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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 169-1997
June 11, 1997**

INQUIRY RE: A decision by the Law Society of British Columbia to refuse access to complaint records

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on January 2, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of two combined requests for review of a two-part refusal by the Law Society of British Columbia to provide complete access to records that it had compiled during its investigation of the applicant's complaint.

2. Documentation of the inquiry process

On September 5, 1996 the applicant submitted a request to the Law Society for "copies of all and any records pertaining to my complaint against [a lawyer], including notes of telephone conversations and draft documents." On September 27, 1996 the Law Society provided its first response to the request. It disclosed, in severed form, some records pertaining to the applicant's complaint and withheld the others. It informed the applicant that it had applied sections 14 and 22 of the Act to the withheld information.

On October 16, 1996 the Law Society provided its second response to the applicant's request by releasing severed copies of some records and withholding two others in full. It told the applicant that it was applying sections 14 and 22 to the withheld information. In addition, it told the applicant that section 57 of the *Legal Profession Act* required it to apply section 14 of the *Freedom of Information and Protection of Privacy Act* to withhold some of this information. The applicant requested reviews by the Office of both responses.

During the review period, the Law Society withdrew its application of section 22 of the Act and released three records to the applicant. However, the Law Society maintained its application of section 14 for all of the records it had previously withheld under this section. The Law Society also informed the applicant that section 57 of the *Legal Profession Act* required it to withhold some of the information in the records from its first response.

On December 10, 1996 the Office of the Information and Privacy Commissioner gave notice to the applicant and the Law Society of the written inquiry to be held on January 2, 1997 to resolve the section 14 issues in the combined reviews.

3. Issues under review at the inquiry and the burden of proof

The issue under review is the Law Society's decision to apply section 14 of the *Freedom of Information and Protection of Privacy Act* to a series of records related to the applicant's complaint to the Law Society about an individual lawyer (the third party). Section 14 reads as follows:

Legal advice

- 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

A related issue under review is the Law Society's claim that section 57 of the *Legal Profession Act*, S.B.C. 1987, chapter 25, as amended (which is now section 63 of the *Legal Profession Act*, R.S.B.C. 1996, chapter 255) requires it to withhold confidential information:

Non-disclosure of privileged and confidential information

- 57(1) Notwithstanding section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of carrying out duties under this Act, becomes privy to information, files or records that are confidential or are subject to solicitor and client privilege, has the same obligation respecting the disclosure of that information as the member from whom the information, files or records were obtained.
- (2) A member, former member or articled student who, in accordance with this Act, provides the society with any information, files or records that are confidential, or subject to a solicitor and client privilege is deemed not to have breached any duty or obligation that he or she would otherwise have had to the society or the client not to disclose the information, files or records.

- (3) A person who, during the course of an appeal under section 64 or an application under the *Judicial Review Procedure Act* with respect to a matter under this Act, becomes privy to information or records that are confidential or are subject to solicitor and client privilege, must not
 - (a) use the information other than for the purpose for which it was obtained, or
 - (b) disclose the information to any person.
- (4) The Court of Appeal, on an appeal under section 58, and the Supreme Court, on an application under the *Judicial Review Procedure Act* with respect to a matter under this Act, may exclude members of the public from the hearing of the appeal or application if the court considers the exclusion is necessary to prevent the disclosure of information, files or records that are confidential or subject to solicitor and client privilege.
- (5) In the giving of reasons for judgment on an appeal or application referred to in subsection (4), the Court of Appeal or the Supreme Court, as the case may be, must take all reasonable precautions to avoid including in those reasons any information before them on the appeal or application that is confidential or subject to solicitor and client privilege.
- (6) Notwithstanding section 14 of the *Freedom of Information and Protection of Privacy Act*, the benchers may make rules that they consider necessary or advisable for the purpose of ensuring the non-disclosure of any confidential information or information that, but for this Act, would be subject to solicitor and client privilege, and the rules may be made applicable to any person who, in the course of any proceeding under this Act, would become privy to the confidential or privileged information.
- (7) Section 47(4) of the *Freedom of Information and Protection of Privacy Act* does not apply to information that, but for this Act and the production of the information to the commissioner under that Act, would be subject to solicitor and client privilege.

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to information in the record has been refused under section 14, it is up to the public body, in this case the Law Society, to prove that the applicant has no right of access to the record or part of the record.

4. The records in dispute

The records in dispute consist of correspondence compiled or generated by the Law Society in the course of investigating the applicant's complaint about the third party. They comprise the records to which the Law Society applied section 14 of the Act, as listed in the attachments to the two letters of response from the Law Society to the applicant.

5. The Law Society's case

The Law Society retained outside counsel to investigate the applicant's complaint against one of its members under the discipline provisions of the *Legal Profession Act*. She found no evidence that the third party had "done anything that might constitute professional misconduct or incompetence." (Submission of the Law Society, paragraph 3)

I have discussed below the Law Society's submission on section 14 of the Act.

6. The applicant's case

The applicant indicated, in his initial submission, that he was not asking the Law Society to provide him with records which are subject to solicitor-client privilege as between the lawyer he complained about and that lawyer's clients. His interest is in the correspondence between the Law Society and the lawyer retained to investigate his complaint.

I have discussed below, as I deemed it appropriate to do so, the main points of the applicant's submission.

7. Discussion

The applicant is of the view that there are 36 records withheld or severed by the Law Society, mostly involving communications between officials of the Law Society and outside counsel. In his view, this "raised the issue of possible interference with her investigation and an attempt to influence the results of that investigation." (Submission of the Applicant, paragraph 2.09) Having reviewed the records in dispute, I can assure the applicant, unequivocally, that there is no evidence of that sort in these materials.

The applicant has various things to say about the selection of outside counsel by the Law Society to investigate his complaint and related ones that he has filed against other members of the Law Society. (Submission of the Applicant, paragraphs 3.05-3.08) These are not matters that I can address under the Act.

Section 14: Solicitor-client privilege

The Law Society's submission on the scope of solicitor-client privilege includes a review of decisions of the Supreme Court of British Columbia on the matter.

(Submission, paragraphs 13-20) These arguments are very familiar to me; I agree with them in principle and see no reason to review them in detail in this inquiry. (See Order No. 29-1994, November 30, 1994; Order No. 61-1995, November 1, 1995; and Order No. 74-1995, December 22, 1995. See also the resulting judicial review decisions: The Minister of Environment, Lands and Parks and the Minister responsible for Human Rights and Multiculturalism, and the Attorney General of British Columbia v. The Information and Privacy Commissioner of the Province of British Columbia (1995), 16 B.C.L.R. (3d) 64 (S.C.); Municipal Insurance Association of British Columbia v. The Information and Privacy Commissioner for the Province of British Columbia and the Corporation of the District of North Vancouver, [1996] B.C.J. No. 2534 (S.C.); Legal Services Society v. The Information and Privacy Commissioner of British Columbia and Blaine Gaffney (1996), 140 D.L.R. (4th) 372 (S.C.))

I disagree with the argument of the applicant to the effect that the records of the outside counsel's communications with Law Society staff "are not products of a lawyer-client relationship arising from the consultation of a lawyer acting within her capacity as legal advisor." He answers his only question about the applicability of solicitor-client privilege by admitting that "[w]hat we have here is an investigator (who happens to be a lawyer and a member of the Law Society) performing an important task under the watchful eye of the Law Society." (Submission of the Applicant, paragraph 3.14-3.15) That is exactly what distinguishes the situation of a member of the Law Society from the activities of other self-governing professionals covered by the Act; the former enjoy the benefits of the concept of solicitor-client privilege.

I also disagree with the applicant's argument about the confidentiality of the records in dispute under solicitor-client privilege. According to him:

In my view, whenever a member of the Law Society including outside counsel, as in this case, writes letters or memos, or any other documents, they do so in the certain knowledge that copies of the records may be disclosed to the complainant at a Complaints Review Committee hearing, or copies may be requested under the *Freedom of Information and Protection of Privacy Act*. (Submission of the Applicant, paragraph 4.10)

The relevant distinction here is between a right to request records and a right to receive them. This is fully subject to the exceptions in the Act, including section 14 which, for historic reasons, extends special protections to the communications between and among barristers and solicitors and their clients. Arguments about the need for openness cannot change this situation. (Submission of the Applicant, paragraphs 4.11, 4.12) What may happen in terms of disclosure of records before the Complaints Review Committee of the Law Society is also a completely separate matter from a request for access under the Act.

(Submission of the Applicant, paragraph 4.16) The fact that a privileged record may be disclosed to an applicant in a later proceeding does not mean that it must be disclosed now in response to a request under the Act.

Section 57 of the Legal Profession Act

This section includes several “notwithstanding” clauses with respect to the application of section 14 of the Act. It imposes an obligation of confidentiality on individuals who become privy to records including, but not limited to, those which are subject to solicitor-client privilege. The Law Society submits that “[t]he clear and unambiguous meaning of the phrase ‘notwithstanding section 14 of the *Freedom of Information and Protection of Privacy Act*’ in s. 57(1) is that the latter imposes an obligation which applies regardless of, or despite, what s. 14 prescribes.” The Law Society’s position is that all communications with its outside counsel in this case are privileged under both section 57 of the *Legal Profession Act* and section 14 of the Act. (Submission of the Law Society, paragraphs 21-24)

Section 57 reinforces the application of section 14 to the records in dispute in this particular inquiry. As the Law Society submits, “s. 14 has been interpreted to provide full enforcement of solicitor-client privilege. In this case, s. 57 may be seen to function in a parallel, or complimentary fashion.” Although the limitation of the relevant notwithstanding clause to section 14 of the Act is troublesome, it seems that the intent is effectively to extend the privilege to all records which are confidential, even if not subject to the privilege. However, in this particular inquiry, I am making my decision only on the basis of section 14 of the Act.

Review of the records in dispute

The Law Society submits that the majority of the records in dispute involve correspondence between the Law Society, as the client, and outside counsel as its solicitor: “These records involve written or verbal communications between solicitor and client for the purpose of seeking, giving or relaying legal advice and were intended to be confidential. They are therefore privileged and immune from disclosure.” (Submission of the Law Society, paragraph 25)

The Law Society describes another category of records that it has protected as concerning the “solicitor’s brief” prepared by its outside counsel, including her efforts to make inquiries and collect materials in order to advise the Law Society properly. (Submission, paragraphs 26-28) That correspondence inevitably includes various attachments which are the subject of specific legal advice (it is worth noting that many of them are duplicates).

There are three additional records which the Law Society wishes to keep confidential under section 57 of the *Legal Profession Act*: some information in notes made by Law Society’s outside counsel; a letter dated March 25, 1996; and

correspondence between the third-party lawyer and his client. As the Law Society has also withheld these records under section 14 of the Act and I am satisfied that solicitor-client privilege does attach to them, I do not need to make a decision about section 57 of the *Legal Profession Act*.

Thus I have reviewed all of the records in dispute and am satisfied that they fall within the category of solicitor-client privilege as required by section 14 of the Act. Moreover, they are the records of the actual handling and processing of a complaint, and a report on the investigation, that I have decided in previous Orders can be kept confidential by a professional body charged with investigation of the behaviour of its own members. (See Order No. 163-1997, May 14, 1997, p. 5) I can also state that there is a considerable repetition of the same records in the records in dispute. Some of the material withheld originated with the applicant, so he will be aware of its contents from his own files. As is the applicant's practice, he has also provided the Law Society with copies of his correspondence with others; since the Law Society has then used the material in investigating his complaint, it has now chosen to protect the records under section 14 of the Act, as it has a right to do.

Procedural matters

After he received the Notice of Written Inquiry, the applicant asked that this inquiry be combined with another in which he is the applicant and the Law Society is the public body. Although separate matters can be dealt with in one inquiry, it was not appropriate for this inquiry. The applicant also wanted additional information added to the Portfolio Officer's fact report. Since the fact report is essentially an agreed statement of facts for the purposes of setting up the inquiry, additions were not necessary. Moreover, the applicant presented the additional information in his submissions, as was appropriate.

The Law Society asked for the opportunity to respond to the applicant's reply submission. A party is not normally permitted an additional response to the other party's reply, because the reply should not raise new issues. It should address only the points raised in the other party's initial submission. However, I make exceptions where a party strays from this rule and raises new points in his or her reply that, for reasons of fairness, require a response. I did so in this matter, even though the applicant objected, to allow the Law Society to correct inaccuracies and to respond to new issues raised by the applicant. The applicant then asked for a similar opportunity to respond to the Law Society's reply, as well as for submissions from intervenors. As the Law Society's reply did not raise any new issues, I did not permit any further submissions. I also did not grant intervenor status to anyone.

8. Order

I find that the Law Society of British Columbia was authorized under section 14 of the Act to refuse access to the records in dispute. Accordingly, under section 58(2)(b)

of the Act, I confirm the decision of the head of the Law Society of British Columbia to refuse access.

David H. Flaherty
Commissioner

June 11, 1997