

# Manitoba Ombudsman

## REPORT UNDER

## THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2019-0070

### MANITOBA JUSTICE

**ACCESS COMPLAINT: REFUSED ACCESS**

**PROVISIONS CONSIDERED: 27(1)(a) and (b)**

**REPORT ISSUED ON DECEMBER 4, 2019**

**SUMMARY:** The complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) for access to records indicating all monies paid to a named law firm with respect to a third party's lawsuits against the Manitoba government. Manitoba Justice refused access under clauses 25(1)(n) (disclosure harmful to law enforcement or legal proceedings) and 27(1)(a) and (b) (solicitor-client privilege) of FIPPA. Our office concluded that the records at issue would reveal information that is subject to solicitor-client privilege. Our office found, therefore, that clauses 27(1)(a) and (b) of FIPPA applied to the information requested by the complainant. Having found that clauses 27(1)(a) and (b) applied to this information, our office did not consider the application of clause 25(1)(n) to the same information. The complaint was not supported.

### COMPLAINT

Two requests were made on December 3, 2018 under the Freedom of Information and Protection of Privacy Act (FIPPA or the act), one to Manitoba Finance and the other to Manitoba Justice (the public body) for access to the following information:

*To the most current date available: all records, including but not limited to invoices, indicating all monies paid to the law firm [name removed] with respect to [third party organization]'s lawsuits.*

In certain circumstances as allowed under subsection 16(1) of FIPPA, a request may be transferred to another public body. Subsection 16(1) reads:

***Transferring a request***

**16(1)** *Within seven days after a public body receives a request for access to a record, the head of the public body may transfer it to another public body if*

- (a) the record was produced by or for the other public body;*
- (b) the other public body was the first to obtain the record; or*
- (c) the record is in the custody or under the control of the other public body.*

The request made to Manitoba Finance was transferred to Manitoba Justice on December 6, 2018. As both requests were identical, both requests were responded to with one decision letter by Manitoba Justice on February 1, 2019. Manitoba Justice refused access in full to the requested information.

A complaint relating to this access decision was received by our office on February 8, 2019.

**POSITION OF THE PUBLIC BODY**

In refusing access to the requested information, Manitoba Justice applied the following exceptions under FIPPA:

***Disclosure harmful to law enforcement or legal proceedings***

**25(1)** *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

- (n) be injurious to the conduct of existing or anticipated legal proceedings.*

***Solicitor-client privilege***

**27(1)** *The head of a public body may refuse to disclose to an applicant*

- (a) information that is subject to solicitor-client privilege;*
- (b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney-General or the public body in relation to a matter involving the provision of legal advice or legal services or in relation to the investigation or prosecution of an offence;*

## INVESTIGATION AND ANALYSIS

On receiving the complaint, our office contacted Manitoba Justice and asked the public body to provide reasons which supported the application of the exceptions which it had relied on in refusing access. Our office noted that the access decision provided to the complainant did not describe the responsive records and we asked Manitoba Justice to identify the records which would be responsive to this request.

In an access complaint investigation, it is the usual procedure of our office to ask that copies of responsive records be made available for our review. However, mindful of the unique weight given to solicitor-client privilege in law, our office will consider means other than direct examination of the records at issue by which a public body may establish the application of the exceptions under clauses 27(1)(a) and (b) of FIPPA. In the absence of records, it is our position that the legal advice branch of solicitor-client privilege may be evidenced by applying the criteria prescribed in *Canada v. Solosky*, [1980] 1 S.C.R. 821. Therefore, in the event the public body elected not to provide copies of the responsive records, we asked Manitoba Justice to provide sufficient information about the records at issue such that our office was able to conclude that:

- There is a communication between a lawyer and the lawyer's client; and
- The communication entails the giving or seeking of legal advice; and
- The communication was intended to be confidential.

Manitoba Justice responded to our request for information; however, the public body elected not to provide copies of the responsive records for our review. Manitoba Justice did provide our office with a description of the records determined to be responsive to the complainant's access requests, as follows:

*The records refused are communications with legal counsel related to services performed, the fees owing for such services as well as financial records of legal expenses.*

As stated by the public body, all communications that fell within the scope of the request related to legal charges for services rendered.

### **Do clauses 27(1)(a) and (b) of FIPPA apply to the information withheld by Manitoba Justice?**

Solicitor-client privilege covers all communication of a confidential character between a solicitor and a client related to the seeking, formulating or giving of legal advice and includes both legal advice privilege and litigation privilege. Privilege belongs to the client and it persists in perpetuity unless waived (relinquished) by the client. In the matter at issue, the client is the

public body. Clause 27(1)(a) of FIPPA may be applied by a public body to withhold information that is subject to solicitor-client privilege. Clause 27(1)(b) applies to information (such as a memorandum or an invoice for services) prepared by or for a public body in relation to a matter involving the provision of legal advice or the investigation or prosecution of an offence.

Our office notes that in *Maranda v Richer*<sup>1</sup> the Supreme Court of Canada held that there is a general presumption that information relating to fees and disbursements paid to legal counsel is privileged as it arises out of the solicitor-client relationship and what transpires within it. In previous cases<sup>2</sup> our office has concluded that a detailed summary of services (such as would appear on an invoice for services) would reveal details about the nature of legal advice and therefore would expose information that is protected by solicitor-client privilege. We have also previously found that invoices submitted by a lawyer may, in some cases, be amenable to severance in order to remove from them the nature of the advice or other communication protected by solicitor-client privilege and then the total amount on an invoice may be disclosed. In those specific instances, we determined that total legal costs were neutral information that would not reveal directly or indirectly any information protected by solicitor-client privilege and, therefore, could be released. In this instance, Manitoba Justice maintained that the total of legal costs paid to a particular law firm with respect to a [third party organization]'s lawsuits was not neutral information and the release of this figure would reveal information subject to solicitor-client privilege.

Further to our investigation of this matter, Manitoba Justice referenced *School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner)*<sup>3</sup>. This case considered a matter in which an applicant had made two requests for access to information regarding the expenditure of public funds on legal fees by the School District. In *School District No. 49*, the court gave significant weight to the fact that the access applicant was involved in ongoing litigation against the public body. The court found that the disclosure of any information about fees where litigation is ongoing could reveal privileged information. The court in *School District No. 49* noted with approval the formulation adopted by the court in *Municipal Insurance Assn. of British Columbia v British Columbia (Information and Privacy Commissioner)*<sup>4</sup>. As explained in *Municipal Insurance Assn.*:

[47] I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail

<sup>1</sup> *Maranda v. Richer*, [2003] 3 SCR 193, 2003 SCC 67 (CanLII), <<http://canlii.ca/t/1rz>>, retrieved on 2019-11-04.

<sup>2</sup> See our report on Cases 2013-0285 and 2013-0286 found online at <https://www.ombudsman.mb.ca/uploads/document/files/case-2013-0285-0286-en.pdf>.

<sup>3</sup> *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 (CanLII), <<http://canlii.ca/t/fqr6f>>, retrieved on 2019-11-04.

<sup>4</sup> *Corp. of the District of North Vancouver v. B.C. (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BCSC) [*Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)*].

*in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given.*

*[48] Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.*

*[49] Some examples, certainly not intended as exhaustive, which might be reasonably discerned from knowledge only of the type of information contained in the document record in issue here, being basically the total of interim legal fees to date in a lawsuit, could include:*

- the state of preparation of a party for trial;*
- whether the expense of expert opinion evidence had been incurred;*
- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;*
- where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;*
- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;*
- whether legal accounts were being paid on an interim basis and whether payments were relatively current;*
- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.*

As pointed out by Manitoba Justice, the decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v College of the North Atlantic*<sup>5</sup> was consistent with the decision in *School District No. 49*. As the court in *Newfoundland* explained:

*[43] Disclosing information on expenditures for legal services during the litigation for which the services were or are being provided poses a serious risk to the confidentiality that must attach to the communications between solicitor and client during those proceedings. The fair conduct of litigation, while it relies on full disclosure of the substantive factual elements of the claim and dispute, also relies on the ongoing ability of the client to discuss confidentially with his or her solicitor matters such as resolution strategy, trial strategy, assessment of the case and the many other issues on which advice may be sought during litigation.*

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<sup>5</sup> *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic*, 2013 CanLII 83886 (NL SC), <<http://canlii.ca/t/g2g78>>, retrieved on 2019-11-04.

[44] *There is at least a possibility that disclosure for amounts paid for legal services could, in this context, reveal something of the confidential communications that are essential during litigation. This possibility cannot be negated by any level of redaction. Even aggregating the total amount invoiced for services may allow the diligent inquirer to make inferences about CONA's instructions to its solicitors; the simple expedient of making a similar request every month would lead to a greater possibility of making such inferences.*

In the view of Manitoba Justice, the cited cases make it clear that solicitor-client privilege functions to considerably circumscribe access to a public body's account of legal fees in respect to a specific matter while litigation is ongoing. The public body notes that Manitoba is currently involved in litigation with the third party organization and, although the complainant in this case may not be an adversarial party to that litigation, the public body has no control over publication of the record or information at issue if it is released to the complainant.

In this matter our office has concluded that the records at issue, including information about the total amount of fees paid, would reveal legal advice provided to Manitoba Justice in the course of litigation and are, therefore, subject to solicitor-client privilege. As a result, Manitoba Justice is authorized to withhold this information under clause 27(1)(a) of FIPPA. Our office has also concluded that the responsive records in this matter contain information prepared by a lawyer in relation to a matter involving the provision of legal advice and legal services to the public body and, therefore, fall under clause 27(1)(b) of FIPPA.

Clauses 27(1)(a) and (b) are discretionary exceptions to disclosure under FIPPA. This means that, even though an exception to access may be shown to apply to the responsive information, FIPPA permits the public body the discretion to give rather than withhold access to the information requested. As such a public body must provide reasons for its decision to refuse access, which demonstrate that it exercised its discretion in a reasonable manner.

Our office considered Manitoba Justice's representations explaining its decision to withhold rather than give access to the information in question. Based on our review, we found that the exercise of discretion by the public body to withhold the responsive information was reasonable and discretion was exercised in a manner consistent with the purpose of the exception.

## **CONCLUSION**

Our office found that clauses 27(1)(a) and (b) of FIPPA applied to the information requested by the complainant. Having found that clauses 27(1)(a) and (b) applied to this information, our office did not consider the application of clause 25(1)(n) to the same information.

The complaint is not supported.

In accordance with subsection 67(3) of the Freedom of Information and Protection of Privacy Act, the complainant may file an appeal of the Manitoba Justice decision to refuse access to the Court of Queen's Bench within 30 days following the receipt of this report.

Manitoba Ombudsman

December 4, 2019