



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F16-37

LAW SOCIETY OF BRITISH COLUMBIA

Ross Alexander
Adjudicator

July 21, 2016

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Summary: An applicant requested records from the Law Society of British Columbia about legal services he believes a law firm provided to a lawyer in relation to the lawyer's evidence in an estate litigation matter. The applicant believes the law firm was retained by the Law Society's insurance department in relation to the lawyer's professional liability insurance coverage. The Law Society requested that the Commissioner exercise her discretion under s. 56 of FIPPA to not hold an inquiry on the basis that it is plain and obvious that the Law Society is authorized to refuse to confirm or deny the existence of records that are responsive to the applicant's request (s. 8(2)(b)). The adjudicator determined that it is not plain and obvious that s. 8(2)(b) applies. Therefore, the adjudicator dismissed the Law Society's s. 56 application.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(b) and 56.

Authorities Considered: B.C.: Order 260-1998, [1998] B.C.I.P.C.D. No. 55 (QL); Decision F08-11, 2008 CanLII 65714 (BC IPC); Order F09-02, 2009 CanLII 3226 (BC IPC); F08-11, 2008 CanLII 65714 (BC IPC); Order F14-48, 2014 BCIPC 52 (CanLII); Order 02-35, 2002 CanLII 42469 (BC IPC); Order F15-01, 2015 BCIPC 1 (CanLII).

INTRODUCTION

[1] This order involves an application by the Law Society of British Columbia (the “Law Society”) requesting that the Office of the Information and Privacy Commissioner (“OIPC”)¹ exercise its discretion under s. 56 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to decline to hold an inquiry into a Law Society decision to refuse to confirm or deny the existence of records requested by an applicant.²

[2] The applicant’s spouse is the executrix of her mother’s estate. The spouse’s mother’s estate was involved in litigation (the “Action”) challenging the validity of the spouse’s grandmother’s Will. In the Action, the lawyer (the “Lawyer”) who drafted the Will deposed an affidavit concerning its creation. He also testified at trial about the creation of the Will.

[3] The outcome of the trial was that the British Columbia Supreme Court determined that the spouse’s grandmother’s Will was valid and subsisting, and had been proven in solemn form. The British Columbia Court of Appeal dismissed an appeal and leave to the Supreme Court of Canada was denied.

[4] The applicant believes that the Law Society retained a law firm (the “Firm”) to draft affidavits for the Lawyer and his assistant in its role as the Lawyer’s professional liability insurer.³ The applicant also believes that the Lawyer’s evidence in the Action was false and contributed to the Will being upheld by the Court. In an effort to establish this, he requested all records in the custody or control of the Law Society in relation to the preparation of these affidavits, as well as all invoices and communications from or to the Firm regarding this work.

[5] The Law Society responded to the applicant, in part, as follows:

The Law Society does not provide information or records related to any professional liability matters to the public or third party requesters because this information is personal information. The Law Society refuses to confirm or deny the existence of any specific claims to third parties under sections 8(2)(b) and 22 of FIPPA because the disclosure of their existence would be an unreasonable invasion of privacy. In addition, types of records and information described in your request would also be subject to solicitor client privilege under section 14 of FIPPA.

¹ Section 56 of FIPPA confers this discretion on the Information and Privacy Commissioner. I am the Commissioner’s delegate for this decision as permitted by s. 49 of FIPPA. For ease of reference, this order refers to the decision under s. 56 as the discretion of the OIPC.

² FIPPA refers to a person who makes a request for records to a public body as an “applicant”. Therefore, I will refer to the person who requested records from the Law Society as the “applicant” throughout this order, notwithstanding that he is the respondent to this application.

³ This liability insurance is known as the Lawyers Insurance Fund.

[6] The applicant disagreed with the Law Society's response and requested a review by the OIPC.

[7] In response, the Law Society made an application requesting that the OIPC exercise its discretion to not proceed with an inquiry under s. 56 of FIPPA.

[8] The Law Society submits it is plain and obvious that ss. 8(2)(b) and 22 apply here, as Order 260-1998⁴ previously held that s. 8(2)(b) (refusal to confirm or deny the existence of records) applied to an applicant's request for the Law Society's professional liability insurance claim records about specified lawyers.⁵ The applicant disputes the Law Society's position and he points out that I am not bound to follow previous OIPC decisions. He also submits that s. 25 of FIPPA (information must be disclosed if in the public interest) applies, so the Law Society must immediately produce all requested documents.

ISSUE

[9] The issue in this application is whether the OIPC should exercise its discretion under s. 56(1) of FIPPA to not hold an inquiry.

[10] Previous orders have established that the party asking the OIPC to exercise its discretion to not hold an inquiry bears the burden of demonstrating why that request should be granted.⁶

DISCUSSION

Preliminary Matter – scope of this application

[11] Given the various FIPPA sections raised by the parties, I will clarify the scope of the application I am deciding here. The Law Society submits that it correctly applied ss. 8(2)(b) and 22 of FIPPA when it refused to confirm or deny the existence of any responsive records. Further, the Law Society's initial response to the applicant's access request states that the types of records and information he seeks would also be subject to solicitor client privilege under section 14 of FIPPA. For his part, the applicant raises s. 25 of FIPPA in his submissions.

[12] As discussed below, s. 8(2)(b) cannot be applied at the same time as ss. 14 and 22.⁷ Section 8(2)(b) states as follows:

⁴ Order 260-1998, [1998] B.C.I.P.C.D. No. 55 (QL).

⁵ Order 260-1998[1998] B.C.I.P.C.D. No. 55 (QL) applied s. 8(2)(b) only. However, Decision F08-11, 2008 CanLII 65714 (BC IPC), a case involving the complaints and disciplinary records of a member of the Law Society, determined that ss. 8(2)(b) and 22 both applied.

⁶ Order F09-02, 2009 CanLII 3226 (BC IPC) and F08-11, 2008 CanLII 65714 (BC IPC) at para. 11.

...the head of a public body may refuse in a response to confirm or deny the existence of

- ...
- (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

[13] An applicant in an inquiry under s. 8(2) is in a different position than applicants who have been denied access to information under other exceptions to disclosure in FIPPA. By invoking s. 8(2), a public body is denying the applicant the knowledge of whether a record exists (or does not exist). In order for s. 8(2) to apply, there must be uncertainty about the existence of responsive records. In contrast, ss. 14 and 22 only apply to information that is contained in a responsive record (*i.e.* a record that exists). Given this difference, s. 8(2) cannot be considered simultaneously with other exceptions to disclosure regarding the same responsive records. In this case, the Law Society is refusing to confirm or deny if there are records that are responsive to the applicant's request, so it is clearly relying on s. 8(2)(b).

[14] This is not the first time an applicant has raised s. 25 in relation to records whose existence a public body is refusing to confirm or deny under s. 8(2)(b). This, for example, occurred in Order F14-48.⁸ I find here, as I did in that case, that it would be inconsistent for me to simultaneously consider ss. 8(2)(b) and 25, since a s. 25 analysis is predicated on information that exists.

[15] For the above reasons, in deciding whether to exercise discretion to not hold an inquiry under s. 56 of FIPPA, I am only considering whether it is plain and obvious that s. 8(2)(b) applies.

Section 56

[16] Section 56(1) of FIPPA states as follows:

- 56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[17] The OIPC has the discretion to decide whether to conduct an inquiry due to the word "may" in s. 56. A number of previous orders have considered the exercise of this discretion. Decision F08-11 provides a list of principles to guide the exercise of that discretion. They are as follows:

⁷ I state this notwithstanding Decision F08-11, 2008 CanLII 65714 (BC IPC), in which the adjudicator determined that both ss. 8(2)(b) and 22 applied to a Law Society decision to refuse to confirm or deny the existence of records.

⁸ Order F14-48, 2014 BCIPC 52 (CanLII).

- the public body must show why an inquiry should not be held;
- the respondent (the applicant for records) does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the public body properly applied FIPPA, the respondent must provide “some cogent basis for arguing the contrary”;
- the reasons for exercising discretion under s. 56 in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of FIPPA, and the principles of abuse of process, *res judicata* and issue estoppel; and
- it must in each case be clear that there is no arguable case that merits an inquiry.⁹

[18] I apply these principles here.

Section 8(2)(b)

[19] Section 8(2)(b) of FIPPA authorizes public bodies to refuse to confirm or deny the existence of a record if the disclosure of its existence would be an unreasonable invasion of a third party's personal privacy.

[20] For s. 8(2)(b) to apply, a public body must first establish that disclosure of the mere existence or non-existence of the requested records would convey third party personal information.¹⁰ It must then establish that disclosure of the existence or non-existence of that personal information would itself be an unreasonable invasion of a third party's personal privacy. Section 22 of FIPPA is relevant in determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b).¹¹ However, the analysis under ss. 8(2)(b) and 22 differ somewhat to reflect that s. 8(2)(b) relates to whether disclosure of the mere existence of records – as opposed to the disclosure of the information in the record – would be an unreasonable invasion of that third party's personal privacy. For example, as stated in Order 02-35:

The s. 22(2) analysis may, under s. 22(2)(a), entail an assessment, in a case where disclosure of the personal information itself is in issue, of whether disclosure is desirable in order to subject a public body's activities to public scrutiny. But disclosure of the fact that personal information exists does not necessarily raise the same public scrutiny issues under s. 22(2)(a). The s. 22 analysis looks to the impact of disclosure of the personal information itself,

⁹ Decision F08-11, 2008 CanLII 65714 (BC IPC) at para. 8.

¹⁰ Order 02-35, 2002 CanLII 42469 (BC IPC).

¹¹ *Ibid.*

while the s. 8(2)(b) analysis in a sense will, in many cases, not mirror the in-depth examination under s. 22.¹²

[21] These above principles for interpreting s. 8(2)(b) have been used in numerous orders and I apply them here.¹³

[22] I will now consider what – if any – personal information of a third party would be conveyed by confirming or denying the existence of the requested records.

What information, if any, will be conveyed by confirming or denying the existence of requested records?

[23] In applying s. 8(2)(b), a public body must first establish that personal information would be disclosed by confirming or denying the existence of the requested records. Schedule 1 of FIPPA defines “personal information” as “recorded information about an identifiable individual other than contact information”.

[24] In this case, the applicant is requesting records in the custody or control of the Law Society relating to the Firm’s preparation of two affidavits, as well as related invoices from the Firm to the Law Society and communications regarding this work.

[25] In my view, it appears that confirming whether the requested responsive records exist or not would disclose whether the Firm was retained by the Law Society to provide legal services for the Lawyer.¹⁴ This in turn appears to reveal information about the Lawyer – namely whether (or not) claims or possible claims were reported in relation to his professional liability insurance regarding the Will.¹⁵ The applicant does not dispute that this is the information that would be revealed.

¹² Order 02-35, 2002 CanLII 42469 at para. 33.

¹³ For example, see Order F15-01, 2015 BCIPC 1 (CanLII).

¹⁴ In expressing this preliminary view, I acknowledge it is conceivable that the Firm provided legal services to the Lawyer without the Lawyer’s Insurance Fund’s involvement, but the records came into the possession of the Law Society for some other reason. However, based on the materials before me, this appears to be very unlikely.

¹⁵ Again, for clarity, there are no *in camera* materials before me in this inquiry, and I do not know whether there are responsive records or any Law Society involvement in this matter.

Is it plain and obvious that s. 8(2)(b) of FIPPA applies?

[26] It is my preliminary view that confirming or denying the existence of responsive records would itself convey personal information about the Lawyer. The issue remains, however, whether to exercise discretion under s. 56 of FIPPA to not hold an inquiry because – as the Law Society submits – it is plain and obvious that s. 8(2)(b) applies.

[27] The Law Society submits that there is no arguable issue because it is obvious from previous Orders and Decisions that the Law Society properly applied the provisions of FIPPA in response to the applicant's request for access to professional liability insurance claims records. The Law Society bases its argument on Order 260-1998.

[28] In Order 260-1998,¹⁶ an applicant requested that the Law Society disclose the professional liability insurance records of specified lawyers, among other records.¹⁷ Former Commissioner Flaherty determined that s. 8(2)(b) applied with respect to the requests for these professional liability insurance records. In reaching this conclusion, he stated that the Law Society's evidence and submissions were "fully persuasive", and that the following factors were particularly relevant: s. 22(2)(e) (unfair exposure to financial or other harm), s. 22(2)(f) (personal information supplied in confidence), s. 22(2)(g) (personal information that is likely to be inaccurate or unreliable), and s. 22(2)(h) (unfair damage to reputation).¹⁸ The bulk of his reasoning is as follows:

The fact that the Law Society's insurance department has a claim file in respect of a particular member is in itself very sensitive information. Members of the Law Society are required to report in writing to the insurance department if they 'become aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious . . .' Thus members report many errors and circumstances which ultimately do not result in any loss to a client or any claim against a member. Of reports received from January 1, 1993, to April 21, 1998, 65% were reported as potential claims only, and over 50% were closed with no defense required or indemnity paid...

The Law Society goes on to point out that the fact that a report has been made is not necessarily evidence of negligence on the part of a lawyer and is not evidence of incompetence. Many capable lawyers report potential claims

¹⁶ Order 260-1998, [1998] B.C.I.P.C.D. No. 55.

¹⁷ The applicant also requested the lawyers' professional misconduct or discipline records, and records concerning the applicant's claims to the Law Society under its Special Compensation Fund.

¹⁸ In Order 260-1998, the request for records related to both regular professional liability insurance and excess insurance. Section 22(3)(d) also applied to the excess insurance. However, the applicant's request in the Law Society's current application relates to compulsory – not excess – insurance.

out of an abundance of caution. The difficulty stems from the fact that the reports of insurance claims are likely to be taken by the public as a negative reflection on a lawyer's competence.¹⁹

[29] The Law Society submits that the circumstances in this case are the same as in Order 260-1998, so s. 8(2)(b) obviously applies in the same way it did in that case.

[30] However, in my view, it is not plain and obvious that disclosing whether the Lawyer's professional liability insurer was (or was not) involved in providing legal services to the Lawyer for the Action would be an unreasonable invasion of the Lawyer's personal privacy. In this case, it is at least arguable that Order 260-1998 is distinguishable because the specific details of the Lawyer's conduct regarding the Will are already publicly available. The Court decisions relating to the Action give detailed accounts of the steps taken by the Lawyer in drafting the Will, which the Courts concluded was valid. While I expressly do not reach any conclusions about the matter, the fact that the Lawyer's conduct in relation to creating the Will is already publicly available may be relevant. In these circumstances, in my view it is at least arguable that disclosing whether the Lawyer's professional liability insurer was (or was not) involved in this matter would not unfairly reflect on his competence, fall under ss. 22(2)(g) or (h), or unreasonably invade the Lawyer's personal privacy.

[31] Therefore, for these reasons above, I find that it is not plain and obvious that s. 8(2)(b) applies in this case.

CONCLUSION

[32] I find that the Law Society has not established that it is plain and obvious that it is authorized to refuse to confirm or deny the existence of records that are responsive to the applicant's request within the meaning of s. 8(2)(b) of FIPPA. Therefore, I dismiss the Law Society's s. 56 application. An inquiry will be held under Part 5 of FIPPA about whether s. 8(2)(b) applies.

[33] I reach this decision without drawing any conclusions about the respective positions of the parties. The ultimate determination of this matter will be decided based on the evidence and arguments both parties submit at the inquiry.

July 21, 2016

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F16-61165

¹⁹ Order 260-1998, [1998] B.C.I.P.C.D. No. 55 at para. 33.