation would entirely exempt it from the *Act* and questions why LAO is included in the definition of an “institution” under Regulation 460⁴¹ of the *Act* if the Legislature had intended it to be exempt? The appellant maintains that the Regulation reflects a clear intention that LAO be subject to the *Act*.

³⁹ 2014 ONSC 239 (Div. Ct.); aff'd 2015 ONCA 107.

⁴⁰ An operational conflict occurs when compliance with the decision of a tribunal necessitates the violation of another tribunal's decision. In *Doe*, the purported conflict was between *FIPPA* and a decision of the Grievance Settlement Board.

⁴¹ R.R.O. 1990, Regulation 460, Schedule, Item 62.

[83] The appellant challenges LAO's position that an alternate interpretation of section 90 would undermine client confidentiality and LAO's independence, arguing that section 89 of the *LASA* and sections 19 and 21 of the *Act* provide a comprehensive scheme for the protection of client confidentiality for access requests under the *Act*. Further, the appellant states that the *Act* applies to all types of institutions, "none of which enjoy the type of blanket *FIPPA* exemption that LAO seeks."

[84] The appellant goes on to state:

Section 90 is intended to regulate the conduct of individuals. It does not prohibit disclosure outright, but instead establishes a process whereby individuals must seek approval from the Corporation prior to releasing certain information. This is a completely reasonable and valid objective. It is the only interpretation of s. 90 that is consistent with the wording of that section and *LASA* as a whole.

The more difficult question is how s. 90 of *LASA* and s. 67(2) of *FIPPA* interact. If s. 90 of *LASA* does not prohibit the Corporation from releasing documents, what was the legislature intending to achieve by listing it in s. 67(2) of *FIPPA*? WTCLS submits that s. 90 adds an additional procedural safeguard in the case of an LAO staff person seeking to release information outside of the context of an access to information request. Section 90 is listed in s. 67(2) to make it clear that, outside of a formal access to information request, an LAO staff person must *always* seek approval from the Corporation before releasing materials received from third parties, even if disclosure would have otherwise been allowed under s. 42 of *FIPPA*.

In this way, s. 90 plays a role in relation to Part III of *FIPPA*, which relates to the protection of personal privacy, not Part II, which relates to access requests to institutions. Part III (which contains s. 42, noted above) governs the ways in which organizations can and cannot use and release records. Section 90 adds a safeguard in addition to those listed in Part III.

The appellant's supplementary representations – question 2

[85] Responding to question 2, the appellant submits that section 90 of the *LASA* does not prevent LAO's president from releasing records in response to an access request under the *Act* because requests are made *to the institution* (i.e., the Corporation), not to the head of the institution or a specific employee. The appellant submits that there are two ways in which an LAO record could be disclosed:

- First, a request is made under section 24 of the *Act*. The information is requested from the Corporation and disclosed by it, through the head and on the

Corporation's behalf. Section 90 is not triggered because it does not apply to disclosure of information by the Corporation. Since section 90(1) does not apply to disclosure of information by the Corporation itself, explicit consent under section 90(2) is not required. However, section 89 of the *LASA* and sections 19 and 21 of the *Act* ensure that all necessary confidentiality is maintained.

- Second, LAO could disclose a record on its own accord, or an individual could informally request information outside of a formal access request from a staff member. This is the type of circumstance where section 90 of the *LASA* applies. The staff member would then be required, because of section 90, to seek approval from the Corporation prior to disclosing the record. In this way, LAO is given a statutorily-enforced method to ensure that staff follows the proper procedures before releasing a record on their own accord or based on a request outside the formal *FIPPA* process.

LAO's supplementary reply representations

[86] LAO rejects the appellant's claim that the doctrine of implied exclusion applies. Specifically, LAO states that contrary to WTCLS's submission, no legislative intention to exclude the Corporation from the prohibition in section 90(1) can be imputed or assumed simply because sections 89, 90 and 92 of *LASA* differentiate between the Corporation and LAO employees, officers, etcetera. LAO notes that courts have treated the "implied exclusion" doctrine with caution, recognizing that there may be many other reasons why legislators expressly mention something in one context and not another.⁴² According to LAO, the Supreme Court of Canada has expressed reservations about the use of the implied exclusion doctrine "if other indications suggest that the consequences would go against the purpose of the statute."⁴³ Relying on Halsbury's Laws of Canada, "Determining Legislative Intent,"⁴⁴ LAO submits that any presumption of implied exclusion may be rebutted by a cogent explanation of why the legislature explicitly mentioned some things and not others in a provision. LAO argues that it has provided a persuasive alternative explanation for why the Corporation is not explicitly listed in section 90(1) of the *LASA*, including the consequences of WTCLS's interpretation, which LAO says is inconsistent with other evidence of legislative intention and the statutory scheme.⁴⁵

[87] LAO disputes the appellant's claim that LAO's proposed interpretation of section 90 is absurd because it would mean that "the Corporation is prohibited from disclosing

⁴² LAO cites *Turgeon v. Dominion Bank*, 1929 S.C.J. 56 and other cases, such as *Dorval v. Dorval*, 2006 SKCA 21 (CanLII).

⁴³ Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal: Thémis, 1999, endorsed: *65302 British Columbia Ltd. v. Canada*, [1999] 3 SCR 804, 1999 CanLII 639 (SCC) at para. 11.

⁴⁴ (VIII.1) at HLG-84 "Expressio unius est exclusion alterius."

⁴⁵ Here, LAO adopts its initial supplementary representations, set out above.

certain information except with the Corporation's consent." In LAO's view, this argument ignores the differences in how the Corporation may act and authorize disclosure and the role of discretion in section 90. In particular, LAO submits that:

Neither *LASA* nor the [*FIPPA*] mandates any person to authorize disclosure on behalf of LAO for the purposes of s. 90(2) of *LASA*. Thus, LAO's authorization under s. 90(2) would need to derive from the board of directors in the form of a policy, an express mandate, and/or a case-specific resolution. Where LAO's board has permitted disclosure (e.g. through a policy), the individual retains discretion under s. 90(2) to refuse disclosure provided that this decision is reasonable and consistent with the purposes of *LASA*.

With this context in mind, it is not absurd to prohibit individuals acting on behalf of the Corporation from disclosing information unless authorized by the Corporation. ...

[88] As LAO puts it, if the individual acting in this capacity receives a request for information that falls under section 90(1), then the individual must consider whether the board has authorized its disclosure or if any of the other preconditions for disclosure under section 90(2) are met.

[89] Next, LAO submits that WTCLS has mischaracterized its (LAO's) position respecting the application of *FIPPA* to its operations. Noting that *FIPPA* regulates not only the disclosure of information, but also its collection, storage and use, LAO notes that section 90 does not exempt LAO from the *FIPPA* provisions governing the collection of personal information (section 84 of the *LASA*) or its access procedures.

[90] LAO also disputes the appellant's characterization of its (LAO's) position as being based on concern that WTCLS's proposed interpretation of section 90 "would undermine client confidentiality and LAO's independence." LAO relies on its previously articulated position that section 90 is not restricted to the protection of client information. LAO submits that its organizational independence, as guaranteed under the *LASA*, is necessary for LAO to maintain the confidence of the public, including its vulnerable clientele. LAO also submits that section 90 strengthens its "capacity to develop policies, implement pilot projects, and bring innovation to the delivery of legal aid services free from political influence." According to LAO, these examples illustrate how LAO's interpretation of section 90 of *LASA* is the interpretation most consistent with the objects of *LASA* and LAO's statutory obligation to provide legal aid services.

[91] LAO disagrees with "virtually every aspect" of WTCLS's submission that "section 90 ... does not prohibit disclosure outright but instead establishes a process whereby individuals must seek approval from the Corporation prior to releasing certain information." First, LAO cites the wording of section 90(1) and states that it clearly

conveys an outright prohibition on disclosure with the use of “shall not,” subject only to the exceptions in subsection (2). As for WTCLS’s position that individuals “must seek approval from the Corporation,” LAO suggests that this is misleading because it suggests that section 90 obliges individuals to seek approval for disclosure when, in fact, the provision “does not compel action of any kind.” LAO also argues that WTCLS’s position fails to account for the central feature of the procedure under section 90 of the *LASA*, the exercise of statutory discretion, which must be consistent with the limits of that discretion.

[92] LAO also rejects WTCLS’s argument that section 90 is listed in section 67(2) of *FIPPA* to clarify that LAO staff must always seek approval from the Corporation before releasing materials received from outside parties, even if section 42 of *FIPPA* would have permitted the disclosure. LAO submits that since section 42 of *FIPPA* prohibits an institution from disclosing information except in certain circumstances, disclosure in accordance with it would already be authorized by the Corporation.

[93] LAO rejects WTCLS’s position on the second supplementary question, stating that it would not be reasonable for section 90 of *LASA* to cease to apply to LAO’s president when that person is carrying out duties as head under *FIPPA*, since this would frustrate the clear purposes of section 90 of *LASA* and section 67(2) of *FIPPA*.

Analysis and findings

[94] LAO claims that all of the many records identified as responsive to WTCLS’s request for records related to a legal services transition plan for the clinic fit within section 90(1) of the *LASA* and must therefore be dealt with under that statute, rather than the *Act*. Having considered the representations submitted by the parties and the wording of section 90 in its complete and proper context, however, I reject the meaning given to the provision by LAO.

[95] On a plain reading of this provision, section 90(1) applies to information or material *furnished to or received by the individuals listed in the provision* and prohibits those individuals from disclosing information they have received. The prohibition against disclosure is not intended to apply to information contained in records created or generated by directors, officers and employees of the Corporation, or by the other individuals listed within this provision. In this way, the confidentiality provision in section 90(1) of the *LASA* is directed at the recipients of the information, not its sources or creators, and it operates as the statutory equivalent of an oath of secrecy applicable to persons who receive confidential information in the course of their duties or in the provision of legal aid services under the *LASA*. Given the absence of the Corporation from the list of individuals that are subject to the prohibition against disclosure, I conclude that section 90(1) regulates the information handling practices of individuals acting in the listed capacities, rather than the obligations of the Corporation at large, including under *FIPPA*. Accordingly, section 90(1) of the *LASA* does not prevent the

head from processing an access request or from disclosing a document, if it does not fall within an exemption under *FIPPA*.

[96] I reach this conclusion based on the following considerations: the plain wording of section 90 of the *LASA*, including the omission of the Corporation from the list of individuals subject to the prohibition; the modern rule of statutory interpretation; the meaning of section 67(2) of the *Act* in the context of other confidentiality provisions listed there; the relationship between *LASA*'s confidentiality provisions; and, finally, the absurdity that would result from adopting LAO's interpretation of section 90. In the discussion that follows, I address only the most relevant submissions, but I have considered the parties' exhaustive and comprehensive representations, in their entirety.

The statutory context

[97] Section 10(1) of *FIPPA* grants every person a right of access to a record or a part of a record in the custody or control of an institution unless the record is exempt or the request is "frivolous or vexatious." Under section 2(1), an "institution" is defined, in part, to include "any agency, board, commission, corporation or other body designated as an institution in the regulations." Legal Aid Ontario is designated as an institution by Item 62 of the schedule to Regulation 460 made under the *Act*.

[98] Section 67 of *FIPPA* identifies confidentiality provisions that prevail over the *Act* and LAO relies on it, in conjunction with section 90 of the *LASA*, in denying WTCLS access to the requested records.

[99] Section 67 of *FIPPA* states:

(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*.

[100] This suite of confidentiality provisions in the *LASA* begins with one intended to protect privileged communications. Section 89 states:

89. (1) All legal communications between the Corporation, 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.

[101] Section 90 sets out the prohibition on disclosure of information by the listed individuals and states:

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.

(2) 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 services or with the consent of the applicant or if authorized by the Corporation.

[102] Finally, section 92 of the *LASA* establishes LAO's mandatory quality assurance program and its 13 subsections outline the program's mandate, powers and audit process. The three parts most relevant in this appeal state:

92. (1) The Corporation shall establish a quality assurance program to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner.

(6) The Corporation and its employees shall keep confidential any information obtained in a quality assurance audit.

(7) The Corporation and its employees are governed by the rules of solicitor-client confidentiality with respect to any legal communications obtained in a quality assurance audit.

Regarding the scrutiny of "confidentiality provisions"

[103] In my review of the confidentiality provision at issue in this appeal, I am guided by Order 9. In that decision, former Commissioner Sidney Linden interpreted sections of

the *Health Insurance Act* and the *Health Care Accessibility Act* to determine if they qualified as confidentiality provisions for the purpose of (the predecessor to) section 67(1) of the *Act*.⁴⁶ The former Commissioner explained his approach as follows:

... Where, as in this case, an institution purports to remove itself from the ambit of the *Act* through the use of a "confidentiality provision" in another act, it is **my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under that act (i.e. the head of the institution) are covered by the "confidentiality provision" relied on** [emphasis added].

...

While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the provision upon receipt of an appeal. I regard this duty as fundamental to the effective operation of the *Freedom of Information and Protection of Privacy Act, 1987* and the principles of providing a right of access to information and protecting the privacy of individuals.

[104] I agree with Commissioner Linden's explanation of the rationale for this office's oversight of a claim by an institution that a confidentiality provision applies to preclude access.

[105] Further, the Supreme Court of Canada has affirmed that the Commissioner is owed deference on the interpretation of other statutes when a provision of another statute may directly impact the IPC's core jurisdiction.⁴⁷ In extending deference to the Commissioner's interpretation of provisions in other statutes, the Court stated:

The Commissioner was required to interpret Christopher's Law in the course of applying FIPPA. She had to interpret Christopher's Law for the narrow purpose of determining whether, as set out in s. 67 of FIPPA, it contained a "confidentiality provision" that "specifically provides" that it prevails over FIPPA. This task was intimately connected to her core functions under FIPPA relating to access to information and privacy and

⁴⁶ The provisions addressed were section 44 of the *Health Insurance Act*, R.S.O. 1980, c.197 and section 7 of the *Health Care Accessibility Act*, S.O. 1986, c.20.

⁴⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31. The decision is discussed in greater detail, below, including the relevant provisions of Christopher's Law (Sex Offender Registry), 2000, S.O. 2000, Chapter 1 (*Christopher's Law*).

involved interpreting provisions in Christopher's Law "closely connected" to her functions. The reasonableness standard applies.⁴⁸

[106] Since LAO seeks to remove the requested records from the positive right of access afforded to the public under section 10(1) of the *Act*, I must be satisfied that section 90(1) of the *LASA* applies to the records for which the provision is claimed.⁴⁹ If section 90(1) does not apply, the *LASA* is not the controlling statute for determining disclosure of the records requested in this appeal. Before I continue with the interpretation of section 90 of the *LASA*, however, I will address the effect of precedent on my analysis.

The IPC is not bound by precedent

[107] LAO relies on Orders PO-2083, PO-2994 and PO-3114⁵⁰ to support its position that section 90 of the *LASA* completely governs the confidentiality and disclosure of the records in this appeal. LAO is concerned that an interpretation different than the one distilled from those orders would lead to uncertainty and administrative challenges in carrying out its duties under the *LASA*.

[108] At its core, the desire to maintain the *status quo* is based on the notion that consistency in decision-making promotes predictability and supports the rule of law. Without doubt, such consistency is an important factor in building and maintaining public confidence in the integrity of the administrative justice system, of which this office is a part. It is also true that past decisions frequently offer useful guidance by illustrating legal principles that assist in achieving consistent and predictable results for administering and applying *FIPPA*. The common law doctrine that decisions should be guided by precedent is known as *stare decisis*. However, as the appellant correctly points out, I am not bound by *stare decisis* and may depart from earlier interpretations of the same provision, particularly when doing so is required, for example, to clarify its meaning.⁵¹ The rationale for re-examining precedent was described by Sharpe J.A. in *Fernandes v. Araujo*, as follows:

The common law has long prided itself in its capacity to evolve and improve with the times. The rule of *stare decisis* is not absolute. There comes a point at which the values of certainty and predictability must

⁴⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above, at para. 27. See also para. 67: "As an expert in privacy rights, as well as in access to information requests, the Commissioner's decisions deserve deference, short of an unreasonable conclusion falling outside the range of possible and acceptable outcomes."

⁴⁹ Orders MO-2439 and MO-3294-I. See also *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.

⁵⁰ Issued in December 2002, September 2011 and September 2012, respectively.

⁵¹ Order PO-2976, citing *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.).

yield to allow the law to purge itself of past errors or decisions that no longer serve the interests of justice. Moreover, decisions that rest on an unstable foundation tend to undermine the very values of certainty and predictability that *stare decisis* is meant to foster.⁵²

[109] *Stare decisis* is not, in other words, a straightjacket. In interpreting section 90 of the *LASA* in the circumstances of this appeal, I will distinguish the orders relied upon by LAO. To begin, the information found to fit within section 90(1) in Orders PO-2083 and PO-3114 included the personal information of legal aid applicants. In Order PO-2083, where detailed information about 23 criminal trials had been requested, former Assistant Commissioner Tom Mitchinson concluded that either of sections 89 or 90 would apply to “any information or material” in an application for legal aid, a legal aid retainer and a legal aid account. Those records could not be severed in such a way as to de-identify the individuals whose criminal trials formed the subject matter of the requests and so were subject to the prevailing confidentiality scheme under *FIPPA* and the *LASA*. In Order PO-3114, where the requester sought records relating to his own case and more general operational records, such as policies and manuals, the only records withheld on the basis of sections 89 and 90 of the *LASA* were five sets of meeting minutes. LAO simply redacted the personal information of other individuals from the meeting minutes and partially disclosed them.⁵³

[110] Order PO-2994 offers the interpretation of section 90 of the *LASA* preferred by LAO. It involved records created in the course of investigating the requester’s complaint about the funding, management and administration of a legal clinic.⁵⁴ Referring to section 90(1) as “a very broadly worded statutory provision,” the adjudicator concluded that the wording “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.”⁵⁵ The reasoning advanced by LAO and accepted by the adjudicator in Order PO-2994 is sufficiently broad to encompass virtually *any* record containing information received by *any* individual listed in section 90(1) from *any* source. This breadth is demonstrably problematic in this appeal where LAO claims that *all* of the responsive records – some 4000 or so pages, without exception - fit within section

⁵² *Fernandes v. Araujo* 2015 ONCA 571, at para. 47. In this decision, the Court was “confronted with the difficult question of whether we should overrule a prior decision of this court” in determining “the vicarious liability of an owner of a vehicle for the negligence of a person who had possession of the vehicle with the owner’s consent” under section 192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

⁵³ Section 90(1) was found to apply to records where reference was made to legal aid applicants other than the appellant and to “sign-in/log-in” information.

⁵⁴ The categories of responsive records were: 1. Correspondence between the requester and persons outside LAO (received by LAO); 2. Documents sent directly to LAO by outsiders; 3. Internal LAO communications; and 4. Correspondence created by LAO and sent to third parties.

⁵⁵ See paragraphs 58-62 of Order PO-2994. Adjudicator Faughnan reviewed other relevant provisions of the *LASA*: sections 2 (definitions), 4 (objects), 37 and 38 (clinic monitoring and sanctions).

90(1) of the *LASA*, in their entirety. The IPC's commentary on section 67(2) of *FIPPA* has been consistent. It does not serve as a jurisdiction-limiting provision that excludes certain categories of records from the *Act*; yet, LAO's response to the voluminous records in this appeal suggests such a categorical approach. Therefore, to the extent that Order PO-2994 and other past orders relied upon by LAO may conflict with my decision in this appeal, I decline to follow them. This is one of those times when the certainty and predictability offered by past IPC orders addressing section 90(1) of the *LASA* must yield to allow for an interpretation of section 90(1) that better serves the interests of justice and the purposes of both enactments.

The "modern rule" of statutory interpretation

[111] The parties disagree on the subject of ambiguity in section 90 of the *LASA*. LAO argues that there is no ambiguity and that section 90 is undeniably clear in its ordinary meaning; recourse to external interpretive aides to glean legislative intent is therefore unnecessary. From LAO's vantage point, the broad interpretation of section 90 advanced here is the only one that flows naturally from its clear language. WTCLS claims the opposite and points to absurd consequences it believes would result from applying LAO's interpretation.

[112] In approaching the task of interpreting section 90 of the *LASA*, I rely on the following description of the "modern" approach given by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed.:

The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁵⁶

[113] The interpretation adopted must be plausible in the context of the act, promote its purposes and lead to a reasonable and just outcome. Since a plausible interpretation must be "one the words can reasonably bear," more than one definition may be considered plausible.⁵⁷ I will look at the plain and ordinary sense of the words in section 90 of the *LASA* as well as their place within that act and in relation to section 67(2) of *FIPPA*. This approach involves considering the purposes of both enactments, in order to understand the context in which this provision is found.

Statutory purposes

[114] In Order MO-2439, Senior Adjudicator John Higgins reviewed the arguments advanced by the City of Toronto in seeking to establish that the confidentiality provision

⁵⁶ Markham: LexisNexis Canada Inc., 2008, at page 1.

⁵⁷ Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at page 123.

in the *City of Toronto Act, 2006*⁵⁸ applied to responsive records in the custody or control of the city's Auditor General.

The City relies on section 181 of the *COTA* in conjunction with section 53(1) of the *Act*. Both sections have an impact on whether the records requested by the appellant are available under an access-to-information regime. The purpose of both statutes is therefore significant in construing these provisions. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 405, the Supreme Court of Canada has clearly recognized that the overarching purpose of access to information legislation is to facilitate democracy. Justice LaForest (dissenting on other grounds) stated:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. (para. 61)

...

Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the *Act* in determining whether an exemption to that general right should be granted. (para. 63)

In my view, the principle of coherence in statutory interpretation counsels the adoption of an interpretation that fulfils and accommodates the purposes inherent in both the *Act* and the *COTA*.

[115] I agree with, and adopt, the approach described above and in other past orders and court decisions.⁵⁹ Section 67(2) of the *Act* and section 90(1) of the *LASA* together will determine whether the records requested by the appellant are available under the

⁵⁸ S.O. 2006, c. 11, Sched. A.

⁵⁹ See Order MO-2468-F, pages 62-63. See also *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366 (CanLII), where the Court affirmed that the *Act* should be given a broad interpretation to best ensure the attainment of its objects, according to its true intent, meaning and spirit. This direction was acknowledged by the Court of Appeal in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20 (CanLII).

access-to-information regime provided by *FIPPA* in these circumstances. Therefore, in determining how section 90(1) of the *LASA* is to be interpreted, the purposes of both statutes are key considerations.

[116] Among other aims, the *LASA* and *FIPPA* each have accountability purposes. The *Legal Aid Services Act, 1998* establishes the statutory scheme for providing legal aid services for low income individuals and disadvantaged communities across Ontario. LAO is a Corporation created under the *LASA* to carry out these statutory objectives by four stated means.⁶⁰ Most relevant to my analysis in this appeal is the purpose set out in section 1(d), which states:

The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of,

(d) providing legal aid services to low-income individuals through a corporation that will operate independently from the Government of Ontario but within a framework of accountability to the Government of Ontario for the expenditure of public funds.

[117] Under *FIPPA*, institutions have a significant obligation to balance their legal obligation to protect privacy with being open and accountable to citizens. The IPC has a statutory mandate to oversee the compliance of institutions with *FIPPA* to ensure realization of the dual access and privacy purposes of the *Act* that are set out in section 1. Of particular relevance in this appeal is section 1(a), which states:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

⁶⁰ Section 1 of the *LASA* reads, in its entirety: The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of, (a) providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario; (b) encouraging and facilitating flexibility and innovation in the provision of legal aid services, while recognizing the private bar as the foundation for the provision of legal aid services in the areas of criminal law and family law and clinics as the foundation for the provision of legal aid services in the area of clinic law; (c) identifying, assessing and recognizing the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario; and (d) [as stated above]. 1998, c. 26, s. 1.

(iii) decisions on the disclosure of government information should be reviewed independently of government; ...⁶¹

[118] LAO's position is that all of the responsive records relate to the management of WTCLS or the development of the alternative PLSC and must fit within section 90(1) to allow for the monitoring and supervision of "legal aid services provided by clinics and other entities funded by the Corporation" to fulfil the objective in section 4(d) of the *LASA*. To give effect to the purposes of both the *LASA* and *FIPPA* however, the phrase "provision of legal aid services" in section 90(1) must remain firmly rooted in statutory context. That context includes adherence to the accountability purpose of both statutes. I conclude that the Legislature could not have intended the reach of section 90(1) to be greater than necessary to accomplish the *LASA*'s overall objectives, a reach that would effectively frustrate access under *FIPPA*, as became evident by LAO's application of it in this appeal.

Section 67(2) of FIPPA and other confidentiality provisions

[119] As articulated by LAO, a confidentiality provision is an express legislative acknowledgement that two statutes may cross paths and pose a challenge to individuals operating under the authority of both of them. The provisions in section 67(2) of the *Act* address various disclosures that are prohibited, privileges or confidences that must be maintained, and conditions imposed on making certain information public. Generally speaking, these other confidentiality provisions illustrate a legislative intent similar to the one ascribed to section 90(1) of the *LASA*, which is to grant institutions greater powers of control over dissemination of certain information that is identified as sensitive in a particular context.

[120] All of the prevailing confidentiality provisions listed in section 67(2) are found in statutes that establish and define the authority of various institutions under the *Act*.⁶² The listed provisions cover information under the custody or control of, for example, the Ontario Municipal Board (part 1), the Ministry of Children and Youth Services, the Child and Family Service Review Board⁶³ (part 2), the Ontario Labour Relations Board (part 3), and the Ontario Securities Commission (part 9). As the appellant observes, none of these institutions "enjoy the type of blanket FIPPA exemption that LAO seeks." There is some truth to that statement. However, each confidentiality provision includes express language by which the disclosure of certain information is clearly prohibited and the other confidentiality provisions are markedly more modest in scope in terms of circumscribed information. In contrast, part 7.0.1 of section 67(2) of *FIPPA* refers to

⁶¹ Additionally, the purpose expressed in section 1(b) is: "to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information."

⁶² According to the Schedule to Ontario Regulation 460 made under the *Act*.

⁶³ Under the Social Justice Tribunals Ontario.

information caught by sections 89, 90 and 92 of the *LASA*, which clearly cuts a much broader swath.

[121] As outlined above, the suite of protections for LAO information in part 7.0.1 of section 67(2) of the *Act* includes section 89 of the *LASA*, which covers communications to which solicitor-client privilege would attach. This provision would, for example, bar a requester from using the access provisions of the *Act* to obtain another individual's legal aid file.⁶⁴ LAO makes no claim to section 89 over any records in the extensive list of responsive records here. Having decided that section 89 of the *LASA* was not a relevant confidentiality provision in this situation, LAO's argument that an alternate interpretation of section 90 would undermine client confidentiality rings hollow. Later in this order, I specifically address LAO's concern that its organizational independence (i.e., privacy) would be compromised by any interpretation of section 90(1) more restrictive than its own. As for privacy interests of an individual nature, however, my own review of the records does not suggest that such interests are at stake in this appeal. Section 89 of the *LASA* and sections 19 and 21 of the *Act* would appear to provide a comprehensive scheme for the protection of client confidentiality for access requests under the *Act*, as the appellant suggests, and I dismiss LAO's position on this issue accordingly.

[122] That said, the application and ambit of the confidentiality provision in section 90(1) of the *LASA* remains to be determined here, where the records relating to the transition plan for WTCLS to a PLSC address a diverse range of matters. There are records related to leasing and facilities, staffing and union issues, client eligibility, intake and referral policies and procedures, case and file management and reporting, legal services operations, data collection, communication and stakeholder outreach, budget and staffing planning. The best place to start is a consideration of the express language by which section 90(1) purports to prohibit the disclosure of information.

The plain wording of section 90(1)

[123] Section 90 of the *LASA* is an express confidentiality provision in that it expressly, rather than by implication, forbids disclosure of information. Once again, it reads:

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.

⁶⁴ Order PO-2083.

[124] First, the provision contains a long list of specified individuals who are subject to the disclosure prohibition. I will return to this point since it is an important aspect of my interpretation of section 90(1).

[125] Next, the individuals who are subject to section 90(1) are prohibited from disclosing or permitting to be disclosed "any information or material." The words in this phrase are not defined in the *LASA*, but their ordinary meaning is clear enough.⁶⁵

[126] Next, and importantly, the prohibition in section 90(1) expressly forbids disclosure of information *furnished to or received by* the listed individuals in carrying out "duties or in the provision of legal aid services." The list includes individuals who are not employed by LAO, such as service-providers.⁶⁶ I understand the phrase "in the course of his or her duties" in section 90(1) to mean duties under the *LASA*, in keeping with the provision of legal aid services, as defined in section 2 of the *LASA* to mean "legal and other services provided under this Act."

[127] I now turn to the omission of the Corporation from the list of individuals in section 90(1) of the *LASA*.

The Corporation is not named in section 90(1)

[128] Reading sections 89, 90 and 92 of the *LASA* together, it is clear that the provisions distinguish between the confidentiality obligations of the Corporation⁶⁷ in its own right and individuals working within or in association with the Corporation. Sections 89 and 92 both expressly name the Corporation, thereby including it in the list of actors prohibited from disclosing the information identified in those sections.

[129] The list of actors in section 90(1), however, stands in contrast: "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." The lengthy list of individuals who are subject to this disclosure prohibition includes individuals who are not employed by (or part of) the Corporation; the list does not include the *Corporation* itself. This is significant. LAO seeks to explain the omission of the Corporation by arguing that section 90(1) merely lists all the individuals ("human actors") who could possibly act on behalf of the Corporation. This argument seems reasonable at first blush, but it must be rejected. Why would the Legislature include people who are not employed by, or a part of, the Corporation in a

⁶⁵ The French language version of the phrase employs virtually identical wording, with the exception that "material" becomes "documents," which is an inconsequential difference.

⁶⁶ A "service-provider" is defined in section 2 as "a person, other than a lawyer, who provides legal aid services."

⁶⁷ In section 2 of the *LASA*, "Corporation" means "Legal Aid Ontario established under this Act."

list that purports to exhaustively catalogue those individuals who may act on the Corporation's behalf, but *not* include the Corporation itself? If there was no significance to this difference, the use of "Corporation" in sections 89 and 92 would be superfluous. On this basis, I reject LAO's argument that no legislative intention to exclude the Corporation from the prohibition in section 90(1) can be imputed or assumed simply because sections 89, 90 and 92 of the *LASA* differentiate between the Corporation and LAO employees, officers, and others. It is true, as LAO states, that there may be other reasons why legislators expressly mention something in one context and not another.⁶⁸ However, LAO has not offered me a cogent explanation for why the Legislature explicitly mentioned the Corporation in the other two related confidentiality provisions, but not in section 90(1).

[130] In my view, if the Legislature had intended the Corporation generally, and not just the listed persons, to be subject to the prohibition on disclosure of information, it would have done so by specifically naming the Corporation in section 90(1) of the *LASA*. There is judicial support for this conclusion in the cases provided to the parties for comment at the supplementary representations stage: *MPAC, Big Canoe* (2006) and *John Doe*.⁶⁹ In each case, the courts demonstrated a preference for limiting the application of statutory language to the person or official specified. Although the court in *MPAC* was addressing a provision authorizing disclosure, rather than a provision prohibiting disclosure, the reasons are apposite because the specific individual who is empowered to act is a significant factor in the interpretation in both situations. Explaining the importance of naming the individual, the Court stated:

The *Assessment Act* neither obligates nor authorizes MPAC to do anything besides making the municipal rolls available to the municipal clerk. We do not accept the Commissioner's submission that because the "head" and the "clerk" are part of the same institution, it does not matter who is named in the statute as having the authority to disclose the information. To override the important privacy interests addressed in *MFIPPA*, MPAC must have express authorization to disclose.⁷⁰

[131] An interpretation of section 90(1) of the *LASA* guided by *MPAC, Big Canoe* (2006) and *John Doe* leads me to conclude that the provision does not extend to cover the Corporation – or the head of the institution acting on behalf of the Corporation – under *FIPPA* because the intention to do so is not clear. In other words, to override the important public right to access information held by government that is afforded by

⁶⁸ LAO cites *Turgeon v. Dominion Bank*, 1929 S.C.J. 56 and other cases, such as *Dorval v. Dorval*, 2006 SKCA 21 (CanLII).

⁶⁹ Cited above, at footnotes 35, 38 and 39, respectively.

⁷⁰ *MPAC* and the identification of the particular individual empowered to act has also recently been discussed in Order MO-3247 in the context of a duty to report under the *Retirement Homes Act* and section 14(1)(d) of *MFIPPA*.

FIPPA, the Corporation itself would have to be expressly prohibited from disclosing in section 90(1) of the *LASA*. In this way, section 90(1) of the *LASA* should be seen as prohibiting the unilateral disclosure of information *by the individuals listed*, but not as preventing the head from exercising authority under *FIPPA*, including making a decision to disclose records under *FIPPA* on behalf of the Corporation in response to an access request.

[132] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above,⁷¹ the Supreme Court of Canada held that explicit references to *FIPPA* in the statute establishing the Sex Offender Registry⁷² under *Christopher's Law* indicate that the Legislature considered the manner in which both statutes operate together. Order PO-2811, which led to the Supreme Court case, and Order PO-2312 are of assistance in this appeal. Order PO-2811 involved a media request for information kept on the registry and in deciding it, Senior Adjudicator John Higgins reviewed Order PO-2312, where former Assistant Commissioner Tom Mitchinson determined whether sections 10 and 13(1) of *Christopher's Law* constituted confidentiality provisions that prevail over *FIPPA* by virtue of the application of section 67(1).⁷³ The assistant commissioner found, first, that section 13(1) of *Christopher's Law* did not qualify as a confidentiality provision for the purpose of section 67(1) of *FIPPA* because it did not restrict disclosure of information, but rather *authorized* its collection, retention, use and disclosure. Therefore, section 13(1) of *Christopher's Law* was not relevant to an access request under Part II of *FIPPA*, but had potential application to

⁷¹ Cited previously for the principle that courts owe deference to decisions of the IPC that interpret a provision in another statute that impinges on the IPC's core function.

⁷² As explained in Order PO-2312, "Christopher's Law was proclaimed on April 23, 2001, in response to a coroner's jury recommendation that the government create a registry for convicted sex offenders. The Sex Offender Registry is a provincial registration system for sex offenders who have been released into the community, requiring them to report annually to the local police service. ... [P]olice enter information on these individuals into a database ... to provide police services with important information"

⁷³ Section 10 of *Christopher's Law* states: (1) Subject to subsections (2) and (3), no person shall disclose to another person information obtained from the sex offender registry in the course of his or her duties under this Act or received in the course of his or her duties under this Act except as provided by this Act. (2) A police force, an employee of a police force and an employee of or person authorized by the ministry for the purpose of this section shall have access to the sex offender registry at any time and may collect, retain and use information obtained from the sex offender registry for any purpose under this Act, under subsection 41 (1.1) of the *Police Services Act* or for crime prevention or law enforcement purposes. (3) A police force, an employee of a police force and an employee of or person authorized by the ministry for the purposes of this section may disclose information contained in the sex offender registry to another police force in or outside Canada for the purposes of this section or for crime prevention or law enforcement purposes and the other police force may collect, retain and use the information for crime prevention or law enforcement purposes. (4) Any disclosure of personal information made under subsection (2) or (3) shall be deemed to be in compliance with clauses 42(e) of the *Freedom of Information and Protection of Privacy Act* and 32(e) of the *Municipal Freedom of Information and Protection of Privacy Act*. Section 13(1) of *Christopher's Law* states: "Personal information may be collected, retained, disclosed and used in accordance with this Act despite [*FIPPA*] and [*MFIPPA*]."

Part III which contains rules governing the management of personal information by institutions covered by the *Act*. In this manner, section 13(1) was intended to eliminate any ambiguity as to which set of rules governing personal information should apply to the Sex Offender Registry. For similar reasons, the conclusion regarding section 10(4) of *Christopher's Law* was that it "provides for, rather than prohibits, the disclosure of personal information by individuals within the policing sector, despite specific listed provisions of the *Act* ... that could, in certain circumstances, prevent disclosure in a manner that would be inconsistent with the policy objectives of *Christopher's Law*."⁷⁴ Notable here is the observation in Order PO-2312 that since section 10 of *Christopher's Law* did not specifically address public access rights under Part II of the *Act*, no restriction on these access rights could reasonably be inferred from its language.

[133] That said, unlike section 10(1) of *Christopher's Law*, section 90 of the *LASA* is specifically stated to prevail over *FIPPA* by virtue of section 67(2) of the *Act*. To the extent this aspect of the *Christopher's Law* decision counsels against the interpretation of section 90 of the *LASA* I give to it, I find a basis for distinguishing the provisions in the wording of section 90(1). The prohibition in section 10(1) of *Christopher's Law* applies to both the recipient and the source of the information, as follows:

... no person shall disclose to another person information obtained from the sex offender registry in the course of his or her duties under this *Act* or received in the course of his or her duties under this *Act* except as provided by this *Act*.

[134] Section 90(1) of the *LASA*, in comparison, refers only to the recipient of the information, not its author or creator. Based on this distinction, I reject LAO's argument that all of the responsive records at issue here fall within the parameters of section 90(1) because they contain information furnished to, or received by, legal aid employees or officers in the course of their duties or in the provision of legal services. Accepting this position would essentially eviscerate access rights under *FIPPA* because, arguably, all information is somehow derived from another source. Section 90(1) is, more reasonably, meant to control the conduct of the listed individuals by prohibiting the unauthorized and unilateral disclosure of confidential information they have received.

Preventing unauthorized disclosure of confidential LAO information by recipients

[135] In this section, I elaborate on my conclusion that section 90 of the *LASA* is intended to act as an additional safeguard to prevent one of the listed individuals from releasing confidential LAO information that they have received. This interpretation gives effect to the clear statutory language indicating that human actors are the focus of the

⁷⁴ The policy objectives of *Christopher's Law* are set out at page 8 of Order PO-2312.

prohibition, not the information *per se*.

[136] As stated, section 90(1) applies to information or material furnished to or received by the individuals listed within this provision and prohibits those individuals from disclosing information they have received. The prohibition against disclosure, on its face, does not apply to information contained in records created or generated by directors, officers and employees of the Corporation, or by the other individuals listed within this provision. In short, it is directed at the recipients of the information and not its sources, generators or creators. Where, for example, a copy of a record passes from an employee within the Corporation who created or generated it to another staff member, the prohibition does not apply to the document in the hands of the employee who created it, because that individual is not its recipient. The Corporation, as a separate entity and an institution covered by the *Act*, would have custody or control of the original record that was created or generated by its staff, regardless of the person or entity to whom the information in the record was ultimately furnished. Viewed in this light, it is plain to see why the Corporation was omitted from the list of persons or entities covered by the prohibition.

[137] Section 90(1) reaches beyond directors, officers and employees of the Corporation to other persons in their own right, including persons associated with entities not covered by the *Act*, such as outside lawyers who provide legal aid services and members, directors, officers or employees of legal aid clinics and student legal aid societies. The application of the disclosure prohibition to these other natural persons sheds further light on its meaning. In my view, section 90(1) is intended to impose obligations of secrecy on the persons listed in their individual capacities. As a confidentiality provision, it operates as the statutory equivalent to an oath of secrecy applicable to persons who receive confidential information in the course of their duties. To this extent, section 90(1) may be said to impose greater obligations on these listed persons with respect to the disclosure of information, both personal and non-personal, than the *Act* imposes on institutions generally with respect to the unilateral disclosure of personal information under section 42 of *FIPPA*. However, by omitting any reference to the Corporation, it does not extend beyond those persons to limit the right of access to records in the custody or control of the LAO as an institution under the *Act*, subject, of course, to any applicable exemptions.

[138] In accordance with this plain meaning of section 90(1), and as argued by the appellant, the Transition Plan for WTCLS that was prepared by one of the two individuals named in the request does not fall within the scope of section 90(1) because the author employee is not a recipient, but the source of the information. Another example of how section 90(1) might operate in this context would be if the Corporation, acting through its executive, were to provide a written communication to clinic staff advising that it was considering extending funding to certain kinds of cases. In that situation, the individuals to whom that information was furnished would be prohibited from disclosing that information without the authorization of the Corporation under

section 90(2). In either of these examples, however, the Corporation itself may disclose the same information in response to an access request, subject to any applicable exemptions it might claim. Section 90 thus regulates the information handling practices of individuals acting in the listed capacities, rather than the obligations of the Corporation at large, including under *FIPPA*. The exclusion of the Corporation from the list of persons in section 90(1) to whom the prohibition applies, together with the limitation of the prohibition's application solely to those listed actors *who receive* the information in the course of their duties, counsels this interpretation.

[139] Further support for the interpretation in which section 90(1) does not apply to the Corporation is offered by the following argument advanced by the appellant: LAO is effectively asking this office to read "the Corporation" into section 90(1), which would have the absurd result – in the context of the entire provision – of the Corporation being prohibited from disclosing certain information except with the Corporation's consent. I agree that it would be both absurd and anomalous for section 90(2) to require the Corporation to authorize itself to disclose information.

[140] As noted, section 90(1) applies to the persons serving in the listed capacities who receive the information in the course of their duties or in the provision of legal aid services. The duties referred to in section 90 must be limited to the duties these individuals perform under, or by virtue of, the *LASA*. For example, section 90(1) could not extend to the duties of outside counsel when representing non-legal aid clients. Nor do I accept that section 90(1) could extend to the performance of positive duties imposed under another statute, such as *FIPPA*. I do not think that section 90(1) could prohibit – without specific authorization by the Corporation under section 90(2) – the head of the institution (who is also the president of the Corporation) from disclosing to an affected third party the fact that LAO staff have received an access request.⁷⁵ Yet, taken to its logical conclusion, that would be the effect of the broad interpretation advanced by the LAO.

[141] Further, in my view, no inherent conflict is posed for LAO's president under this interpretation. Simply put, section 90(1) applies to the president, such that he or she cannot unilaterally disclose information received in the course of his or her duties under the *LASA*. The head must fulfil the Corporation's duties under *FIPPA* and section 90(1) would not prohibit the head (president) from processing an access request simply because the document came into his hands *while acting in his capacity as head of the institution*. In other words, section 90(1) does not prohibit the head from disclosing information which has not been "furnished to or received by" a listed individual. To be clear, I do not accept that receipt of information by the head for the sole purpose of responding to an access request is sufficient to bring that information within the scope of the prohibition. The Corporation and, by extension, the head performing his or her

⁷⁵ See, for example, section 28(1) of *FIPPA*.

duties on behalf of the Corporation under *FIPPA*, is not caught by section 90(1); the authority and duty of the Corporation to disclose resides separately in *FIPPA*. The right of access applies to records in the custody or control of the institution and the head is the instrumentality through which the Corporation and institution fulfil their duties under the *Act*.

[142] LAO is concerned that an interpretation of section 90 of the *LASA* different than its own would create "independent disclosure obligations" for the Corporation and for individuals working within the Corporation that "would create an internal conflict and ultimately ... be inconsistent with other provisions of *LASA*." In LAO's representations responding to the questions put to the parties, this concern is expressed a number of times. It should be said, however, that neither of the questions put to the parties at the supplementary representations stage suggest that the provision is, or may be intended to, preserve *an independent duty of disclosure* on the part of the Corporation.⁷⁶ Furthermore, the interpretation given to section 90(1) in this order does not endow the listed persons with independent disclosure obligations; nor does it put the individuals who generated the records in the position of disclosing them. Since none of the persons listed in section 90(1) would be disclosing information they have received pursuant to this interpretation, LAO's concern about breaching section 96(1) of the *LASA* is unfounded.⁷⁷ Rather, in my view, this interpretation of section 90(1) simply acknowledges and affirms the *confidentiality* (non-disclosure) obligations of the listed individuals and the separate instrumentality of the head.

[143] Indeed, the restriction of section 90(1) of the *LASA* to documents furnished to or received by individuals acting in the listed capacities, the exclusion of the Corporation itself from this list, and the separate duties imposed by *FIPPA* on the president of the Corporation when acting in his capacity as head, all counsel that section 90(1) does not prevent the head from processing an access request or from disclosing a document that does not fall within an exemption or exclusion under *FIPPA*.

[144] Finally, while I have concluded that the focus of the disclosure prohibition in section 90(1) is on the human actors who are subject to it, rather than the information *per se*, this should not be taken as having any effect on the severance requirement in section 10(2) of *FIPPA*.

Interpretation will not compromise LAO's organizational independence

[145] LAO's concerns about its organizational independence should be addressed. To begin, I am satisfied that the interpretation given to section 90(1) in this order is

⁷⁶ Again, Question 1 asked the parties whether section 90(1) "is intended to *prohibit the disclosure* of information by the persons listed" but not by "the Corporation itself."

⁷⁷ Section 96(1) of the *LASA* states: "Any person who intentionally contravenes or fails to comply with section 90 or subsection 92(6) or 95(1) is guilty of an offence."

consistent with, and supports the purpose of, the confidentiality provision, which is to regulate the unilateral disclosure of confidential LAO information. However, it is not intended to shield the operational activities of LAO from scrutiny by the public. I note this in rejecting LAO's argument that a narrower scope to section 90(1) would compromise its organizational independence and its ability to develop policies and projects and foster innovation in the provision of legal aid services. LAO expresses concern that a narrower scope to section 90(1) will introduce "ambiguity respecting LAO's independence at the organizational level" which will, in turn, make it difficult to maintain the confidence of the public, especially its vulnerable clientele. This argument ignores the context of section 90, existing as it does as part of a suite of confidentiality protections in the *LASA*, and the fact that it reaches beyond LAO's own directors, officers and employees to individuals operating outside LAO. Maintaining the confidence of LAO's undeniably vulnerable clientele is accounted for, in good measure, by the privileged communications protection in section 89 of the *LASA*. Moreover, LAO's characterization of section 90 of the *LASA* as existing to safeguard its institutional independence by allowing the listed individuals to carry out their duties without interference confounds the concept of scrutiny with interference. LAO seeks a world in which there is shadow but no sunlight, and a level of protection that would be inconsistent with the very important accountability purposes shared by the *LASA* and *FIPPA*.

[146] Highlighting the subject matter of WTCLS's access request is important. To reiterate, WTCLS sought access to:

- (a) copy of the "transition plan" referred to [in the funding decision], (b) any briefing notes, memos, emails or other records which discuss a poverty law service centre as a method of delivering legal services to West Toronto, and (c) any briefing notes, memos, emails or other records which compare the continued operation of the West Toronto Community Legal Services with other options (such as the planned poverty law service centre) in terms of factors such as cost, client service, etc.

[147] In addressing the court decisions in *MPAC* and *Gombu*, LAO suggests that the circumstances of those cases are distinguishable and that there are no compelling public policy considerations that override the privacy interests at stake in this matter. I disagree. While protecting LAO's organizational independence is a valid objective, I reject the conflation of that objective with ensuring "organizational privacy." The request in this appeal raises genuine accountability issues for LAO, which are inseparable from, and form the basis of, significant public policy considerations I believe exist in this case. Furthermore, the public interest in matters of financial management or proper public administration may demand scrutiny of information that could contribute in a meaningful way to holding an institution accountable for its decisions

and actions, without compromising LAO's independence.⁷⁸ Section 90(1) applies to individuals other than LAO personnel; thus, it cannot be the case that LAO independence is the reason behind the provision. In any event, LAO's development of policy or its implementation of pilot projects would generally be considered to involve information created or generated by LAO staff, not information "furnished to or received by" them. In my view, therefore, accepting LAO's interpretation of the provision would shield essentially all of its records from public input and the accountability that optimally results from it. While it may be that certain responsive information created in the course of LAO operations is exempt under the *Act*, it does not follow that LAO's funding and planning decisions with respect to WTCLS can be peremptorily carved out of the *Act* using section 90(1) of the *LASA*. Upholding LAO's seemingly categorical application of section 90(1) to the thousands of pages identified as responsive to this access request would thwart the accountability objective shared by *FIPPA* and the *LASA*. I simply have not been provided with any evidence or argument sufficient to persuade me that LAO's organizational independence would be impinged by the interpretation of section 90(1) adopted in this order.

[148] It is possible to simultaneously meet the *LASA*'s objective of providing legal aid services to low-income individuals through an independent, but accountable, LAO and *FIPPA*'s objective of facilitating democracy by making meaningful public participation possible, while ensuring the accountability of politicians and public servants alike.⁷⁹

Other considerations in the interpretation of section 90(1)

[149] I offer a few observations in closing about the interpretive aides relied on by the parties. As outlined above, section 90(1) is meant to control the conduct of individuals by prohibiting the unauthorized disclosure of confidential information. Although this interpretation can be informed by consideration of other text, such as the *Compendium* and LAO's Privacy Policy, the need to rely on such sources as interpretive aides is greatly lessened where the statutory language is clear, as I conclude is the case here.

[150] WTCLS correctly notes that *compendia* may provide helpful context and insight into legislative intent where the plain meaning of a provision is not clear.⁸⁰ However, the *Compendium* tabled in this instance is of more limited usefulness. Similarly, LAO's Privacy Policy (and guidelines) may provide relevant context for the interpretation of section 90(1), but it is in no way determinative; nor does it support LAO's position that

⁷⁸ Information and Privacy Commissioner of BC Order F15-02 (at pages 32-33) as discussed in Order PO-2960-I. See also *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41. In addressing the "open courts" principle, access to information and the sealing of search warrant materials upon application by the Crown, the reasons of Fish J. begin with: "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."

⁷⁹ LaForest J. in *Dagg*, cited above, at para. 61.

⁸⁰ Order PO-2775-R.

almost all LAO records are subject to either section 89 or 90 of the *LASA*. Internally created policy and guidelines do not take precedence over statute. LAO's Privacy Policy may reflect LAO's current approach to claiming confidentiality over information that comes into its custody or control in the provision of legal aid services, but when confronted with clear statutory language, it must not equip LAO with a complete code for disclosure of records subject to an access request. Further, LAO's Privacy Policy is dated May 2012, after Orders PO-2994 and PO-2083 were issued; its use of the term "very broad confidentiality provision" to describe section 90 echoes the adjudicator's phrasing in Order PO-2994. As I already observed, I am not obliged to follow the reasoning in past orders, nor do I find the embodiment of it in LAO's Privacy Policy persuasive.

[151] Having said that, implicit in the scheme of the Privacy Policy is the recognition that the *Act* applies to LAO, that the IPC plays an oversight role⁸¹ and that records are disclosable under *FIPPA*.⁸² This signifies awareness on the part of the policy's crafters that like any other confidentiality provision, section 90(1) *may* prevail over the right of access if it is found to apply, but it does not displace the operation of the entire *Act*, the oversight function of this office or its appeal powers.⁸³ Ultimately, I have concluded that section 90(1) does not apply in this appeal.

Summary and conclusion

[152] Section 90 of the *LASA*, it must be acknowledged, covers a wide range of individuals, including people outside the institution, who may come into possession of LAO-related "information and material," even if they do not participate in LAO's day-to-day clinic operations. As explained in this order, however, giving effect to LAO's position in this appeal would mean that this office has no oversight of LAO's decision to withhold all records related to its decision to cease funding WTCLS and plan for an alternate scheme of delivering legal services to that community. This cannot be.

⁸¹ For example, for the purposes of the *Act*, the head is President and CEO of LAO. Decision-making power is delegated to LAO's General Counsel and administration of access requests delegated to the FOIC, Director of Appeals & FOI. This delegation is effected pursuant to section 62 of *FIPPA*. Section 3 of the Privacy Policy provides that "the [IPC] retains jurisdiction to determine whether or not the information requested falls within the scope of the provisions that prevail over *FIPPA*."

⁸² Section 12 of the LAO Privacy Policy provides a list and description of "Legal aid records subject to *FIPPA*": "The following are records that are not subject to either solicitor-client privilege or the confidentiality provisions and, accordingly, their disclosure falls under the provisions of *FIPPA*. The list is not intended to be exhaustive." The five categories of records are: 1. manuals and guidelines; 2. policy and operational notices and memoranda; 3. staff records; 4. records about service-providers or consultants; and 5. opinion letters. The appellant highlights the second category, whose explanation provides that: "... Notices and memoranda sent to staff may be disclosable subject to certain exemptions (s. 18(1)(e), (f) or (g) of *FIPPA*)."

⁸³ See Order PO-2411-I, relating to the effect of section 153 of the *Securities Act*.

[153] Had the Legislature intended to exclude records that are so clearly connected to issues of funding and accountability of the legal aid system in Ontario, that intention would have been clearly and unambiguously expressed. It was not. Instead, the Legislature added LAO as an institution subject to the *Act*. In this context, applying LAO's interpretation of section 90(1) and finding all of the records in this appeal confidential and removed from the scope of the *Act* would be absurd. The interpretation of section 90(1) of the *LASA* in this order serves the purposes of the *Act* and the *LASA* by recognizing the common ground shared by *FIPPA*'s access provisions and the goal of accountability in the *LASA*. This order establishes an interpretation of section 90(1) of the *LASA* that reflects the Legislature's inclusion of LAO in the list of institutions subject to *FIPPA*, while recognizing its special operating context. The Legislature has spoken by regulating the listed individuals to inhibit independent disclosure of confidential information in LAO's custody or control that has been received by them. Section 90(1) does not apply to the Corporation itself and, by extension, its head when making decisions about disclosure on behalf of the Corporation under *FIPPA* in relation to records for which an access request has been received under Part II of the *FIPPA*.

[154] In my view, the construction given to section 90(1) in this order is consistent with the purposes of the *Act* and the *LASA*. It produces a result that is consistent with legal norms and is both reasonable and just. I am also satisfied that it will not result in any unfairness to LAO or its interests in carrying out its duties and obligations under both statutes. For the reasons stated, therefore, I do not uphold LAO's decision in this appeal.

ORDER:

I order LAO to issue a new access decision to the appellant in accordance with the provisions of the *Act*.

Original Signed by: _____

Daphne Loukidelis
Adjudicator

November 30, 2016