



Order F20-28

LEGAL SERVICES SOCIETY

Ian C. Davis
Adjudicator

June 19, 2020

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Summary: The applicant made a request to the Legal Services Society (LSS) for information about the legal aid billings made by a particular lawyer during a specified period. The LSS refused to disclose the information in dispute under s. 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant argued s. 25(1)(b) (disclosure in public interest) of FIPPA. The adjudicator found that s. 25(1)(b) did not apply and that the LSS was required to refuse to disclose the disputed information under s. 22(1) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(4)(e), 22(4)(f), 22(4)(g), 22(3)(d), 22(3)(f), 22(2)(a), 22(2)(f) and 25(1)(b).

INTRODUCTION

[1] The applicant made a request to the Legal Services Society (LSS) for information about the legal aid billings made by a particular lawyer (Lawyer) during a specified period. The LSS refused to disclose the responsive information under ss. 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the LSS's decision. Mediation failed to resolve the matter and the applicant requested an inquiry.

PRELIMINARY MATTERS

[2] Two preliminary matters arise. First, the LSS states in its initial submissions that it is no longer relying on s. 14 to withhold any of the disputed

information.¹ Accordingly, I am satisfied that s. 14 is no longer an issue in this inquiry.

[3] Second, in his response submissions, the applicant says that disclosure of the disputed information is clearly in the public interest under s. 25(1)(b) of FIPPA.

[4] Section 25 was not listed as an issue in the OIPC Investigator's Fact Report or the Notice of Inquiry and the applicant did not seek permission to add that section. In these circumstances, an adjudicator will generally decline to exercise his or her discretion to add s. 25 as an issue.² The LSS argues that I should decline to do so here.³

[5] In the particular circumstances of this case, I have decided to add s. 25(1)(b) as an issue. The applicant's position has always been that disclosure of the disputed information is in the public interest. He simply failed to specifically cite s. 25(1)(b) until his inquiry submissions. The applicant explained his public interest argument to the LSS in an email accompanying his access request.⁴ Further, he explicitly referred to the public interest in his request to the OIPC for a review of the LSS's decision.⁵ I find that adding s. 25(1)(b) as an issue does not prejudice the LSS because it addressed the applicant's s. 25(1)(b) argument in its initial and reply submissions.⁶

ISSUES

[6] The issues to be decided in this inquiry are as follows:

1. Is the LSS required under s. 25(1)(b) to refuse to disclose the disputed information?
2. Is the LSS required under s. 22(1) to refuse to disclose the disputed information?

[7] Although FIPPA is silent on who has the burden under s. 25, both parties should provide evidence and argument to support their positions.⁷ The burden is on the applicant to show that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).⁸

¹ LSS's initial submissions dated January 9, 2020 at paras. 1 and 38.

² See e.g. Order F16-17, 2016 BCIPC 19 (CanLII) at para. 10.

³ LSS's reply submissions dated February 20, 2020 at para. 14.

⁴ Email from the applicant to the LSS dated August 3, 2018.

⁵ Letter from the applicant to the OIPC dated September 12, 2018.

⁶ LSS's initial submissions dated January 9, 2020 at para. 59; LSS's reply submissions dated February 20, 2020 at paras. 15-20.

⁷ See e.g. Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 32-39.

⁸ FIPPA, s. 57(2).

BACKGROUND

[8] The LSS is a non-profit organization continued under the *Legal Services Society Act*.⁹ Its statutory responsibilities include establishing and administering “an effective and efficient system for providing legal aid to individuals in British Columbia”.¹⁰ One of the ways that the LSS fulfills this responsibility is by entering into contracts with lawyers to provide legal services to eligible individuals. The basic terms of such contracts are set out in an LSS document called *General Terms and Conditions*.

[9] Every year, the LSS enters into thousands of contracts with private lawyers to provide legal representation to individuals charged with criminal offences. For almost all of those contracts, the *General Terms and Conditions* are supplemented by what the LSS calls the *Criminal Tariff*. For standard matters that fall within the *Criminal Tariff*, the LSS pays lawyers fixed amounts for various services.

[10] The billing works differently, however, for more costly and complex criminal matters. These matters fall within what the LSS calls the “criminal case management program” (CCM). Under that program, the LSS pays hourly rates based on the lawyer’s year of call. In rare cases, the LSS pays enhanced hourly rates. In cases that involve exceptional responsibility, the LSS pays a premium on top of the enhanced hourly rates.

[11] The applicant’s access request relates to the legal aid billing rates discussed above. He requested:

The number of hours billed to the Legal Services Society by [the Lawyer] each year since 2012.

To be more specific I am seeking the number of hours billed, broken down by whether they are billed at the standard tariff rate or if they are billed at a premium rate under the Criminal Case Management (CCM) program. Simply a report listing all tariff items billed as an hourly unit and all CCM hours is sufficient. I am NOT looking for [the Lawyer’s] billing amounts in dollars, hourly rates on CCM files, disbursements, travel fees or any other figure expressed in dollars. Further I am NOT looking for any names, file numbers or dates of billing.¹¹

⁹ *Legal Services Society Act*, S.B.C. 2002, c. 30 [LSSA]. The background relating to the LSS and legal aid billing for criminal matters is based on the evidence in Affidavit #1 of BD at paras. 3-34, which I accept.

¹⁰ *Ibid*, s. 9(1)(b).

¹¹ Access request dated August 4, 2018 at p. 1.

[12] The LSS advised the applicant that it was withholding the requested information under ss. 14 and 22 of FIPPA. It also clarified how the billing system works because the applicant’s description was inaccurate.¹²

[13] In response, the applicant revised his request by asking for the percentage of the Lawyer’s billing “undertaken at non-CCM vs CCM and CCM-Base [Tariff] and CCM-Premium”.¹³

[14] The LSS then advised the applicant that it was still refusing to disclose the requested information pursuant to ss. 14 and 22 of FIPPA. As noted above, the LSS is no longer relying on s. 14.

INFORMATION IN DISPUTE

[15] The information in dispute is in a one-page record. The record contains a table that sets out the percentages of the Lawyer’s total legal aid billings from April 1, 2012 to October 10, 2018 that were billed at the standard fixed tariff rates, the CCM standard hourly rates, the CCM enhanced hourly rates, and the CCM premium rates.

SECTION 25 – PUBLIC INTEREST

[16] Section 25(1)(b) provides as follows:

(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[17] The threshold to establish that s. 25(1)(b) applies is high because it overrides all other provisions in FIPPA.¹⁴ The duty to disclose under s. 25(1)(b) “only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e. unmistakably) in the public interest.”¹⁵ The information in dispute must be “of clear gravity and present significance to the public interest.”¹⁶ Disclosure under s. 25(1)(b) is required where a disinterested and reasonable

¹² Letter from the LSS to the applicant dated August 14, 2018 at p. 1.

¹³ Email from the applicant to the LSS dated August 14, 2018.

¹⁴ Order F18-50, 2018 BCIPC 54 (CanLII) at para. 26.

¹⁵ Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46 (emphasis in original).

¹⁶ Order 02-38, *ibid* at para. 65.

observer, knowing the information and all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.¹⁷

[18] The applicant submits that s. 25(1)(b) applies because disclosure of the disputed information is “clearly in the public interest”.¹⁸ The applicant is concerned about whether legal aid billing rates are sufficient to provide access to justice.¹⁹ Citing a news article, the applicant says the Lawyer publicly stated that an increase in legal aid billing rates is not needed.²⁰ To assess this opinion, the applicant wants to know how much of the Lawyer’s legal aid billings were at the lower versus the higher rates. The applicant says it would cast doubt on the Lawyer’s position if the disputed information reveals that the Lawyer is mostly paid at rates higher than the ones referred to in the media article. As I understand the applicant, he is interested in whether this would strengthen the case for increased legal aid billing rates and, in turn, improve access to justice.

[19] The LSS submits that s. 25(1)(b) does not apply because the disputed information “does not transcend the Applicant’s private interest.”²¹

[20] I am not persuaded that one lawyer’s legal aid billings engages the public interest in the way that previous orders have said is required under s. 25(1)(b). In my view, the public does not have a clear interest in the Lawyer’s opinion on legal aid billing rates, even if the disclosure of the disputed information would call that opinion into question. The Lawyer’s opinion is only one opinion in a broad debate over legal aid and access to justice. In short, I find that the personal information at issue in this case is far too narrow and specific to be clearly in the public interest. I conclude that s. 25(1)(b) does not apply.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[21] The LSS submits that s. 22 applies to the information in dispute. Section 22(1) provides that a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy. The proper approach to the s. 22 analysis is well-established.²² I will apply that approach here.

¹⁷ Investigation Report F16-02, 2016 BCIPC 36 (CanLII) at p. 26; Investigation Report F15-02, 2015 BCIPC 30 (CanLII) at p. 34.

¹⁸ Applicant’s submissions dated February 5, 2020 at paras. 19-21.

¹⁹ Email from the applicant to the LSS dated August 3, 2018; Affidavit #1 of the applicant.

²⁰ Affidavit #1 of the applicant at para. 2.

²¹ LSS’s reply submissions dated February 20, 2020 at para. 20.

²² See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.

Personal Information

[22] Under FIPPA, “personal information” means “recorded information about an identifiable individual other than contact information”.²³ Information is “about an identifiable individual” when it is “reasonably capable of identifying an individual, either alone or when combined with other available sources of information.”²⁴ FIPPA defines “contact information” as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual”.²⁵

[23] I am satisfied that all of the disputed information is personal information because it is about a named individual, i.e. the Lawyer, and it is not contact information.

No unreasonable invasion – s. 22(4)

[24] The next step is to analyze if the personal information falls into any of the categories listed in s. 22(4). If it does, disclosure of the personal information is not an unreasonable invasion of a third party’s personal privacy.

[25] The applicant submits that s. 22(4)(f) applies.²⁶ That section states that disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if the disclosure “reveals financial and other details of a contract to supply goods or services to a public body”. The applicant argues that s. 22(4)(f) applies because legal aid lawyers provide certain services that are primarily for the benefit of the LSS, such as reporting or preparing a budget.

[26] The LSS submits that s. 22(4)(f) does not apply because legal aid lawyers provide services to their clients, not the LSS.²⁷

[27] The application of s. 22(4)(f) to LSS information was also addressed in Order 322-1999. Former Commissioner Flaherty found that s. 22(4)(f) applied to the names of the top billers for criminal and immigration legal aid cases during a nine-month period. He also found that s. 14 did not apply. The matter was overturned on judicial review with respect to the s. 14 issue, and that judgment was upheld on appeal. Given the findings on s. 14, the courts did not address s. 22. However, in *obiter*, the BC Court of Appeal said that legal aid lawyers

²³ Schedule 1 of FIPPA.

²⁴ Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.

²⁵ Schedule 1 of FIPPA.

²⁶ Applicant’s response submissions dated February 5, 2020 at paras. 8 and 12-18.

²⁷ LSS’s initial submissions dated January 9, 2020 at para. 51.

provide “advice and services ... to their clients, and their clients alone.”²⁸ The Court reasoned that various references in the *Legal Services Society Act* supported this view.

[28] I agree with the Court of Appeal that legal aid lawyers provide services to their clients, not the LSS. This is because the services that the lawyers provide are for the benefit of the clients, not the LSS. The primary purpose of the *Legal Services Society Act* is to “assist individuals to resolve their legal problems”, not to assist the LSS.²⁹

[29] Accordingly, in my view, the information in dispute in this case is not financial and other details of a contract to supply goods or services to a public body. Rather, the information is about the Lawyer’s legal aid contracts to supply goods or services to his clients. I conclude that s. 22(4)(f) does not apply.

[30] The LSS also addressed s. 22(4)(e).³⁰ That section provides that disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if the information is about the third party’s position, functions or remuneration as an officer, employee or member of a public body. The LSS submits that s. 22(4)(e) does not apply because the Lawyer is a contractor, not an officer, employee or member of the LSS.

[31] I find that s. 22(4)(e) does not apply. I am satisfied by the nature of LSS contracts as discussed above that legal aid lawyers are not officers, employees or members of the LSS. Specifically, they are not employees of the LSS within the meaning of FIPPA because they do not perform services for the LSS.³¹

[32] Finally, the LSS also addressed s. 22(4)(g). According to that section, disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if public access to the information is provided under the *Financial Information Act*. The LSS provided evidence that at one time it did disclose the type of information in dispute in this inquiry under the *Financial Information Act*, but that it no longer does.³²

[33] I accept the LSS’s evidence and conclude from it that s. 22(4)(g) does not apply.

²⁸ *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 39.

²⁹ LSSA, *supra* note 9 at ss. 9(1)(a)-(b).

³⁰ LSS’s initial submissions dated January 9, 2020 at para. 50.

³¹ The term “employee” is defined in Schedule 1 of FIPPA as including, in relation to a public body, a “service provider”. The term “service provider” is also defined in Schedule 1 of FIPPA as “a person retained under a contract to perform services for a public body”. Since I found that lawyers working under legal aid contracts do not perform services for the LSS, they are neither service providers nor employees of the LSS within the meaning of FIPPA.

³² Affidavit #1 of BD at para. 23.

[34] The parties did not raise any of the other circumstances listed in s. 22(4), and I am satisfied that none of those apply.

Presumptions of unreasonable invasion – s. 22(3)

[35] The third step in the s. 22 analysis is to determine if any of the presumptions in s. 22(3) apply. Section 22(3) sets out various circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[36] The LSS submits that ss. 22(3)(d) and 22(3)(f) apply.³³ Those sections read as follows:

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(d) the personal information relates to employment, occupational or educational history,

...

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness[.]

[37] The LSS submits that s. 22(3)(d) applies because the information in dispute relates to the Lawyer's employment or occupational history. The applicant argues that the information in dispute does not fall within the meaning of occupational or employment history.³⁴

[38] I find that s. 22(3)(d) applies. In Order 322-1999, former Commissioner Flaherty found that "the amount a specific lawyer bills the Legal Services Society is not part of his or her employment, occupational, or educational history."³⁵ However, in this case, the information in dispute is not the amount of the Lawyer's legal aid billings, but rather a percentage breakdown of those billings by rate. Since the rates are based on the nature of the work, the breakdown reveals how much of the Lawyer's criminal legal aid work during a specific period was on standard matters, more complex matters and matters that involved exceptional responsibility. In my view, this information describes, albeit in a general way, the Lawyer's work history and experience and therefore relates to the Lawyer's employment or occupational history.³⁶

³³ LSS's initial submissions dated January 9, 2020 at paras. 39 and 54-56.

³⁴ Letter from the applicant to the OIPC dated September 12, 2018 at p. 2.

³⁵ Order 322-1999 at p. 8.

³⁶ See Order F10-05, 2010 BCIPC 8 (CanLII) at para. 47 (and orders cited therein).

[39] Turning to s. 22(3)(f), the LSS submits that the disputed information describes the Lawyer’s finances, income, financial history and financial activities. The LSS argues that the information makes it possible to draw inferences about the Lawyer’s income level. The applicant submits that s. 22(3)(f) does not apply.

[40] This issue was also addressed in Order 322-1999. Former Commissioner Flaherty found that s. 22(3)(f) did not apply to legal aid billing information because although it “may relate to the third parties’ financial activities, it must be considered in light of section 22(4)(f).”³⁷ As noted above, former Commissioner Flaherty found that s. 22(4)(f) applied. However, since I found above that s. 22(4)(f) does not apply in this case, Order 322-1999 is not decisive on this issue.

[41] I acknowledge that since the disputed information consists only of what percentage of the Lawyer’s legal aid billings were at particular rates, one cannot infer the actual amounts that the Lawyer was paid. However, the disputed information describes how the Lawyer’s legal aid income was apportioned over a specific period of time. In my view, this is sufficient to engage s. 22(3)(f).

[42] In the result, I conclude that disclosure of the disputed information is presumed to be an unreasonable invasion of the Lawyer’s personal privacy under ss. 22(3)(d) and 22(3)(f).

All relevant circumstances – s. 22(2)

[43] The final step in the analysis is to consider, given all the relevant circumstances, including those set out in s. 22(2), whether disclosure of the disputed personal information would be an unreasonable invasion of third-party personal privacy. It is at this step, after considering all the relevant circumstances, that the s. 22(3) presumptions may be rebutted.

i. Public scrutiny – s. 22(2)(a)

[44] According to s. 22(2)(a), a relevant factor is whether the disclosure is desirable for the purpose of subjecting a public body to public scrutiny. The applicant did not explicitly reference s. 22(2)(a), but the LSS did.

[45] The LSS submits that disclosure of the disputed information would not enable public scrutiny of the LSS or make it more accountable to the public.³⁸ According to the LSS, the applicant’s access request is simply an attempt “to depict a third party as a hypocrite by gaining access to private personal information” about the Lawyer’s income and finances.³⁹

³⁷ Order 322-1999 at p. 8.

³⁸ LSS’s initial submissions dated January 9, 2020 at paras. 59-60.

³⁹ LSS’s reply submissions dated February 20, 2020 at para. 19.

[46] I conclude that s. 22(2)(a) does not weigh in favour of disclosure. The applicant does not satisfactorily explain why disclosing this one lawyer's legal aid billing information is desirable for the purpose of subjecting the LSS's activities to public scrutiny. As discussed above, the applicant argues that disclosure of the disputed information may cast doubt on the Lawyer's opinion on billing rates. However, even if that is so, I fail to see how disclosure would be desirable for scrutinizing the activities of the LSS.

ii. Information supplied in confidence – s. 22(2)(f)

[47] The LSS argues that s. 22(2)(f) applies. According to that section, a relevant circumstance under s. 22(1) is whether the disputed personal information was supplied in confidence. The LSS says that the disputed information was supplied in confidence because it reflects billing information submitted by the Lawyer to the LSS through a "secure online billing portal".⁴⁰ The LSS provided affidavit evidence that it does not publicly disclose the amounts it pays to legal aid lawyers.⁴¹

[48] The applicant did not specifically address s. 22(2)(f). However, he made a related argument about a clause in the contract between the LSS and lawyers working under the CCM that requires them to keep billing information confidential. The applicant says that the LSS has improperly "fettered its obligations under FIPPA" by entering into a contract that includes such a clause.⁴²

[49] In my view, the disputed information was supplied to the LSS in confidence. I accept the LSS's evidence that legal aid billing information is not publicly disclosed and only shared with the LSS through a confidential online system. I find that the disputed information in this case summarizes billing information that was treated in this confidential manner. Further, I am not persuaded that the clause in the CCM contract is improper or otherwise weighs in favour of disclosure. The clause explicitly allows that there may be circumstances where disclosure of billing information is required under FIPPA. I conclude that the disputed information was supplied in confidence and that this factor weighs against disclosure.

[50] The parties did not argue any other relevant circumstances and I find that none apply.

⁴⁰ LSS's initial submissions dated January 9, 2020 at para. 58; LSS's reply submissions dated February 20, 2020 at para. 21; Affidavit #1 of BD at paras. 18 and 25-26.

⁴¹ Affidavit #1 of BD at para. 23.

⁴² Applicant's submissions dated February 5, 2020 at para. 5; Affidavit #1 of BD, Exhibit "C" at p. 69, para. 21.

Conclusion – s. 22(1)

[51] To summarize, I find that the disputed personal information is presumed to be an unreasonable invasion of a third party's personal privacy under ss. 22(3)(d) and 22(3)(f) because it relates to the Lawyer's employment or occupational history and describes the Lawyer's finances. Further, I find that the disputed information was supplied by the Lawyer to the LSS in confidence and that this weighs against disclosure. In my view, no relevant factors weigh in favour of disclosure. Accordingly, in light of all the relevant circumstances, I conclude that it would be an unreasonable invasion of third-party personal privacy to disclose the disputed information.

CONCLUSION

[52] For the reasons given above, under s. 58 of FIPPA, I confirm the LSS's decision that it is required to refuse to disclose the disputed information under s. 22(1) of FIPPA.

June 19, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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