



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2024-045

October 15, 2024

Department of Justice and Public Safety

Summary:

The Complainant made five access to information requests to the Department of Justice and Public Safety seeking information on legal bills and the costs of expert witnesses for several criminal prosecutions. The Department withheld all responsive records, asserting that the legal bills were covered by solicitor-client privilege and the expert witness costs were covered by litigation privilege. The Complainant argued that not all aspects of a legal bill would violate solicitor-client privilege if disclosed, and that all litigation in the criminal prosecutions was over and therefore litigation privilege could not apply. Given that the prosecutions were over, that the identity of the client was known, and that there were multiple criminal proceedings for which information was sought, the Commissioner recommended releasing specific parts of the legal bills in order to disclose the overall cost. As for the claim of litigation privilege, the Commissioner determined that it was not applicable in this case as the prosecutions were finished. The Commissioner therefore recommended the release of specific information within the responsive records that disclosed the total payments made to experts in the criminal prosecutions at the center of the access request.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, section 30(1).

Authorities Relied On:

[Maranda v. Richer](#), 2003 SCC 67.
[Newfoundland and Labrador \(Information and Privacy Commissioner\) v. College of the North Atlantic](#), 2013 NLTD(G) 185.

[Newfoundland and Labrador Legal Aid Commission \(Re\)](#), 2019 NLSC 171.

[Ontario \(Attorney General\) v. Ontario \(Assistant Information and Privacy Commissioner\)](#) 2005 CanLII 6045 (ON CA).

[R. v. Stinchcombe](#), [1991] 3 S.C.R. 326.

[R v. Cunningham](#), 2010 SCC 10.

[R. v. Haevisher](#), 2014 BCSC 1008.

[Blank v. Canada \(Minister of Justice\)](#), [2006] 2 S.C.R. 319.

NL OIPC Reports [A-2018-019](#); [A-2023-044](#); and [A-2024-033](#).

[Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador.](#)

BACKGROUND

[1] The Complainant made five separate but related access to information requests to the Department of Justice and Public Safety:

1. JPS/58/2024: All records (including but not limited to comments, assessments, meeting minutes, meeting agendas, meeting notes, briefing notes, invoices and receipts, including drafts of same) relating to costs and expenses invoiced and/or paid (including but not limited to salaries, wages disbursements, invoices, and expenses invoiced and/or paid, and the cost of expert reports invoiced and/or paid), by the Government of Newfoundland and Labrador and/or department of Justice and Public Safety related to the cases of [named defendants], between January 1, 2014 and April 3, 2024.
2. JPS/60/2024: All records (including but not limited to comments, assessments, meeting minutes, meeting agendas, meeting notes, briefing notes, invoices, and receipts, including drafts of same) relating to costs and expenses invoiced and/or paid to [named solicitor] (also known as [named solicitor]), including but not limited to salaries, wages, disbursements, invoices, and expenses paid to [named individual] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and April 3, 2024.
3. JPS/61/2024: All records (including but not limited to comments, assessments, meeting minutes, meeting agendas, meeting notes, briefing notes, invoices, and receipts, including drafts of same) relating to costs and expenses invoiced and/or paid to [named solicitor] (also known as [named solicitor]), including but not limited to salaries, wages, disbursements, invoices, and expenses paid to [named solicitor] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and April 3, 2024.
4. JPS/64/2024: All records (including but not limited to comments, assessments, meeting minutes, meeting agendas, meeting notes, briefing notes, invoices, and receipts, including drafts of same) relating to costs and expenses invoiced and/or paid to [named expert] (also known as [named expert]), including but not limited to salaries, wages, disbursements, export report costs, invoices, and expenses paid to [named expert] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and April 3, 2024.
5. JPS/65/2025: All records (including but not limited to comments, assessments, meeting minutes, meeting agendas, meeting notes, briefing notes, invoices, and receipts, including drafts of same) relating to costs and

expenses invoiced and/or paid to [named expert] (also known as [named expert]), including but not limited to salaries, wages, disbursements, expert report costs, invoices, and expenses paid to [named expert] by the Government of Newfoundland and Labrador and/or the department of Justice and Public Safety between January 1, 2014 and April 3, 2024.

- [2] A search by the Department produced responsive records, all of which were withheld from the Complainant pursuant to section 30(1) of the **Access to Information and Protection of Privacy Act, 2015** (ATIPPA, 2015).
- [3] The Complainant disagreed with the Department's position and filed a complaint with this Office. The Department has not provided this Office with a copy of the records to support its claim that solicitor-client or litigation privilege applies.
- [4] The circumstances and history of this matter are connected to [Report A-2023-044](#), and involve a request for information about costs associated with several prosecutions that are subject to a prosecutorial stay of proceedings. This places the prosecution on hold for up to one year. The one-year period that allows the Crown to resume the prosecution has now expired and legally it is as if proceedings against all the accused had never been commenced.

PUBLIC BODY'S POSITION

- [5] The Department asserts the legal and expert bills sought by the Complainant are subject to either solicitor-client or litigation privilege. The Department notes there is a presumption that legal bills are covered by solicitor-client privilege and submits that the Complainant has not rebutted this presumption. In support of this position, the Department notes that there is only one single identifiable client and there has been media coverage of the criminal prosecutions at the center of the access requests. As such, an assiduous inquirer could use the disclosed legal bills to make inferences regarding communications covered by solicitor-client privilege.
- [6] As for litigation privilege, the Department argues that other Indigenous people have been charged with similar offences. As these new charges will also deal with issues of Indigenous

rights, the litigation started against those listed in the access request should be considered ongoing due to the charges against other Indigenous people for similar offences. However, no evidence of who these individuals are and their connection to the accused in this matter was provided by the Department.

COMPLAINANT'S POSITION

- [7] With respect to solicitor-client privilege, the Complainant asserts that the requested records can be provided in a manner that discloses the costs incurred by the province in these prosecutions but does not breach solicitor-client privilege. As for the claims of litigation privilege, the Complainant notes there is no longer any litigation between the Crown and those accused and therefore litigation privilege is not applicable.

ISSUES

- [8] At issue in this report is whether the records are subject to solicitor-client privilege or litigation privilege and whether the Department has properly applied section 30 of ATIPPA, 2015.

DECISION

- [9] The section of ATIPPA, 2015 relevant to this matter is as follows:

Section 30.(1) The head of a public body may refuse to disclose to an applicant information

- (a) that is subject to solicitor and client privilege or litigation privilege of a public body; or
- (c) that would disclose legal opinions provided to a public body by a law officer of the Crown.

Solicitor-Client Privilege and Legal Bills

[10] In general, there is a presumption that solicitor-client privilege attaches to the legal bills between a solicitor and their client. This rule was established in [Maranda v. Richer](#), which involved a police search of a lawyer's office and the confiscation of billing information. In reaching its decision regarding legal bills and solicitor-client privilege, the Supreme Court stated:

[30] . . . The protection conferred by the privilege covers primarily acts of communication engaged in and for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible to evidence (Stevens, *supra*, at para. 25) It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as it has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds.

[31] However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it:

The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

[32] While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitate a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect . . .

[33] . . . Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the

privileged category will better ensure that the objectives of this of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum . . .

[11] In [Newfoundland and Labrador \(Information and Privacy Commissioner\) v. College of the North Atlantic](#), Chief Justice Orsborn adopted the position in **Maranda** regarding the application of solicitor-client privilege to legal bills in this province. According to Chief Justice Orsborn, a decision on releasing legal bills does not rest on establishing an exception to solicitor-client privilege, but rather that the bills, in whatever form, did not attract privilege in the first place.

[12] In his decision, Chief Justice Orsborn agreed with the Ontario Court of Appeal in [Ontario \(Attorney General\) v. Ontario \(Assistant Information and Privacy Commissioner\)](#), where it states:

11. While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

12. The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII). If there is a reasonable possibility that the assiduous inquirer, aware of the background information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of feed paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.

[13] The law surrounding the release of legal bills in response to access to information requests was further developed in [Newfoundland and Labrador Legal Aid Commission \(Re\)](#). That decision dealt with an application from the Legal Aid Commission objecting to recommendations made by this Office in [Report A-2018-019](#). In that Report, this Office recommended legal bills for private lawyers paid for through Legal Aid could be disclosed if

sufficient redactions were made to satisfy concerns that an assiduous observer could not discern from the records any communication that would violate solicitor-client privilege.

[14] To summarize:

- There is a presumption that legal bills are covered by solicitor-client privilege;
- That presumption can be overcome if it is clear that an assiduous observer could not deduce from the requested legal bill communications that are protected by solicitor-client privilege;
- Information can be redacted from a legal bill so as to render it neutral and not subject to solicitor-client privilege; and
- Each case is judged on its own merits.

[15] There is no exhaustive list of factors to consider when determining whether a presumption that solicitor-client privilege attaches to a legal bill has been rebutted. Various jurisdictions across Canada have considered whether the legal bills disclose specific activities and dates; whether they provide insight into legal strategies being pursued or considered; whether the legal matter is ongoing; whether it is heavily reported upon in the media; and whether there is a single client.

The Criminal Law Context

[16] In paragraph 46 of *Legal Aid*, Justice Orsborn cites Justice Rothstein in [R v. Cunningham](#):

31. Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McLure and Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosure to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

[17] As Justice Orsborn states, "I read this passage as adding another dimension to the rebuttal inquiry and emphasizing, in all cases, the importance of context."

[18] Unfortunately, there is not a large body of jurisprudence related to the matter at hand: legal fees and expert fees related to a criminal prosecution. The vast majority of access to

information reports that apply **Maranda** to matters involving legal bills fall into two specific categories: the disclosure of legal bills in civil and human rights cases involving a public body; and where the Crown or police come into possession of legal bills belonging to the solicitor of an accused. Similarly, there does not appear to be any reported decisions from other information and privacy commissioners with respect to requests for the legal bills of Crown attorneys. This is not surprising. Most Crown prosecutors are employees of a provincial or federal government and are paid a salary, the pay scale for which can be found with relative ease. A Crown prosecutor employed by the province or federal government does not issue invoices for services rendered. However, as this matter makes clear, there are instances where outside counsel – whether lawyers in private practice or Crown attorneys from another jurisdiction – are contracted to conduct a prosecution on behalf of a province or the federal government that cannot conduct the prosecution with its own staff solicitors.

[19] There are also significant procedural differences in criminal and civil cases, not the least of which are strict disclosure requirements by the Crown to the accused. As stated by the Supreme Court of Canada in [R. v. Stinchcombe](#), and quoted in the Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador at chapter 10:

There is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.

With respect to expert witness reports, the Guide Book, in part, states for their disclosure:

As soon as they are available, copies of all expert witness reports in the possession of Crown Attorneys relating to the offence, except to the extent that they may contain clearly irrelevant or privileged information. Expert reports relating to the offence should be disclosed, whether helpful to the Crown or not.

[20] Both of these statements on disclosure are far broader than those required in a civil law matter. In civil matters, expert reports only have to be disclosed if they are to be used in the proceedings; that is not the case in criminal matters. The Complainant knows the experts that were engaged in the prosecutions and perhaps even has material produced by these experts.

The Complainant's Access Request

[21] In their access to information complaint, the Complainant is cognizant that not every part of a lawyer's bill can be disclosed. However, they argue, given past decisions, certain information can be withheld and other information disclosed so as to preserve solicitor-client privilege. In the end, the access complaint is related to total costs and not costs related to a specific aspect of the prosecution.

[22] For the following reasons, this Office agrees that some information on the legal bills in question can be released:

- The criminal proceedings against all accused are concluded. A stay of proceedings has been entered and legally it is as if the matter never existed;
- There are multiple accused who were charged separately, however, the Complaint is not seeking information for a specific accused; rather, they are seeking total costs associated with all the accused;
- The client of the two lawyers whose billings are at issue is already known: the two lawyers were acting on behalf of the Government of Newfoundland and Labrador; and
- Aspects of the legal bill can be withheld to render the records neutral.

[23] With respect to access requests JPS/60/2024 and JPS/61/2024, this Office recommends the legal bills at issue of the two named solicitors be released in the following manner:

- The letterhead, the name of the named solicitor, and the dollar amounts on the record be disclosed. If the record with a dollar amount is an email, the name of the named solicitor should be disclosed;
- The year should be disclosed, however the day and month should be withheld;
- All other information, including the legal services conducted by the named solicitors and the specific files for which services were provided, should be withheld.

These recommendations would apply to all records of these two solicitors which are dated between January 1, 2014 and April 3, 2024. From the perspective of this Office, the release of the legal bills in this manner would not allow an assiduous observer to deduce or acquire any communication covered by solicitor-client privilege.

Litigation Privilege

[24] The Department claims that litigation privilege applies to the information regarding the costs associated with the two named individuals who were retained to provide expert opinion in the prosecution of those who were accused.

[25] In *Blank v. Canada (Minister of Justice)*, the Supreme Court of Canada explained the scope of litigation privilege. As stated in the decision, litigation privilege contemplates communication between a solicitor and third parties, and “Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor client relationship. The Court was also clear that there is a definite limit to litigation privilege:

[34] The purpose of the litigation privilege, I repeat, is to create a “zone of privacy” in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose—and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: it cannot be said to have “terminated”, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[26] In its submission to this Office, the Department used the second sentence of the above-quoted text to argue that the prosecution of those who were previously accused, and for whom the information is sought, is still ongoing. That is not the case: all proceedings in this prosecution have ended. If this were not the case, the Department could apply section 5(1)(j), which covers criminal cases where there are pending procedures and which removes the access request from the jurisdiction of ATIPPA, 2015. The Department did not apply this provision because all criminal proceedings in these matters are concluded.

[27] The Department asserts that other Indigenous individuals are currently charged with offences similar to those faced by the individuals named in the access requests. Criminal charges are a matter of public record and the Department has not provided any information

on these newly-charged individuals and their alleged offences. The Department has also not provided additional information in confidence to support its assertion. The Department's position is that the prosecution that started and ended against the accused in this matter should be considered to be continuing through those accused in other, unnamed matters since both involve Indigenous rights. Generally speaking, when there is a stay of proceedings in a prosecution, as there has been in the matters at issue, the prosecution is over. In order to make the case that records related to these particular, stayed, charges are part of a wider and ongoing matter, the Department needs to adduce clear and compelling evidence this is the case. In our view, the Department has not done so. The potential for similar charges against several other individual Indigenous people that occur over time cannot be automatically judged as one ongoing litigation. Each case must be adjudicated individually on its merits. Moreover, the access request is not seeking the opinions of the named experts, rather the cost associated with them. The cost of the expert is not related to the expert's analysis or opinions on Indigenous rights.

[28] For the reasons outlined above, it is our conclusion that litigation privilege does not attach to the costs paid to the two experts retained by the Crown in the prosecutions that are the subject of this access complaint.

[29] There is also the question of whether solicitor-client privilege applies to communications between the experts and the named solicitors. Certainly, some of these communications would be subject to solicitor-client privilege, but not the costs. In [R. v. Haevisher](#), the accused were seeking the amount paid by the police for the legal fees of two witnesses. The Crown argued such information was covered under solicitor-client privilege. In ordering the release of this financial information, Justice Wedge noted the "witnesses are not parties to this criminal proceeding; thus the information in question is not linked to the merits of any dispute involving them and cannot result in any prejudice to them."

[30] With respect to access requests JPS/64/2024 and JPS/65/2024, this Office recommends that records containing information on the costs of the two named experts be disclosed in the following manner:

- The year listed on the record, the amounts listed separated into fees, expenses, and disbursement, and the name of the expert for whom these costs relate are to be disclosed.
- The letterhead of a record, if such letterhead exists, should be disclosed. If the record is an email, the name of the named expert should be disclosed.
- The manner in which the costs are accrued, for example charge by the hour or day, should be disclosed.
- All other information on these records can be withheld.

[31] As for access request JPS/58/2024, the Department's submission confirms that the records responsive to this request would be the same as the records responsive to requests JPS/60/2024, JPS/61/2024, JPS/64/2024, and JPS/65/2024. Therefore, the recommendations of this Office on those four requests will also serve as the recommendations for JPS/58/2024.

RECOMMENDATIONS

[32] Under the authority of section 47 of the **Access to Information and Protection of Privacy Act, 2015**, I recommend that the Department of Justice and Public Safety:

1. Disclose the following with respect to responsive records for access requests JPS/60/2024 and JPS/61/2024:
 - a. The letterhead of the record (if any);
 - b. The year in which the record was made;
 - c. The name of the solicitor on the record;
 - d. The dollar amounts that constitute legal fees, broken down by fees, disbursements, and expenses
2. Disclose the following with respect to responsive records for access requests JPS/64/2024 and JPS/65/2024:
 - a. The letterhead of the record (if any);

- b. The date of the record;
- c. The name of the expert on the record;
- d. The dollar amounts charged by the named experts, broken down by fees, disbursements, and expenses; and
- e. The manner in which the costs are accrued, for example is it a flat fee, charge by the hour/week, etc.

[33] As set out in section 49(1)(b) of ATIPPA, 2015, the head of Department of Justice and Public Safety must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of October 2024.



Jacqueline Lake Kavanagh
Information and Privacy Commissioner (Acting)
Newfoundland and Labrador