Office of the
INTEGRITY
COMMISSIONER

Bureau du
COMMISSAIRE
À L'INTÉGRITÉ

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter: 2017-4212-AP-2278

May 23, 2018

I BACKGROUND

1. My investigation as Integrity Commissioner is established in conformity with s. 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6 ("the *Act*"). This Report of Findings is in conclusion of a complaint filed by the Applicant asking the Commissioner to investigate the matter pursuant to s. 67(1)(a)(i) of the *Act*.

2. On October 23, 2017, the Applicant submitted an access request to the Office of the Attorney General ("the OAG") under s. 7 of the *Act* as follows:

> Legal costs to date to the Province of New Brunswick for each of the following cases: FM-38-2014, FM-351-2015, FC-349-2015 [since June 30, 2014].

3. The Applicant was seeking the total amount of legal fees expended by the Province to date in relation to the three on-going legal matters currently before the Courts on the Province's decision to convert the public service pension plan from a defined benefit to a shared risk plan.

4. On November 2, 2017, the OAG responded, confirming that it has records in its custody that consist of "invoices received from a law firm for legal services rendered to the Province in relation to the matters identified above, and payment records." Relying on s. 4(b) of the *Act*, the OAG refused access in full on the basis that these records pertain to "legal affairs that relate to the performance of the duties and functions of the office of the Attorney General".

5. The OAG's response further indicated that even if the *Act* were to apply to the requested information, it would nevertheless be protected from disclosure for the following reasons:

   - the invoices and payment records are comprised of solicitor-client privileged information, the cases are ongoing, and the disclosure of the total amount of legal fees expended to date could reasonably be expected to reveal the state of preparedness of each matter, citing s. 27(1)(a) of the *Act* (*solicitor-client privilege*); and
   - for the same reasons, the disclosure of this information could reasonably be expected to be injurious to the conduct of the existing legal proceedings, citing s. 29(1)(o) of the *Act* (*disclosure injurious to the conduct of legal proceedings*).

6. The end of the OAG's response informed the Applicant of the right to file a complaint with our Office or to refer the matter to a judge of the Court of Queen's Bench should the Applicant not be satisfied with the OAG's decision.

7. The Applicant was not satisfied with this response and filed a complaint with our Office on November 24, 2017. In doing so, the Applicant respectfully disagreed with the OAG's argument that disclosure of this information would hurt the ongoing legal proceedings, **as only the dollar amounts are being sought.** The Applicant is of the view that the amounts expended to date in these three cases are paid by taxpayer dollars and disclosure is in the public interest, as well as in keeping with the public's right to know how public funds are being spent.

8. The Applicant also noted that similar information had been disclosed by the OAG in 2016 in response to another applicant's access request and included a copy of this with the complaint. The Applicant stated that the OAG's decision to refuse access to what is essentially the same information in this case is difficult to understand.

9. As required under s. 67(6) of the *Act*, upon receipt of the Applicant's complaint, our Office provided the OAG with formal notice of the complaint on November 29, 2017 and asked the OAG to provide us with the relevant information for our review, as per our notice of complaint process.

10. The OAG replied to our notice of the complaint on December 5, 2017, stating its position that the relevant records pertain to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General. For this reason, the OAG is of the view that the relevant records are excluded from the application of the *Act* by virtue of s. 4(b) and further that the Commissioner does not have jurisdiction to investigate or make recommendations where the *Act* does not apply to the requested information.

11. Despite several discussions and written exchanges between our respective offices, we were unable to arrive at a definitive understanding on our Office's jurisdiction to investigate and issue recommendations where a public body (including the Office of the Attorney General) decides that the *Act* does not apply to certain records by virtue of s. 4 of the *Act*.

12. That being said, the OAG did provide us with further explanations and documentation in support of its position that the legal fee amounts in question are solicitor-client privileged information under s. 27(1) (*legal privilege*) and that the disclosure of the amounts paid to date could reasonably be expected to be injurious to the conduct of existing and ongoing legal proceedings under s. 29(1)(o).

13. At the end of the day, the OAG refused to provide our Office with the information requested by the complainant; however, given that the sole question in this case is the disclosure of legal fee

amounts, I am able to make a determination based on the relevant facts, circumstances, and applicable provisions of the *Act* without the need to review the amounts in question.

14. As the question of the Commissioner's authority to investigate the matter remains unsettled, an informal resolution of this complaint could not be affected, and I am thus concluding with the issuance of this Report of Findings under s. 73 of the *Act*.

III ANALYSIS AND FINDINGS

Section 4: "The *Act* does not apply"

15. As a starting point, it is important to keep in mind two of the main purposes of the *Act* as set out in s. 2:

> 2 The purposes of this Act are
>
> (a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act...
>
> (e) to provide for an independent review of the decisions of public bodies under this Act.

16. One of the founding principles of the *Act* is to provide individuals with a broad right of access to information relating to the public business of public bodies, subject only to the limited and specific exceptions to disclosure found in ss. 17 to 33 of the *Act*. The *Act* presumes that information will be disclosed by public bodies where requested, unless the public body can present a legitimate reason to protect information in keeping with the requirements of the *Act*.

17. This principle is reflected in s. 4, which states that the *Act* applies to all records in a public body's custody or under its control, with a number of specifically delineated exclusions in ss. 4(a) to (k):

> 4 This Act applies to all records in the custody of or under the control of a public body but does not apply to
>
> (a) information in a court record, a record of a judge, a judicial administration record or a record relating to support services provided to a judge or to a court official,
>
> (b) a record pertaining to legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General,
>
> (c) a note made by or for, or a communication or draft decision of, a person who is acting in a judicial or quasi-judicial capacity,

(d) a record of a member of the Legislative Assembly who is not a Minister of a Crown,

(e) a personal or constituency record of a Minister of the Crown....

18. One of the other main purposes of the *Act* is to provide an independent review of public body decisions under the *Act*. Applicants requesting information from a public body who are not satisfied with how a public body processed or responded to an access request have the right to have the public body's decision independently reviewed, either by our Office or by a judge of the Court of Queen's Bench. The independent review function serves as a check and balance to hold public bodies accountable for their decisions on the general public's access rights.

19. With this in mind, the primary issue to be addressed is whether a public body's reliance on s. 4 and resulting unilateral decision that certain information is not subject to the *Act* effectively removes an applicant's right to file a complaint with our Office to seek an independent review of that decision. Does a public body's reliance on s. 4 simply mean the applicant has no right of access to the requested information, or does it **also** mean that an applicant has no further rights with respect to that information under the *Act*, including the right to file a complaint under s. 67 and seek an independent review of the public body's decision?

20. The OAG's position is that where it determines that requested information falls within the scope of the s. 4(b) exclusion, the *Act* does not apply to the record(s) in question, that the applicant thus has no right of access to that information, and that the Commissioner has no authority to review such a decision or to issue recommendations.

21. Where access requests are submitted to public bodies under the *Act*, public bodies are obligated to respond in keeping with the requirements of the *Act*. In making a decision that a certain record is not subject to the *Act* by virtue of s. 4, a public body is making a decision about the applicant's access rights under the *Act*, and is, as with all other access requests, required to meet its duty to assist an applicant under s. 9 and to provide the applicant with a meaningful response justifying the refusal of any of the requested information as required by s. 14.

22. In particular, s. 14(1)(c)(ii) requires that public bodies, in refusing access to requested information, inform the applicant "of the reasons for the refusal and the specific provision of this Act on which the refusal is based," and further "that the applicant has the right to file a complaint with the Commissioner about the refusal or to refer the matter to a judge of The Court of Queen's Bench of New Brunswick for review" (s. 14(1)(c)(iv)).

23. As the OAG specifically relied on s. 4(b) in this case, some discussion on this particular provision is also warranted.

Paragraph 4(b)

24. Paragraph 4(b) excludes records from the application of the *Act* where they pertain to "legal affairs that relate to the performance of the duties and functions of the Office of the Attorney General". I should note here that New Brunswick is the only jurisdiction in the country with a specific exclusion to this effect.

25. The term "legal affairs" is not defined in the *Act* but the duties and functions of the Attorney General are set out in s.2 of *An Act Respecting the Role of the Attorney General,* R.S.N.B. 2011, c.116*:*

> 2 The Attorney General is the law officer of the Executive Council and shall do the following:
>
> (a) see that the administration of public affairs is in accordance with the law;
> (b) perform the duties and have the powers that at common law belong to the Attorney General, so far as those duties and powers are applicable to New Brunswick, and perform the duties and have the powers that, until the *Constitution Act, 1867*, belonged to the Office of the Attorney General in the Province of New Brunswick and which are, under the provisions of that Act, within the scope of the powers of the Legislature;
> (c) carry out the duties and exercise the powers that are attendant to the prosecution of offences by and in proceedings under statutes and regulations in which offences are created;
> (d) advise the government on all matters of law connected with legislative enactments and on all matters of law referred to him or her by the government;
> (e) advise the heads of government departments on all matters of law connected with those departments;
> (f) conduct and regulate all litigation for and against the Crown;
> (g) advise government on all matters of a legislative nature and superintend and draft all government measures of a legislative nature;
> (h) perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant-Governor in Council.

26. The issue as to whether the Attorney General can unilaterally decide that a particular record pertains to "legal affairs that relate the performance of the duties and functions of the Office of the Attorney General" so as to deprive this Office of the authority to investigate or make

recommendations with respect to a complaint filed under the *Act* has never been decidedly settled by the Court.

27. On the other hand, the Court of Queen's Bench has commented on the scope of s. 4(b) on a few occasions and has make it known quite clearly that it is not prepared to accept the OAG's interpretation of s.4(b).

28. In *Bray v. New Brunswick (Attorney General)*, (2016) N.B.J. 265, Justice Garnett commented on the scope of s. 4(b). In that case, the applicant had referred pursuant to s. 65(1)(a) of the *Act* the OAG's refusal to provide access to certain records but her comments are nevertheless apposite to this case:

> [22] Section 4(b) is relied upon by the OAG to protect every document in its possession.
>
> [23] The Government submits "that the effect of this provision is that the *Act* has no application to the records of the OAG and that disclosure of records is therefore unavailable to the applicant" (Respondents' brief paragraph 13).
>
> [24] The Government argues that every record in the OAG pertains to "legal affairs" and that the OAG is therefore completely exempt from the provisions of the *Act* in every case. I have been invited to find that the proposition is valid. I will refrain from doing so. If the exemption related to every record in the OAG it would be unnecessary to use the limiting words "legal affairs". It may be that every document in the OAG pertaining to the legislative amendment to the *Judicature Act* is a "legal affair" and is therefore exempt but I am unwilling to speculate that this would be true in every case. Such speculation would, of course, be *obiter* but it might encourage the OAG to treat Referrals under the *Act* as never applying to them and therefore not worthy of their attention. The assertion that "the *Act* has no application to the records of the OAG" has not been established and should not be relied upon for blanket refusals to provide documents to applicants under the *Act*".

29. In *Charleson v. New Brunswick (Attorney General),* (2014) N.B.J. 91, Justice Clendening put it this way:

> [13] The limiting term in subsection 4(b) "legal affairs" is not defined in the *RTIPPA.* Determining the Legislature's intent in using the term in subsection 4(b) is no easy task. The parties were unable to find another statute to define the term. The term "legal affairs" is exceptionally vague, and it is therefore difficult to deduce the Legislature's intention as opposed to terms such as "legal advice" or "legal services".
>
> [14] The interpretation advanced by counsel for Mr. Charleson is preferred over that of counsel for the Attorney General for the following reasons.
>
> [15] It should be noted that the *RTIPPA* provides a list of public bodies that are completely exempt from the application of the *RTIPPA.* If the Legislature had intended a broad exclusion, surely it would have used clear and unequivocal language demonstrating this intention. In my

> opinion, a blanket exclusion of the Office of the Attorney General from the application of the *RTIPPA* would hinder accountability, hence defeat the purpose of the *Act*.

30. While the amount of legal fees incurred on a particular matter certainly relates to legal work conducted by the OAG or through private law firms on behalf of the Province, I am not prepared to accept that information of this nature falls outside the scope of the *Act* by virtue of s. 4(b). In my view, such an interpretation and application of s. 4(b) would be contrary to the spirit and intent of the *Act* as it would presume that the general public has no right of access on principle to legal fee information.

31. For the reasons explained above, my view is that the OAG's assertion that our Office does not have jurisdiction to investigate or make recommendations in this matter by virtue of s. 4(b) has no merit, nor do I agree that legal fee information falls within the scope of s. 4(b) of the *Act*. The disclosure of legal fee information is more appropriately addressed under the solicitor-client privilege exception found in s. 27 of the *Act*, as explained below.

Section 27: Solicitor-client privilege

32. The OAG is the in-house law firm for Provincial departments, and as described above in its duties and powers under s. 2 of *An Act Respecting the Role of the Attorney General,* it provides legal advice and opinions and legal representation on all sorts of matters facing government departments. As a starting point, there is no question that the vast majority of the work conducted by, and thus the records in the custody or under the control of, the OAG will fall under the umbrella of solicitor-client privilege found in s. 27 of the *Act*.

33. Further, where the OAG is the solicitor in the solicitor-client relationship, s. 27(2) of the *Act* prohibits the OAG from disclosing solicitor-client privilege information:

> 27(2) The head of a public body shall refuse to disclose to the applicant information that is subject to a solicitor-client privilege of a person other than the public body.

34. This makes sense, as the solicitor for a public body, which is most often the Office of the Attorney General, does not have the authority to waive the client's privilege – the privilege can only be waived by the client (in a public sector context, another public body) who enjoys the privilege.

35. The key question in the present case is whether legal fees are solicitor-client privileged information. On this point, we conducted a review of pertinent case law and decisions of other Canadian access oversight bodies, all of which have adopted the same approach to legal fees.

36. The leading Supreme Court of Canada decision on this question is *Maranda v. Richer* (2003 SCC 67). The Supreme Court of Canada confirmed that, as a general rule, the amount of legal fees paid by a client is protected by solicitor-client privilege; however, as it is a general rule, the presumption of the privilege can be rebutted.

37. In light of this decision, we then looked to the decisions of other Canadian access to information oversight bodies to determine how they have approached the question of the disclosure legal fees. Several other Canadian jurisdictions' oversight bodies have adopted the following test (including British Columbia, Saskatchewan, Prince Edward Island, Ontario, and previously upheld by the BC Supreme Court in *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner)* (2012 BCSC 427)).

38. Legal billing information is presumptively privileged unless the communication is "neutral" and does not directly or indirectly reveal privileged communications.

39. In determining whether the presumption has been rebutted, the following two questions must be considered:

    - Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
    - Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

40. If the answer to either or both of these questions is yes, then the legal fees can be protected as solicitor-client privileged information under s. 27(1)(a) of the *Act*. If the answer to both questions is no, then the presumption that the legal fees constitute solicitor-client privileged information is rebutted and the information cannot be withheld under the s. 27(1)(a) exception to disclosure.

41. I adopt the above test. In my view, the circumstances at issue in the Supreme Court of Canada decision are quite different than where a public body is asked by a member of the public to disclose information pursuant to the *Act* about a particular legal matter. The question of legal fees paid by a private citizen to his or her lawyer (as in the *Maranda* case) are generally no one's business other than the citizen and counsel, while the question of how much a public body has paid from taxpayer dollars on a legal matter may well merit public scrutiny. In that context, it makes sense that legal fee information can only be protected from disclosure where clearly merited under the circumstances.

42. In applying the above test to the present case, I note that the OAG indicated in its response to the Applicant that it was refusing access to the total legal costs to date for the following reasons:

- the invoices and payment records are comprised of information that is subject to solicitor-client privilege;
- the cases are ongoing; and
- the disclosure of the total amount of expended on legal fees to date could reasonably be expected to reveal the state of preparedness for each matter.

43. During our investigation, the OAG further submitted that it did not disclose the requested legal fee information to the Applicant due to a concern that this information could lead someone to discovering information about matters that are subject to ongoing litigation and in order to avoid its use against government's interest in the specific litigation. In support of its position, the OAG cited three cases:

- *Municipal Insurance Assn. (British Columbia) v. British Columbia (Information and Privacy Commisioner* (1996 Carswell BC 2854 (BC) at para. 39;
- *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner)* (2012 BCSC 427) at para. 135; and
- *Newfoundland and Labrador (Information and Privacy Commissioner) v. College of the North Atlantic* (2013 NLTD 185).

44. In all three of these cases, the courts found the fact that the litigation in question was ongoing at the time of the access request to be a significant consideration in arriving at a finding that the presumption that the legal fee information was protected from disclosure under the umbrella of solicitor-client privilege.

45. In the Newfoundland decision cited above, the applicant was also a litigant in a wrongful dismissal action against the public body, and had requested access to invoices for legal services, after receiving redacted copies of legal invoices from the same public body on this matter in the past. In that case, the Court found the following:

> [40] The most important contextual factors here are that there is litigation ongoing and that the records requested are the invoices sent to one party for legal services obtained in connection with that litigation and, presumably, in connection with any other legal issues between [the public body] and [the applicant].

46. We acknowledge that the disclosure of legal invoices, particularly during the course of ongoing litigation, by their very nature contain solicitor-client privileged information, as they set out the details and nature of the work conducted; however, the Applicant has not requested the invoices themselves, but rather the total global amounts spent to date on each of the three named matters.

47. In applying the principles set out above to the present case, I am prepared to accept that there may be grounds for some concern in disclosing the total amount of legal fees expended in each of these three cases, as requested by the Applicant. In my view, there is an argument to be made that the disclosure of the specific amounts expended to date for each case may, depending on the respective total amounts, reveal something about the steps taken or work done to address a particular issue within the context of one of these cases, meaning that the presumption that this information falls within the scope of solicitor-client privilege has not been rebutted. For this reason, I am not recommending that the total amounts of legal fees expended to the date of the Applicant's request for each of the three named cases be disclosed.

48. That being said, I am not prepared to accept that the Applicant, and by extension, the general public, do not have the right to know in general terms about the amount of legal fees expended by the Province on a particular matter. In my view, the total global amount of legal fees expended to date for all three matters is "neutral" information. I cannot fathom how an assiduous inquirer, aware of the pertinent background, could use such information (i.e. the aggregate amount of legal fees paid to date with respect to the three pension cases) to deduce or otherwise acquire privileged communications" (see para. 28 of the *Central Coast* case).

49. In my view, the presumption that the total global amount of legal fees expended to the date of the Applicant's request (October 23, 2017) falls within the scope of solicitor-client privileged information is rebutted and can be disclosed without directly or indirectly revealing a privileged communication.

50. In light of this finding, I must also consider whether the OAG's reliance on the s. 29(1)(o) exception has merit before arriving at a final conclusion.

Section 29(1)(o): Disclosure injurious to the conduct of legal proceedings

51. The OAG also raised the possibility that the legal fee information falls within the scope of s. 29(1)(o):

> 29(1) The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to
>
> ...
>
> (o) be injurious to the conduct of existing or anticipated legal proceedings.

52. This is a discretionary exception to disclosure based on a reasonable expectation of harm test. To properly rely on this exception, a public body must first demonstrate that the information falls within its scope by demonstrating:
    - that there are related existing legal proceedings, or in the alternative, that the public body has a reasonable belief that related legal proceedings are imminent; and
    - how the disclosure of the information in question could reasonably be expected to be injurious to the conduct of such legal proceedings.

53. The mere fact that legal proceedings are imminent or ongoing is generally not sufficient to meet the test, as the public body must also show how the disclosure of the information could reasonably be expected to harm the conduct of the proceedings.

54. I note that the wording of the exception does not contemplate the impact of the disclosure of information on the parties to the proceedings, including the public body. In my view, this exception is not intended to protect the public body's interests in an actual or anticipated legal proceeding, but rather the **conduct** of the proceeding itself.

55. As this is a discretionary exception to disclosure, where the public body has demonstrated that the information in question falls within the scope of the exception, it must also show that it exercised its discretion by taking into account relevant factors in arriving at the decision to refuse access.

56. In the present case, and on this point, the OAG informed us that the 2016 disclosure of legal fee information to a different and unrelated applicant formed part of an affidavit and used in argument by a party to one of the ongoing pension reform actions before the courts. The party in question brought a motion seeking to have the Province pay the plaintiffs' legal fees to pursue the action against the Province, and the 2016 disclosure of legal fee information was attached to the affidavit in question. The OAG submits that the 2016 disclosure was a waiver of solicitor-client privilege and that the information was subsequently used against the government's interests by an opposing party in that legal proceeding.

57. It is clear from the Request itself that there are ongoing legal proceedings in all three cases, which remain before the courts to this day, thus satisfying the first part of the test.

58. As for the second part of the test, the arguments and facts raised by the OAG in support of its reliance on this exception do not demonstrate how the disclosure of the legal fee information could reasonably be expected to harm the conduct of these proceedings. The OAG states that the 2016 disclosure was later used in a motion brought before the court to argue that the Province should cover its legal fees in that proceeding, but this is not sufficient to show how the disclosure of that information was injurious or harmful to the conduct of the ongoing proceedings.

59. For this reason, I find that the legal fee information does not fall within the s. 29(1)(o) exception of the *Act*.

RECOMMENDATION

60. In light of the above findings, I find that the OAG is entitled to protect the total amount of legal fees expended to the date of the Applicant's request for each of the three named matters (FM-38-2014, FM-351-2015, FC-349-2015) as solicitor-client privileged information under s. 27 of the *Act*.

61. That being said, I am of the view that the presumption that the total global amount of legal fees expended for all three of these matters falls within the scope of solicitor-client privileged information is rebutted and can be disclosed without directly or indirectly revealing a privileged communication. For this reason, and pursuant to s. 73(1)(a)(i) of the *Act*, I recommend that the OAG disclose the total global amount of legal fees paid for all three proceedings up to the date of the request (October 23, 2017).

62. As set out in s. 74(2) of the *Act*, the OAG is to notify the Applicant of its decision with respect to this recommendation. If the OAG decides to accept the recommendation, s. 74(3) requires the OAG to comply or make the decision it deems appropriate within 15 days of receipt of this Report. If the OAG decides not to accept the recommendation or fails to notify the Applicant of its decision, the Applicant will have right to appeal the matter to the Court of Queen's Bench in accordance with section 75 of the *Act*.

63. This Report issued in Fredericton, New Brunswick this 23rd day of May 2018.

The Hon. Alexandre Deschênes, Q.C.
Integrity Commissioner of New Brunswick