

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### DECISION P2013-D-01

February 8, 2013

#### THE LEGAL AID SOCIETY OF ALBERTA

Case File Number P2034

Office URL: [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** Under the *Personal Information Protection Act* (the “Act”), the Applicant requested a review of the response of The Legal Aid Society of Alberta (the “Organization”) following requests for access to information that he had made to it. A preliminary issue was whether the Organization was subject to the Act, as it is a non-profit organization.

Under section 56(3) of the Act, the Act has a limited application to non-profit organizations. The Act applies only in the case of personal information that is collected, used or disclosed by such organizations in connection with a “commercial activity”.

The Adjudicator found that, when the Organization collected, used and/or disclosed the Applicant’s personal information, it did so in connection with a commercial activity that it was carrying out. In particular, he found that the Organization carries out a commercial activity when it assesses individuals for legal aid coverage, arranges for legal aid services to be provided by lawyers in private practice, and provides legal aid services through its staff lawyers. Further, this is the case whether or not the individual pays or partly pays for the services.

The Adjudicator therefore concluded that the Act applied, and that he had jurisdiction to review the matters raised in the Applicant’s request for review.

**Statutes Cited:** **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss.3, 4(1), 4(3), 4(3)(a), 4(3)(k), 4(3)(o), 4(5), 24(1)(b), 56, 56(1)(a), 56(1)(b), 56(1)(b)(i), 56(2) and 56(3); *Legal Profession Act*, R.S.A. 2000, c L-8; *Societies Act*, R.S.A. 2000, c. S-14. **CAN:** *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20(1)(b), *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss. 2(1) and 4(1)(a).

**Orders Cited:** **AB:** Orders P2007-007 and P2010-021

**Cases Cited:** **AB:** *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, leave to appeal refused [2011] S.C.C.A. No. 260 (QL). **ON:** *Rodgers v. Calvert*, 2004 CanLII 22082 (Ont. S.C.). **CAN:** *Ontario (R.A.C.) v. Caisse Populaire de Hearst Ltee.*, [1983] 1 S.C.R. 57; *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157, leave to appeal refused [2006] S.C.C.A. No. 259 (QL); *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736.

## **I. BACKGROUND**

[para 1] Based on the nature of an individual's legal issue and financial eligibility, he or she is eligible to receive services from The Legal Aid Society of Alberta (the "Organization") in the form of a referral, information, legal advice, limited scope representation or full scope representation. The Applicant sought assistance from the Organization with respect to legal matters in 2008 and 2011. He was denied legal representation both times, but was provided with limited advice and referral information in 2011.

[para 2] By letter dated October 3, 2011, the Applicant made the following requests to the Organization under the *Personal Information Protection Act* (the "Act" or "PIPA"):

1. *I seek access to all computer generated notes created by staff lawyer [name] during my consultation with him on Monday, September 19, 2011 for the purpose of securing legal assistance of Legal Aid Alberta for a Federal Court of Appeal matter.*
2. *I seek access to personal information related to the internal sharing, if any, of the full contents of the file created on me for this matter with all persons at Legal Aid Alberta.*
3. *I seek access to the possible external sharing, if any, of the full contents of this file with third parties outside Legal Aid Alberta but within the Departments of Alberta Minister of Justice and Attorney General, and Alberta Solicitor General and Public Security or otherwise.*
4. *I seek access to specific instruction(s), if any, received of persons at either Alberta Minister of Justice and Attorney General, or Alberta Solicitor General and Public Security or otherwise concerning me.*

*5. I seek access to the full contents of computer generated and hand written notes created by the Southern Appeals Committee concerning my application for Legal Aid coverage for a medical malpractice lawsuit in 2008.*

[para 3] The Organization responded to the Applicant's requests by letter dated October 28, 2011. In response to item 1 above, it gave the Applicant a copy of the staff lawyer's notes from the meeting of September 19, 2011. For item 2, it advised the Applicant that his personal information had been used internally to make decisions about what information, referrals, services and legal advice to provide him, as summarized in a Service Plan that had been given to him earlier. For item 3, the Organization advised the Applicant that it had not disclosed his personal information outside the Organization. For item 4, it advised that it had not collected any personal information of the Applicant from any source other than the Applicant himself. In response to item 5, the Organization gave the Applicant a copy of records, although they were from the Northern Appeals Committee, not the Southern one, as the Northern Appeals Committee was the one that had been involved with the Applicant's application in relation to the lawsuit in question.

[para 4] In a form dated November 6, 2011, the Applicant requested a review by this Office of the Organization's response to him. First, he alleged that the Organization had failed to seek clarification from him regarding item 2 of his request. In its letter of October 28, 2011, the Organization had indicated that section 24(1)(b) of PIPA permitted the Applicant to know about the use or disclosure of his own personal information only, and not the personal information of staff of the Organization. In his request for review, the Applicant took the position that the Organization should have contacted him to determine whether he was requesting his own personal information as opposed to that of any third party. Second, the Applicant took the position that the Organization should have consulted with him regarding item 4 of his request. In its letter of October 28, 2011, the Organization had noted that its receipt of specific instructions from a government department would amount to a collection of the Applicant's personal information within the terms of PIPA. In his request for review, the Applicant alleged that it was wrong for the Organization to treat the provision of instructions from a third party as a collection by the Organization from that third party, at least not before first seeking clarification from him.

[para 5] In a letter to the parties dated November 29, 2011, the former Commissioner noted that the Organization is a "non-profit organization" under PIPA, but that it is unclear whether the Organization was carrying out a "commercial activity" when it dealt with the Applicant, which is necessary in order for PIPA to apply with respect to his personal information. The former Commissioner therefore decided to first proceed with the preliminary issue of whether this Office has jurisdiction over the matters raised in the Applicant's request for review. If it were concluded that this Office has jurisdiction, a further inquiry into the substance of the matters raised by the Applicant would proceed.

## **II. RECORDS OR INFORMATION AT ISSUE**

[para 6] As this matter involves a preliminary issue regarding this Office's jurisdiction, there are no records or information at issue. For context, however, the Applicant has

requested information about the sharing of his personal information within the Organization, and about any specific instructions received by the Organization from third parties, as set out in items 2 and 4 of his letter of October 3, 2011.

[para 7] The Applicant did not raise any concerns, in his request for review, regarding the Organization's response to item 3, which was that it had not disclosed any of his personal information outside the Organization. Further, there are no records of concern with respect to items 1 and 5 of the Applicant's request of October 3, 2011. First, the Organization did not withhold any information from the Applicant in response to those items. Second, the Applicant raised concerns only about the Organization's response to items 2 and 4 in his request for review. While he wrote that he sought a review of the "findings" of the Organization, he elaborated by referring specifically to the Public Body's responses to items 2 and 4.

### **III. ISSUES**

[para 8] The Notice of Inquiry, dated January 24, 2012, set out the following preliminary issues:

Did the Organization collect, use and/or disclose the Applicant's personal information in connection with a commercial activity, within the terms of sections 56(1)(a) and 56(3) of the Act?

If the Organization collected, used and/or disclosed the Applicant's personal information in connection with a commercial activity, is the collection, use and/or disclosure excluded from the Act by virtue of section 4(3)?

### **IV. DISCUSSION OF ISSUES**

#### **A. Did the Organization collect, use and/or disclose the Applicant's personal information in connection with a commercial activity, within the terms of sections 56(1)(a) and 56(3) of the Act?**

[para 9] Section 56 of PIPA reads as follows:

*56(1) In this section,*

*(a) "commercial activity" means*

*(i) any transaction, act or conduct, or*

*(ii) any regular course of conduct,*

*that is of a commercial character and, without restricting the generality of the foregoing, includes the following:*

*(iii) the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;*

*(iv) the operation of a private school or an early childhood services program as defined in the School Act;*

*(v) the operation of a private college as defined in the Post-secondary Learning Act;*

*(b) “non-profit organization” means an organization*

*(i) that is incorporated under the Societies Act or the Agricultural Societies Act or that is registered under Part 9 of the Companies Act, or*

*(ii) that meets the criteria established under the regulations to qualify as a non-profit organization.*

*(2) Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.*

*(3) This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.*

*(4) The Lieutenant Governor in Council may make regulations*

*(a) establishing, for the purposes of subsection (1)(b)(ii), the criteria to be met by an organization to qualify as a non-profit organization;*

*(b) establishing the criteria to be met by non-profit organizations to qualify as non-profit organizations that are restricted or otherwise limited in the scope of their operations and exempting those non-profit organizations from the operation of subsection (3);*

*(c) governing the coming into force of this Act or any provision of this Act with respect to a non-profit organization;*

*(d) providing that this Act or any provision of this Act commences to apply to a non-profit organization at a date that is later than January 1, 2004;*

*(e) providing for and governing any transitional matter relating to the application of this Act to a non-profit organization.*

(5) Any regulation made under this section may be general or specific in its application.

[para 10] Under section 4(1), PIPA applies to every organization and in respect of all personal information, except as provided elsewhere in the Act and subject to the regulations. Under section 56(2), PIPA does not apply, generally speaking, to certain non-profit organizations, which are defined in section 56(1)(b). Under section 56(1)(b)(i), an organization is a non-profit organization, for the purposes of PIPA, if it was registered under the *Societies Act*. The Organization submitted a copy of its Certificate of Incorporation dated May 24, 1973, which indicates that it was incorporated under the *Societies Act*.

[para 11] Under section 56(3), PIPA has a limited application to non-profit organizations, such as the one in this inquiry, in that the Act applies only in the case of personal information that is collected, used or disclosed by them in connection with a commercial activity. Under section 56(1)(a), “commercial activity” means any transaction, act or conduct, or any regular course of conduct, that is of a commercial character. The fundamental question for the purpose of this preliminary decision is whether the Organization was carrying out a commercial activity when it collected, used and/or disclosed the Applicant’s personal information.

## 1. Relevant orders and case law

[para 12] Order P2007-007 (at para. 40) noted that the question of whether a non-profit organization is carrying out a commercial activity must be considered in the circumstances of every case and the answer must be determined on a case-by-case basis. That Order (at para. 39) also noted the following comments that have been made regarding the phrase “commercial activity” under sections 2(1) and 4(1)(a) of the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”):

The phrase, “commercial activity” has been considered in the case law in a variety of statutory contexts. Courts have commented on the difficulty of assigning a precise meaning to this phrase, often citing lengthy and varied definitions from dictionaries. [...]

[...] Although these cases may be of some general interest in outlining the potential scope of the phrase “commercial activity”, they provide little direct guidance in interpreting the phrase for the purposes of PIPEDA. The theme that emerges from these cases is that the phrase is capable of a broad range of meanings that may vary from one statute to another, and that it is necessary to consider the phrase in the overall statutory context and in light of the purpose of the statute in which the phrase is found (Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector: An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002, pp. PIP-7, 8, 8.1).

The foregoing is to say that the question of whether an organization is carrying out a “commercial activity”, within the terms of PIPA, depends on PIPA’s own statutory context and objectives, although stated interpretations of the same or similar terms under

comparable legislation – such as PIPEDA, referenced above, as well as the federal *Access to Information Act* – might assist.

[para 13] The Applicant argues that the Organization should be subject to PIPA because it processes information having a personal aspect and is charged with making decisions that personally affect him and involve his statutory rights, such as whether he is entitled to legal aid. He notes the sensitivity of the personal information held by the Organization, in that it can include age, marital status, date of birth, personal address, past and current employers, information relating to financial status, and documentation relating to the case for which legal assistance is sought. He submits that the Organization collects even more personal information than a private law firm, and notes that the collected personal information might be shared with and viewed by various individuals. He also argues that it is important for PIPA to give clients a right of access to their personal information, particularly where they wish to appeal a decision not to grant legal aid coverage.

[para 14] However, the fact that an organization deals with personal information, and makes decisions personally affecting individuals, does not mean that the organization is subject to PIPA, given that the Legislature chose to exclude non-profit organizations from the purview of the Act unless they collect, use or disclosed personal information in connection with a commercial activity. Collecting, using or disclosing personal information is not sufficient, in and of itself. In *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (at para. 35), a justice of the Court of Appeal of Alberta stated:

The issue is not whether privacy rights are important. They are, as demonstrated by the cases discussed by Conrad J.A. at paras. 102-114 [below]. The Legislature has deemed them to be important by passing the *Act*. But their admitted importance does not mean that privacy rights must predominate over all other societal needs, values and interests.

[para 15] As the Court did in *Leon's Furniture Ltd.* (at para. 34), the Organization in this inquiry points out section 3 of PIPA, which reads as follows:

*3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.*

However, as I stated in Order P2010-021 (at para.33), this purpose of PIPA is not particularly helpful in determining the scope of the term “commercial activity” under section 56(3), given that PIPA and therefore section 3 do not apply, in the first place, if a non-profit organization is not carrying out a commercial activity. To put it differently, the purpose of the legislation is to govern certain acts of certain organizations, yet the question here is whether the Organization, by engaging in a particular activity, is even subject to the legislation.

[para 16] I now turn to the relevant case law, which is sparse in terms of interpretations of the phrase “commercial activity”, or even “commercial”, in the context of legislation governing access to information, privacy and personal information protection.

[para 17] In *Rodgers v. Calvert*, 2004 CanLII 22082 (Ont. S.C.) (at paras. 51-54), the Ontario Superior Court of Justice made the following comments about the definition of “commercial activity” within the terms of sections 2(1) and 4(1)(a) of PIPEDA:

The “exchange of consideration” involved in supplying personal information and a prescribed membership fee in exchange for the services and benefits of membership in the Association may constitute consideration under the law of contract. However, consideration in contract does not in itself lead to the finding of commercial activity in the PIPEDA context. In my view, there must be something more than a mere “exchange of consideration”, as described by counsel, to be within the definition of “commercial activity”.

Counsel for the Association has in his written submissions referred to a dictionary definition of the words “commerce” and “commercial”, in aid of interpreting the meaning of the phrase “commercial activity”.

In that dictionary, the word “commerce” is defined as:

... exchange between men of the products of nature and art; buying and selling together; exchange of merchandise...

The word “commercial” is defined as:

... engaged in commerce; trading; of or relating to commerce or trade.

(See *Shorter Oxford English Dictionary* p. 349 - Appendix B.)

The same words are defined in the *Oxford English Reference Dictionary*, Oxford University Press, 2nd ed., 1996, as follows:

“commerce”: financial transactions, especially the buying and selling of merchandise, on a large scale;

“commercial”: of, engaged in or concerned with commerce; having profit as a primary aim rather than artistic, etc. value.

(See page 290).

The difficulty in dictionary definitions can be readily seen by the absence of the word or notion of profit or gain in the source quoted by counsel for the Association and the presence of the notion of profit or gain in the definition found in the *Oxford Reference Dictionary*.

[para 18] The above commentary is to the effect that the mere exchange of consideration, or the exchange of services for a fee, is not sufficient to establish a commercial activity. A similar idea was noted in *Canada (Information Commissioner) v.*

*Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 (at para. 69). In that case, the Federal Court of Appeal made the following comments about the definition of “commercial” as found in the phrase “commercial information” in section 20(1)(b) of the *Access to Information Act*:

Common sense with the assistance of dictionaries ... dictates that the word “commercial” connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as “commercial”.

[para 19] In addition to noting that the exchange of services for a fee is not sufficient to make something commercial, the foregoing excerpt refers to the concept of “trade” as being synonymous with “commerce”. In my view, the reference to “commercial” in the context of PIPA is likewise intended to capture activity of a trade- or business-like nature. In Order P2010-021 (at para. 41), I similarly referred to the notion that an organization is engaged in a commercial activity, for the purpose of PIPA, if it is engaged in what appears more or less to be a “business”.

[para 20] Another point that may be taken from the relevant case law is that an organization does not have to be carrying out an activity that is primarily, mostly or predominantly for the purpose of making a profit in order for it to be said to be carrying out a commercial activity for the purpose of legislation governing access to information, privacy and the protection of personal information. The “preponderant purpose” test was rejected in *Rodgers v. Calvert*, cited above. There, the Court summarized one of the parties’ submissions as follows (at para. 47):

Rodgers submits that in interpreting the words “commercial activity” in the statutory definition, the court should apply the preponderant purpose test, set out in *Ontario (R.A.C.) v. Caisse Populaire de Hearst Ltee.*, [1983] 1 S.C.R. 57. The test simply stated is that if, upon analysis, the preponderant purpose of the activity is the making of a profit, then the activity may be classified as a business. However, if there is another preponderant purpose to which any profit earned is merely incidental, then it will not be classified as a business.

The Court then rejected the foregoing interpretation by writing (at para. 50):

I deal first with the preponderant purpose submissions. I am persuaded that the question of whether any organization is a business for purposes of taxation under the *Assessment Act*, R.S.O. 1990, c. A.31, is not determinative or applicable to the interpretation of the term “commercial activity” under PIPEDA, having regard to the different objectives of the two statutes. ...

[para 21] As indicated in the excerpts above, the Court in *Rodgers v. Calvert* rejected the test that had been articulated in *Ontario (R.A.C.) v. Caisse Populaire de Hearst Ltee.*, [1983] 1 S.C.R. 57. In that case, the Supreme Court of Canada had set out the test as follows:

[...] I agree that, in deciding whether or not any activity may be classed as a business under the provisions of s. 7(1)(b) of *The Assessment Act*, all relevant factors regarding an operation must be considered and weighed. However, they must be considered and weighed in order to determine not whether in some general sense the operation is of a commercial nature or has certain commercial attributes, but whether it has as its preponderant purpose the making of a profit. If it has, it is a business; if it has not, it is not a business.

[para 22] In my view, when it rejected the narrow “preponderant purpose” test based on profit, which had been articulated in *Ontario (R.A.C.) v. Caisse Populaire de Hearst Ltee.*, the Court in *Rodgers v. Calvert* may be taken to have essentially returned to the broader test. The broader test, when determining whether an entity is engaged in a commercial activity, depends on a consideration and evaluation of all factors, not simply profit. To use some of the terminology in the excerpt above, the question to be answered is whether the entity’s operation is of a “commercial nature” or has “commercial attributes”.

[para 23] My interpretation that there is a relatively broad test for determining what constitutes a commercial activity is consistent with the definition that is set out in section 56(1)(a) of PIPA itself. A commercial activity is any transaction, act, conduct, or regular course of conduct that is of a commercial character. While admittedly somewhat circular, the definition does not say that a commercial activity is an activity that is “commercial”. Rather, an activity must have a commercial “character”. To me, the definition is meant to capture activities that are more or less commercial, or appear to be commercial by most accounts. To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity. In short, PIPA is meant to apply to non-profit organizations that are carrying out activities as though they are a business. Moreover, the idea that profit is not determinative or even relevant, when deciding whether an organization is carrying out a commercial activity, is even clearer under PIPA, given that the organization in question is already a “non-profit” organization (unlike the organizations in question under PIPEDA, which refers to the notion of “commercial activity” to decide whether *any* organization is subject to that legislation). Virtually all non-profit organizations under PIPA do not have the objective of making an overall profit that is distributed to individuals associated with the organization.

[para 24] I turn to one last case. The Organization cites *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736 (at paras.101-106) for the proposition that something done in a private capacity as a litigant is not a commercial activity, even where an agent, including a lawyer, is engaged to assist in the litigation. However, when – as in this inquiry – an organization collects, uses and/or discloses the personal information of a client in order to establish or possibly establish a relationship with him or her, the organization is not acting *on behalf of the client*, but rather *vis-à-vis* him or her. To put it differently, the relationship under review in this inquiry is not the one between the Applicant and, for example, a third party being sued or otherwise involved with him in a legal matter. In such a case, it might be argued that the Organization is assisting its client in a domestic or personal matter when it

collects, uses and/or discloses the personal information of the third party (or even the client's own personal information) on the client's behalf for the purpose of advancing the legal matter. Here, the question to be answered is not whether opposing parties in a legal matter, along with their lawyers, are engaged in a commercial activity, but whether the Organization is engaged in a commercial activity when it is deciding whether to establish a relationship, or does establish a relationship, with a client who comes to it seeking assistance.

[para 25] I now turn to the facts of this case and the parties' submissions in order to reach a conclusion as to whether the Organization collected, used and/or disclosed the Applicant's personal information in connection with a commercial activity.

## **2. The parties' submissions**

[para 26] The Organization explains that it has entered into a Governance Agreement with the Minister of Justice and Attorney General for the Province of Alberta and with the Law Society of Alberta. Under the Agreement, the Organization agrees to operate the Legal Aid Plan and to provide other services in accordance with an annual budget and business plan approved by the Minister. The Agreement referenced by the Organization, as well as one of the ways in which its operations are funded, is contemplated by the *Legal Profession Act*, which reads, in part, as follows:

*2 The Law Society of Alberta as previously constituted continues by that name as a corporation consisting of its members.*

...

*4(1) Subject to the approval of the Lieutenant Governor in Council, the Minister of Justice and Attorney General, the Society and the Legal Aid Society of Alberta may enter into an agreement respecting the operation by the Legal Aid Society of Alberta of a plan to provide legal aid to persons in need of it in civil matters or criminal matters or both.*

...

*118 The Alberta Law Foundation, in this Part called the "Foundation", is continued as a corporation consisting of the members of its board of directors.*

*119 The objects of the Foundation are*

...

*(v) contributing to the costs incurred by the Legal Aid Society of Alberta to administer a plan to provide legal aid under an agreement under section 4;*

...

[para 27] The Organization explains that, in addition to being funded by a grant from the Alberta Law Foundation, as referenced above, funding for the Legal Aid Plan and the

Organization's other services is also provided by the Government of Alberta and the Government of Canada. Further, there is partial recovery from clients where repayment by them will not cause undue hardship. Funding from client recovery amounted to 12% of the Organization's total revenue in 2011, and 10% in 2010.

[para 28] The Organization relies on members of the private bar and its own staff counsel to deliver approved legal services to clients. Lawyers in private practice are listed on a roster, are issued certificates for individual cases, and are paid according to the Organization's Tariff of Fees. If the Organization approves legal representation for a client, staff of the Organization will contact and assign lawyers, and may authorize certain procedures and disbursements according to the Tariff and the Organization's policies. The Tariff is based on a combination of block fees and hourly charges, which the Organization submits to be less than the fees ordinarily charged by lawyers to their privately-paying clients, in other words less than those existing in the open marketplace for legal services. The Organization explains that, where its clients make some form of payment, it is on a graduated basis up to the maximum set out in the Tariff of Fees, and it characterizes the limited payments made by some of its clients to be in the form of cost recovery, not profit. The Organization further submits that, although its activities are in some ways similar to legal services provided in the commercial legal marketplace, they differ in nature and quality because additional free advice services may be provided even when no formal legal representation is approved.

[para 29] The Organization argues that any privacy interest of clients or others interacting with a non-profit organization does not trump the need for a non-profit organization to collect, use and disclose information in a simple and straightforward manner in order to achieve the public benefit to which the organization aspires. The Organization argues that the purpose of its activities is to provide a benefit to the public, not a benefit to itself. It submits that its core activities involve the assessment of eligibility for legal services and the facilitation of the provision of legal services to low-income Albertans. In this regard, it says that it is carrying out a charitable mandate and has a charitable purpose. It repeats that its activities are not intended to confer a commercial benefit or profit on itself, but to provide a benefit to the public by enabling individuals to access the justice system when they would not otherwise be able to do so. The Organization adds that, unlike other providers of legal services, it does not participate in the open market but instead provides services only to a limited pool of clients.

[para 30] The Applicant likewise notes that individuals occasionally repay the Organization for the legal assistance provided to them and that, when this happens, the individual is directly billed and the repaid amounts are returned to the Organization's legal aid fund. He says that the services provided by the Organization therefore cannot be characterized as entirely free for all clients. He argues that the fact that the Organization is willing to accept payments from clients who have the ability to pay detracts from any claim that the ends of the Organization are purely "charitable". He also notes that many private law firms offer lower rates or contingency fees to low income clients.

[para 31] The Applicant argues that the Organization can, at most, be considered non-profit for taxation purposes, depending on its total revenues generated in any given year, but that it remains at all times subject to PIPA, given that it is mandated to provide a lawyer on its roster with a retainer to represent an individual in a criminal or civil matter. He says that the representation by the lawyer, and the Organization's coordination of the legal services in question, remains commercial in nature. The Applicant notes that the right of a solicitor to receive fees for legal services rendered to a client derives from a contractual arrangement, or the signed certificate in a legal aid matter. He says that this is an activity that is in every way commercial in nature. He says that the Organization is relying on a "slight difference" between its Tariff of Fees and the rates ordinarily charged by private lawyers.

[para 32] The Applicant further submits that the Organization is engaged in a commercial activity because it does not generate its own funding, or obtain the majority of its funding from another non-profit organization, such as the Law Society of Alberta. He notes that the Organization is predominantly funded by the Government of Alberta, and he argues that the exchange of public funds for the provision of the legal services offered by the Organization makes its activities commercial. He characterizes the Government as "purchasing" the service of the Organization, as it does with many other service providers that it engages for business purposes.

### **3. Findings and conclusion**

[para 33] As noted above, the Organization says variably in its submissions that it is not making a "profit", that it is conferring a "public benefit" and that its activities are "charitable". However, none of the foregoing ideas is referenced in section 56 of PIPA. The Legislature did not say that an organization is subject to PIPA if it is making a profit, or that it is not subject to PIPA if it is conferring a public benefit, or doing something that can be characterized as charitable. The notion that the Legislature chose to use is "commercial activity".

[para 34] The Organization argues that PIPA should not apply to organizations effectively carrying out the core activities of government or government-funded activities. It places itself – along with legal aid societies in other jurisdictions – in this category of carrying out essentially non-commercial activities. However, given my relatively broad interpretation of the meaning of commercial activity for the purpose of Alberta's PIPA, I disagree that the Organization here may be characterized as carrying out what would amount to a non-commercial activity. In my view, there is nothing that significantly distinguishes, from an operational or service standpoint, The Legal Aid Society, as the Organization here, from a private law practice or business. It meets with prospective clients and decides whether to provide legal services, which might be performed by a private lawyer engaged by the Organization or by one of its own staff lawyers.

[para 35] The fact that only some clients reimburse the Organization, while most do not, does not detract from my conclusion. It is troublesome to focus on the foregoing

distinction, as it raises the possibility that paying clients would have their personal information protected under PIPA, while non-paying clients would not. In any event, in its role of deciding whether and how to assist its clients, the Organization obtains funding from the Alberta Law Foundation, Government of Alberta and Government of Canada. In my view, the fact that the Organization obtains funding from the government militates in favour of, not against, a finding that it is carrying out a commercial activity for the purpose of PIPA. While the case law cited earlier indicates that some form of exchange of consideration does not, in and of itself, make an activity commercial, it is not an irrelevant factor when taken in conjunction with other aspects of the activity in question that appear, for all intents and purposes, to be business-like. Here, the Organization obtains its funding from various sources in order to “pay” the lawyers that it engages, and the staff that it hires.

[para 36] I have equated the notion of commercial activity with carrying out a trade or business. Here, the Organization carries out the business of assessing clients for legal aid coverage, providing them with information or referrals, and facilitating and/or providing legal services if coverage is approved. The Organization carries out a business-like commercial activity in the sense of paying private lawyers, in accordance with the Tariff of Fees, and paying its own staff lawyers their salaries. The size of the payments or salaries is not important, in my view, as private lawyers are paid a variety of amounts, and even perform services for free. Finally, even if legal aid coverage is denied, meaning that a client does not actually obtain the services of a lawyer, the Organization’s assessment of whether a client qualifies remains of a commercial character. The Organization serves as an intermediary between individuals and lawyers in a manner that aims to possibly provide the lawyers with business, revenue or remuneration.

[para 37] To summarize, I find that the Organization carries out a commercial activity, within the terms of section 56 of PIPA, when it assesses individuals for legal aid coverage, arranges for legal aid services to be provided by lawyers in private practice, and provides legal aid services through its staff lawyers. This is the case whether or not the individual pays or partly pays for the services.

[para 38] I conclude that, when the Organization collected, used and disclosed the Complainant’s personal information, it did so in connection with a commercial activity that it was carrying out. PIPA therefore applies, and this Office has jurisdiction to review the matters raised in the Applicant’s request for review.

**B. If the Organization collected, used and/or disclosed the Applicant’s personal information in connection with a commercial activity, is the collection, use and/or disclosure excluded from the Act by virtue of section 4(3)?**

[para 39] At the time of the Applicant’s access request, section 4(3) read, in part, as follows:

*4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.*

...

(3) *This Act does not apply to the following:*

*(a) the collection, use or disclosure of personal information if the collection, use or disclosure, as the case may be, is for personal or domestic purposes of the individual and for no other purpose;*

...

*(k) personal information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master in chambers of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

...

*(o) personal information contained in a personal note, communication or draft decision created by or for a person who is acting in a judicial, quasi-judicial or adjudicative capacity.*

...

(5) *This Act is not to be applied so as to*

*(a) affect any legal privilege,*

*(b) limit the information available by law to a party to a legal proceeding, or*

*(c) limit or affect the collection, use or disclosure of information that is the subject of trust conditions or undertakings to which a lawyer is subject.*

...

[para 40] Under section 4(3), PIPA does not apply to certain information, or to the collection, use or disclosure of certain information. The subsections of section 4(3) that the Organization in this inquiry believes might apply in the circumstances of this case are reproduced above. I find that none of them apply so as to preclude the application of the Act.

[para 41] First, when the Organization collected, used and/or disclosed the Applicant's personal information, it – meaning the Organization – was not doing so for personal or domestic purposes (although it is arguable that, if the Organization had collected, used and/or disclosed a third party's personal information, or the Applicant's own personal information, on behalf of the Applicant in order to advance his legal interests, section

4(3)(a) might have been engaged). Second, while some of the information collected by the Organization from the Applicant apparently emanated from court files within the terms of section 4(3)(k), this information does not appear to be part of the information requested by the Applicant in his access request, or at least not in relation to items 2 and 4 of his letter of October 3, 2011, being the items that are of concern to him with respect to the Organization's response. Third, none of the information in question is contained in a personal note, communication or draft decision created by or for a person who is acting in a judicial, quasi-judicial or adjudicative capacity, a set out in section 4(3)(o).

[para 42] While not referenced in relation to an issue in the inquiry, the Organization notes section 4(5), reproduced above. My conclusion that PIPA applies to the Organization because it was carrying out a commercial activity when it collected, used and/or disclosed the Applicant's personal information does not affect any legal privilege, does not limit the information available by law to a party to a legal proceeding, and does not limit or affect the collection, use or disclosure of information that is the subject of trust conditions or undertakings to which a lawyer is subject. In the end, the Organization provided the Applicant with only limited information and referrals. It did not provide any legal representation, whether through a private lawyer or one of its staff lawyers.

[para 43] I conclude that the Organization's collection, use and disclosure of the Applicant's personal information are not excluded from the PIPA by virtue of section 4(3).

## **V. DECISION**

[para 44] I find that, when the Organization collected, used and/or disclosed the Complainant's personal information, it did so in connection with a commercial activity that it was carrying out. The Act therefore applies, and this Office has jurisdiction to review the matters raised in the Applicant's request for review.

[para 45] I further find that the collection, use and disclosure of the Applicant's personal information are not excluded from the Act by virtue of section 4(3).

Wade Raaflaub  
Adjudicator