

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4359

Appeal PA21-00294

Legal Aid Ontario

March 3, 2023

Summary: This appeal addresses a request for an email that an employee of Legal Aid Ontario (LAO) received in the course of their duties. In this order, the adjudicator finds the record at issue falls within the scope of the confidentiality provision at section 42(1) of the *Legal Aid Services Act* and in accordance with section 67(2) of the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), the *Act* is not the controlling statute for protecting the confidentiality of this information. As a result, the adjudicator upholds LAO's decision not to disclose the record and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders P-26, PO-2083 and PO-2994.

OVERVIEW:

[1] Legal Aid Ontario (LAO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for the following information:

A copy of the email sent by [a named individual] to LAO on March 22, 2021 at 3:12 PM entitled [last name v. last name].

[2] LAO identified the responsive records related to the request and notified the author of the email (the affected party) to obtain their views regarding disclosure of the

records. LAO subsequently issued a decision denying access to the records pursuant to the personal privacy exemption in section 49(b) of the *Act*.

[3] The requester, now the appellant, appealed LAO's decision to the Information and Privacy Commissioner (the IPC).

[4] During the mediation process, the mediator had discussions with both the appellant and LAO. The appellant requested that the mediator notify the affected party and attempt to gain their consent to disclose the requested records. The affected party did not consent to the disclosure of their information.

[5] Through the mediator, LAO provided the appellant with a description of the seven attachments contained in the email.

[6] The appellant advised that she was still seeking access to the email; however, she confirmed that she was not seeking access to the seven attachments.

[7] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. As the adjudicator in this appeal, I decided to conduct an inquiry and invited representations from the parties. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[8] In its representations the LAO raised the potential application of section 67(2) (conflict with another Act). As a result, this issue was added to the scope of the appeal and the parties were given an opportunity to provide representations concerning section 67(2).

[9] In this order, I find that section 67(2) of the *Act* is relevant and that the confidentiality provisions in sections 40 and 42 of the *Legal Aid Services Act* prevail over *FIPPA*. I dismiss the appeal.

RECORDS:

[10] The record at issue is a three-page email.

DISCUSSION:

[11] The sole issue to be determined is whether the withheld information falls within a confidentiality provision in the *Legal Aid Services Act (LASA)*, such that the *LASA* confidentiality provision prevails over *FIPPA*.

[12] As identified above, LAO has withheld access to an email and takes the position that it falls within the confidentiality provisions in section 40 and 42 of the *LASA*.

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

[14] Section 67(2) 7.0.1 of the *Act* states:

The following confidentiality provisions prevail over this *Act*:

...

Sections 40 and 42 of the *Legal Aid Services Act, 2020*.

[15] Section 40 (privileged communications) of *LASA* states:

1. All communications between an individual receiving or requesting to receive legal aid services and the Corporation, an officer or employee of the Corporation or a service provider are deemed to be privileged in the same manner and to the same extent as if the communications had been between the individual and a solicitor under a solicitor-client relationship.
2. In the case of a service provider that is an entity, subsection (1) applies with necessary modifications with respect to each board member, officer and employee of the service provider, as applicable.
3. Disclosure of privileged information to the Corporation that is required under this Act does not negate or constitute a waiver of privilege.

[16] Section 42(1) (prohibition on information disclosure) of the *LASA* provides:

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

[17] Section 42(1) is, however, subject to the exception at section 42(2) of *LASA* which sets out that:

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

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

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

(c) if authorized by the Corporation.

[18] LAO submits that the record in question is a complaint by a person external to LAO and sent to LAO employees, who, in the course of their duties, reviewed the record and chose not to proceed with the complaint. LAO submits that section 67(2) of *FIPPA* is justification for withholding release of the record. It relies on Order PO-2994 in making its determination.

[19] The appellant did not directly address the application of section 67(2) of *FIPPA* and instead addresses the potential conflict between sections 40 and 42 of the *LASA* and *FIPPA*. She also sets out her argument as to why she is entitled to the record under section 42 of *LASA*.

Analysis and finding

[20] As noted in Order PO-2994, section 67(2) of the *Act* is not a jurisdiction-limiting provision that excludes certain categories of records from the *Act's* application. 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.¹ Section 67(2) 7.0.1 specifically includes section 42 of *LASA* among the listed confidentiality provisions that prevail over the *Act*.

[21] In Order P-26, former Commissioner Sidney Linden held that where a "confidentiality provision" exists in another statute prevails over the confidentiality provisions of *FIPPA*, there is no authority under *FIPPA* to order the release of records.

[22] In Order PO-2083, where LAO was the institution, the adjudicator commented on the impact of the confidentiality provision at section 90(1) of *FIPPA* and the exception at section 90(2) (now sections 42(1) and 42(2)). In his analysis of section 90(2) of *LASA* he recognized that the exercise of discretion in relation to seeking consent clearly rests in the LAO, writing:

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

[23] Similarly, in Order PO-931, the relevant confidentiality provisions were found in section 53 of the *Assessment Act*. Section 53(1), as it read at the time, provided for the confidentiality of certain information provided to a property tax assessor, while section 53(3) permitted the assessor to disclose certain information to the owner of the assessed property. In that case, the adjudicator found that the discretion contemplated under section 53(3) is to be exercised exclusively by an assessor and that the IPC does

¹ Orders PO-2029, PO-2083 and PO-2411-I.

not have the authority to override the application of section 53(1), where this provision has been validly claimed, by ordering disclosure of the relevant information under section 53(3).

[24] In contrast to the wording in section 40(1) of the *LASA* which is limited to communications between an individual receiving or requesting to receive legal aid services, section 42 is broadly worded statutory provision which prohibits those listed in the section from disclosing "any information or material" furnished to or received in the course of their duties or in the provision of legal aid services. In my view, the wording of the provision is intentionally broad and meant to capture all types and forms of information and materials furnished or received by a listed individual, including the email which is a complaint sent by an external party to an employee of LAO.

[25] I acknowledge the appellant's assertion that there is no conflict between the *Act* and *LASA*, but I do not need to decide whether that is the case; section 67(2) sets out that the confidentiality provision in *LASA* at section 42 prevails over the *Act*.

[26] I have reviewed the email at issue and confirm LAO's description of same, a complaint received by an employee of LAO in the course of their duties. Based on the wording of section 42(1) of *LASA*, I find that the record falls within the scope of the confidentiality provision at section 42(1) of *LASA*. I agree with the adjudicator in Order PO-2083 that it is not for me to require LAO to seek the consent of the author of the email. Finally, even if the IPC had the power to order disclosure where another exception in section 42(2) applies, I have been provided no evidence that any exception applies here.

[27] Accordingly, I find that the record at issue fall within the scope of the confidentiality provision at section 42(1) of *LASA*. In accordance with section 67(2) 7.0.1 of *FIPPA*, section 42(1) of *LASA* prevails over *FIPPA*, and I therefore uphold LAO's decision to deny access on that basis.

ORDER:

I uphold LAO's decision and dismiss this appeal.

Original Signed By: _____

Alec Fadel
Adjudicator

March 3, 2023