Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 289-2021

Ministry of Justice and Attorney General

October 26, 2022

Summary: The Applicant sought the contingency fee information contained with a contingency fee agreement between the Government of Saskatchewan and its lawyers. The Ministry of Justice and Attorney General (Justice) refused the Applicant access pursuant to subsections 14(a), 15(1)(d), 18(1)(d) and 22(a), (b), and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Justice elected to make a *prima facie* case that subsection 22(a) of FOIP applies to the full contingency fee agreement by providing an affidavit of records and schedule of records to the Commissioner. It also provided a submission that detailed its arguments as to why subsection 22(a) of FOIP applies to the full contingency fee agreement. The Commissioner found that Justice did not make a *prima facie* case that subsection 22(a) of FOIP applies to the contingency fee information. Since Justice elected to make a *prima facie* case to my office, it had not provided the Commissioner with a copy of the records. Therefore, the Commissioner could not find that other exemptions relied upon by Justice applied to the information sought by the Applicant. He recommended that Justice release the contingency fee information (but not the entire contingency fee agreement) to the Applicant.

I BACKGROUND

[1] On October 25, 2021, the Ministry of Justice and Attorney General (Justice) received the following access to information request from the Applicant:

> Extract indicating the contigency [sic] fees, from the contingency fee agreement of the government and lawyers representing the government in the medicare cost recovery lawsuit against the tobacco industry, filed on June 8, 2012. The full contigency [sic] fee agreement could be provided, but this is not necessary.

[2] In a letter dated November 8, 2021, Justice responded, but indicating it was refusing the Applicant access. Justice cited subsections 14(a), 15(1)(d), 18(1)(d) and 22(a), (b), and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On November 12, 2021, the Applicant requested that my office review Justice's decision to refuse them access.

[4] On November 23, 2021, my office notified both the Applicant and Justice that my office would be undertaking a review.

[5] On February 24, 2022, my office received a submission from the Applicant.

[6] On April 14, 2022, my office received a submission from Justice.

II RECORDS AT ISSUE

[7] The information sought by the Applicant are the contingency fees set out in a contingency fee agreement between the Government of Saskatchewan and its lawyers. The Applicant has indicated they were not necessarily seeking the entire contingency fee agreement.

[8] However, Justice has withheld the entire contingency fee agreement from the Applicant.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] Justice qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I find that I have jurisdiction to conduct this review.

2. Did Justice make a *prima facie* case that subsection 22(a) of FOIP applies?

[10] My office's *Rules of Procedure, Part 9: Solicitor-Client or Litigation Privilege*, (revised September 1, 2022) at page 34 outlines the process a government institution is to follow when claiming solicitor-client or litigation privilege:

> **9-1 Claiming solicitor-client or litigation privilege**
> (1) Where solicitor-client or litigation privilege is being claimed as an exemption by the head or delegate, the commissioner's office will request the head or delegate to provide a copy of the records, or an affidavit of records, schedule and redacted record over which solicitor-client or litigation privilege is claimed setting out the elements requested in Form B.

[11] For this review, Justice elected to make a *prima facie* case that subsection 22(a) of FOIP applies to the full contingency agreement. Justice provided my office with an affidavit of records, including the schedule of records, signed by its Director, Access to Information. Justice also provided a submission.

[12] Subsection 22(a) of FOIP provides:

> **22** A head may refuse to give access to a record that:
>
> (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[13] Subsection 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege (*Guide to FOIP*, Chapter 4: "Exemptions from the Right of Access, updated April 30, 2021, [*Guide to FOIP*, Ch. 4], p. 255).

[14] The following three-part test can be applied:

1. Is the record a communication between a solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

(*Guide to FOIP*, Ch. 4, pp. 258-262)

1. Is the record a communication between a solicitor and client?

[15] A "communication" is the process of bringing an idea to another's perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct (*Guide to FOIP*, Ch. 4, p. 258).

[16] A "client" means a person who consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf. It includes a client of the law firm in which the lawyer is a partner or associate, whether the lawyer handles the client's work (Guide to FOIP, Ch. 4, p. 258).

[17] A "lawyer" means a member of the Law Society and includes a law student registered in the Society's pre-call training program (*Guide to FOIP*, Ch. 4, p. 259).

[18] The government institution should make it clear who the solicitor is and who the client is (*Guide to FOIP*, Ch. 4, p. 259).

[19] In its submission, Justice asserted that a solicitor-client relationship exists between the Government of Saskatchewan (client) and Bennett Jones LLP and Siskinds LLP (solicitors).

[20] Justice asserted that the agreement is a communication between it (the client) and its lawyers. It cited paragraph [72] of *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172 (CanLII) (*Imperial)* which says:

> [72] The entering into a contingency fee agreement is an act. The fact that it exists and the parties who are participating in it are identified would not therefore be protected by the privilege. It does not follow, however, that the information contained in the agreement could not be regarded as a "communication" and therefore protected.

[21] I note that in *Imperial*, the Court concluded that the contingency fee agreement at issue in that case constituted a communication between the client and lawyers at paragraph [76].

Similarly, I find that the contingency fee agreement at issue in this case qualifies as a communication between solicitors and client.

2. Does the communication entail the seeking or giving of legal advice?

[22] Within the affidavit provided to my office, Justice asserted that the communication entails the seeking or obtaining of legal advice and the communication was intended to be kept confidential.

[23] "Legal advice" means a legal opinion about a legal issue and a recommended course of action, based on legal considerations, regarding a matter with legal implications (*Guide to FOIP*, Ch. 4, p. 261).

[24] In its submission, Justice did not provide arguments as to how the record at issue entails the seeking or giving of legal advice. Instead, Justice asserted that all communications between a solicitor and client are *prima facie* confidential. To support its assertion, Justice cited *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII), [2016] 1 SCR 381 at paragraphs [19] and [20] where the Supreme Court of Canada (SCC) said:

> [19] Although *Descôteaux* appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para. 30). While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in Maranda) must be presumed to be privileged absent evidence to the contrary (Maranda, at paras. 33-34; see also *Foster Wheeler*, at para. 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para. 34; R. v. *Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, at p. 289).
>
> [20] In the case at bar, therefore, we cannot conclude at the outset that Mr. Thompson's communications with his clients are distinct from financial records that disclose various facts about their relationships in order to determine whether solicitor-client privilege covers those facts. **Absent proof to the contrary, all of this information is prima facie privileged, and therefore confidential.**
>
> [Emphasis added by Justice]

[25] Justice also cited *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 (CanLII), [2016] 1 SCR 336 at paragraph [40]:

> [40] From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (Maranda, at paras. 30-33; Foster Wheeler, at para. 38). The line between facts and communications may be difficult to draw (S. N. Lederman, A.W. Bryant and M.K. Fuerst, The Law of Evidence in Canada (4th ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). **The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (Maranda, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered prima facie confidential in nature"** (Foster Wheeler, at para. 42).
>
> [Emphasis added by Justice]

[26] Therefore, Justice's position was that there was a rebuttable presumption that all communications between a solicitor and client fall within the privilege. Justice asserted that information shared between solicitor and client are *prima facie* confidential. This would include the contingency fee agreement between the Government of Saskatchewan and its lawyers.

[27] In contrast, the Court of King's Bench in *Rieger et al. v. Burgess et al.*, 1989 CanLII 4593 (SK KB) (*Reiger*), Malone J. found that the financial arrangements (and the contingency nature thereof) was not privileged information:

> [3] **The plaintiffs maintain the terms of the financial arrangements between themselves and their counsel, and in particular the contingency nature thereof if that should indeed be the case, are privileged communications between solicitor and client and need not be disclosed.** Counsel for the plaintiffs cites numerous authorities with respect to solicitor/client privilege including the following from Sopinka and Lederman, The Law of Evidence in Civil Cases at p. 157:
> ...
> [4] This statement of the principle and the other authorities referred to by counsel for the plaintiffs emphasize the need for confidentiality to facilitate the full disclosure of all facts by a client to his solicitor so proper legal advice may be given. **I fail to see how disclosure of the financial arrangements between the plaintiffs and their**

> **solicitors offends this principle.** The professional relationship between the parties would not be compromised or the essential element of confidentiality upon which it is based infringed upon. **The defendants are not seeking disclosure of any communications between the plaintiffs and their solicitors that deal with the prosecution of the action or the advice given with respect thereto.** They are seeking to determine if any monies are owed to the plaintiffs by their solicitors which they are entitled to do on an examination in aid of execution. **This, in my opinion, is not privileged information as it has nothing to do with the seeking and obtaining of legal advice and the past conduct or future of litigation.**
>
> [Emphasis added]

[28] In *Burr v. Bhat et al.* 1997 CanLII 22753 (MB KB) (*Burr*), Master Lee agreed with the Malone J. in *Reiger*:

> 10 The reasoning employed by Malone, J. in the Rieger case does not appear to be at odds with the legal principles canvassed by Professor Stuesser in the article the plaintiff is relying on. Professor Stuesser discusses what communications are in fact privileged and cites the definition from *Wigmore, Treatise on Evidence* (3rd Ed., 1940), vol. 8, para. 2292. *Wigmore* defined solicitor client privilege in the following terms:
>
> 1) Where legal advice of any kind is sought
> 2) from a professional legal adviser in his capacity as such,
> 3) the communications relating to that purpose,
> 4) made in confidence
> 5) by the client,
> 6) are at his insistance permanently protected
> 7) from disclosure by himself or by the legal adviser,
> 8) except the protection be waived.
>
> 11 **It is difficult to comprehend how a fee arrangement between a solicitor and a client can fall within the definition of a communication made in confidence for the purpose of seeking legal advice**.
>
> 12 Accordingly, I am satisfied that the claim of solicitor client privilege cannot be sustained and that the plaintiff is ordered to answer the questions asked by way of interrogatories.
>
> [Emphasis added]

[29] At paragraph [79] of *Imperial*, the Court observed that Canadian case law has not been uniform in dealing with the question of whether financial arrangements between lawyers and client are subject to solicitor-client privilege. It contrasted the findings in *Reiger* and *Burr* with two British Columbia Supreme Court decisions, *Municipal Insurance*

Association of British Columbia v. British Columbia (Information and Privacy Commissioner) (1996), 1996 CanLII 521 (BC SC), 143 D.L.R.(4th) 134 and *Legal Services Society v. British Columbia (Information and Privacy Commissioner) (1996)*, 1996 CanLII 1780 (BC SC), 140 D.L.R.(4th) 372.

[30] The two British Columbia Supreme Court decisions found that financial arrangements between solicitor and client are privileged. However, both decisions dealt with billing information for services already rendered. This contrasts with the case before me where I am dealing specifically with the contingent fee information contained within a contingent fee agreement. Contingent fee information is distinct from billing information for services rendered, such as invoices. A lawyer's invoice may detail the legal services already rendered, from which privileged information between solicitor and client may be drawn. The contingent fee information contained with a contingent fee agreement may detail what is to be paid based on an outcome in the future. In other words, billing information such as invoices deals with the past whereas contingent fee information within a contingent fee agreement deals with the future. Therefore, the details of the two British Columbia Supreme Court decisions appear not relevant to the matter before me.

[31] In *Imperial*, the Court said that if the disclosure of the contingent fee agreement would disclose information which legal advice could be based, then the document should be regarded as privileged:

> [95] In my view, in light of conflicting non-binding judicial views on the issue, the proper way to approach the question of whether a fee agreement is privileged is to consider whether the fundamental purpose of solicitor-client privilege would be subverted or compromised if the terms of the agreement were disclosed. This is the approach taken to the issue in *Rieger v. Burgess*. **If, therefore, disclosure of a contingency fee agreement would involve disclosure of information on which legal advice could be based, or the legal advice itself, or could reasonably lead to the discovery of legal advice passing between lawyer and client, then the document should be regarded as privileged**.
>
> [Emphasis added]

[32] The Applicant in this case is seeking the contingency fee information. They have not sought the entire contingency fee agreement. Justice has provided arguments that the entire

contingency fee agreement is presumptively privileged. Justice's description of the contingency fee agreement provides that the agreement "goes beyond the fee itself" and describes other information that it argues to be privileged information. The Applicant is merely seeking the "fee itself". They are not seeking any other information contained within the contingency fee agreement.

[33] I find that Justice has not demonstrated how the disclosure of the contingency fee information would disclose legal advice or any information on which legal advice could be based.

[34] I find that Justice has not met the second part of the test. There is no need to consider the third part of the test.

[35] I find that Justice has not made a *prima facie* case that subsection 22(a) of FOIP applies to the contingency fee information. I find that Justice has not met the burden of proof pursuant to section 61 of FOIP. I recommend that Justice disclose the contingency fee information (not the entire contingency fee agreement) to the Applicant.

[36] I should note that the Government of Newfoundland and Labrador (Government of NFLD) received a similar access request. It has published its response. I note that not only did the Government of NFLD released the contingency fee information, it has also published a copy of its response to its website, available here.

[37] Justice also cited subsections 14(a), 15(1)(d), 18(1)(d), 22(b) and (c) of FOIP as reasons for withholding the contingency fee agreement in full. My office did not receive a copy of the records. Justice had only provided my office with an affidavit and schedule of records. As I am not able to view the record where Justice applied subsection 22(a) of FOIP, I am also not able to view the record to determine if Justice properly applied subsections 14(a), 15(1)(d), 18(1)(d), 22(b) and (c) of FOIP (Review Report 145-2019 at [48]). As I have said earlier, section 61 of FOIP places the burden of proof on a government institution that an exemption applies. Justice has not done so. Therefore, I find that Justice has not properly applied subsections 14(a), 15(1)(d), 18(1)(d), 22(b) and (c) of FOIP.

IV FINDINGS

[38] I find that I have jurisdiction to conduct this review.

[39] I find that Justice has not made a *prima facie* case that subsection 22(a) of FOIP applies to the contingency fee information.

[40] I find that Justice has not met the burden of proof pursuant to section 61 of FOIP.

[41] I find that Justice has not properly applied subsections 14(a), 15(1)(d), 18(1)(d), 22(b) and (c) of FOIP.

V RECOMMENDATION

[42] I recommend that Justice disclose the contingency fee information (not the entire contingency fee agreement) to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 26th day of October, 2022.

Ronald J. Kruzeniski, K.C.
Saskatchewan Information and Privacy Commissioner