

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 179-1997
August 6, 1997**

INQUIRY RE: A decision of The Law Society of British Columbia to withhold records pertaining to an applicant's complaint against several lawyers

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

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 March 27, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of The Law Society of British Columbia (the Law Society) to withhold records concerning the applicant's complaint against a number of lawyers and the billing records of another lawyer who was retained to investigate those complaints.

2. Documentation of the inquiry process

On October 9, 1996 the applicant requested records concerning (1) the applicant's complaint against five lawyers and (2) the billing records of a sixth lawyer for services rendered concerning the applicant's complaint against the five lawyers mentioned above and against a seventh lawyer. On October 18, 1996 the Law Society wrote to the applicant informing him that the billing records would not be provided since they were excepted from disclosure under section 14 of the Act. On November 13, 1996 the Law Society provided the applicant with a number of other records and withheld others under sections 14 and 22 of the Act.

On October 22, 1996 the applicant requested a review of the first decision of the Law Society and, on November 25, 1996, a review of the second decision.

3. Issues under review and the burden of proof

The principal issue under review is the Law Society's decision to apply sections 14 and 22 of the Act to a series of records related to the applicant's complaints to the Law Society. In addition, this inquiry covers the Law Society's decision to apply section 14 of the Act to a lawyer's billing records. The applicable sections read 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.

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- ...
- (f) the personal information has been supplied in confidence,
-
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
- (d) the personal information relates to employment, occupational or educational history,
- ...
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
-

A related issue under review is the Law Society's claim that section 63 of the *Legal Profession Act*, R.S.B.C. 1996, c. 255, (formerly section 57 of the *Legal Profession Act*, S.B.C. 1987, c. 25) requires it to withhold confidential information in the records relating to the applicant's complaints to the Law Society:

Non-disclosure of privileged and confidential information

- 63(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 articulated 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.
-
- (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 *Freedom of Information and Protection of Privacy 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. Under section 57(2), where access to information in a record has been refused under section 22, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third parties' personal privacy.

4. The records in dispute

The records in dispute include various letters, memos, and notes pertaining to the applicant's complaints against a number of lawyers and the billing records for a lawyer under contract to the Law Society of British Columbia to investigate the complaints.

5. The applicant's case

The applicant submits that section 14 of the Act is not properly engaged by the Law Society. He also argues that the disclosure of personal information of the five lawyers would not constitute an unreasonable invasion of the lawyers' privacy under section 22, because it is information which is already in the public domain. I have presented below further details of the applicant's submission on the application of sections 14 and 22 to the records in dispute.

6. The Law Society's case

The Law Society submits that it has indicated to the applicant, in writing, the section of the Act that it has relied on for not disclosing (1) lawyers' bills which detail legal services rendered; (2) documents listed in attachments to the Law Society's letter to the applicant, dated November 13, 1996; and (3) a letter which was not disclosed in a letter of the Law Society to the applicant on December 6, 1996. (Submission of the Law Society, paragraphs 15, 16; Brief of documents and authorities, tab nos. 2, 3, 4)

I have presented below more of the Law Society's detailed submissions on the applicability of sections 14 and 22 of the Act.

7. Discussion

This inquiry follows on from issues that I have already discussed in Order No. 169-1997, June 11, 1997, in which I upheld the Law Society's decision not to release records of an investigation of one of its members to this applicant.

Section 14: Solicitor-client privilege

The applicant contends that the retainer of outside counsel by the Law Society to investigate the complaints does not give rise to the right to claim solicitor-client privilege. He has advanced various reasons why section 14 should not apply to the remaining records in dispute. (Submission of the Applicant, pp. 5-17) In particular, he argues that:

(1) "... communications which took place during the course of an investigation into a complaint about the conduct of a lawyer should be disclosed to the complainant." (Submission of the Applicant, p. 8)

(2) “...the reality is that an outside lawyer’s role vis-à-vis the investigation of a complaint against a member, is limited to informing, seeking direction and presenting a far from independent report to the Discipline Committee of the Law Society.... In these circumstances, the outside lawyer is not giving advice to the Law Society at all. They are merely rubber-stamping a decision made at 845 Cambie Street at taxpayer’s expense.” (Submission of the Applicant, pp. 11, 12)

(3) “[the outside counsel’s] financial arrangements with the Law Society cannot be protected by solicitor-client privilege. Indeed, it is in the public interest to know what [outside counsel] was paid for ‘investigating’ my complaints.” (Submission of the Applicant, p. 12)

The Law Society submits that section 14 protects from disclosure all communications between it, its employees and officers, and outside counsel that it retained to handle a complaint against a member of the Law Society. (Submission of the Law Society, paragraph 21) I have reviewed the affidavit of Bryan F. Ralph, Q.C., Secretary to the Law Society of B.C. (as he then was), and find that the requirements necessary to establish a solicitor-client relationship are present. (Submission of the Law Society, paragraph 21, and Law Society response to the surreply of the applicant, paragraph 4) In addition, the records include two pages of counsel’s handwritten notes which I find form part of counsel’s brief and are protected by solicitor-client privilege. (Submission of the Law Society, paragraphs 22 and 23) The Law Society, as client, has not consented to the disclosure of any of its communications with outside counsel or the contents of the solicitor’s brief. (Submission of the Law Society, paragraph 23)

I agree with the Law Society’s submission that legal accounts enjoy the same privilege as any other solicitor-client communications (Submission of the Law Society, paragraph 24). (Corporation of the District of North Vancouver v. The Information and Privacy Commissioner (unreported, Vancouver Registry No. A954022/A954033), [1996] B.C.J. No. 2534 (S.C.), October 15, 1996).

I agree with the various submissions of the Law Society on the application of section 14 to the records in dispute. (See also Order No. 169-1997, pp. 4, 5) I do not agree with the arguments of the applicant on the limited scope of section 14 of the Act.

Section 22: Disclosure harmful to personal privacy

The applicant is of the view that the Law Society is being inconsistent in its application of section 22 of the Act to the records in dispute because it released similar information concerning a lawyer in another case. In addition, the applicant contends that the bulk of the material being withheld is already in the public domain in directories of lawyers. (Submission of the Applicant, paragraphs 6.01, 6.02; see also Reply Submission of the Applicant, paragraphs 4, 5) In his view, disclosure of the personal information about the five lawyers held by the Law Society would not be an unreasonable invasion of their privacy. (Reply Submission of the Applicant, p. 18)

The Law Society submits that the personal information in dispute must be withheld on the basis of the statutory presumptions established by section 22(3) and circumstances under section 22(2) of the Act. (Reply Submission of the Law Society, paragraph 5) The Law Society states that the fact that disclosure was made in a different case in different circumstances is not evidence that disclosure with respect to these lawyers would not be harmful.

I agree with the Law Society that the fact that it disclosed similar personal information in another access to information request, with the consent of the member involved, is not a binding precedent in this inquiry. (Reply Submission of the Law Society, paragraphs 7, 8). Further, the personal information withheld by the Law Society is not available in the directories of lawyers.

The records in dispute include computer printouts of a member's history. I agree with the Law Society that the information relates to the third parties' employment histories (section 22(3)(d)) and describes their financial history (22(3)(f)) and that disclosure would therefore be an unreasonable invasion of the privacy of the lawyers in question. In addition, the Law Society applied section 22(2)(f) as a consideration in determining whether disclosure would be an unreasonable invasion of privacy. However, as the origin and context of the information is not clear from the submissions, and given the presumptions in sections 22(3)(d) and 22(3)(f), it is not necessary to decide on the application of this consideration.

I conclude that the applicant has not advanced sufficient evidence or argument to rebut the presumption under section 22(3) of the Act. Therefore, I find that the applicant has not met his burden of proof under section 57(2). The Law Society is required to withhold the information in the records in dispute under section 22.

Section 63 of the Legal Profession Act

As in Order No. 169-1997, pp. 5-6, the Law Society invokes section 63; in view of my decision on section 14, it is not necessary to address this submission.

Procedural matters

Shortly after he received the Notice of Inquiry, but before he made his initial submissions, the applicant complained that he did not receive the Portfolio Officer's fact report before the Notice of Inquiry. It was sent to him the day after my Office received his objection and thirteen days before the submissions were due. It does not appear that the applicant has been prejudiced in this matter.

After receiving the Law Society's reply submission, the applicant asked for the opportunity to respond to it. The applicant said that the Law Society's reply submission raised "some new and unexpected issues as well as some misleading statements." The

Law Society stated that it could “see no basis for the applicant’s assertion that anything in the Law Society’s reply is new or unexpected.” In addition, the Law Society submitted that it could “see no merit whatsoever in [the] unsubstantiated allegation” of misleading statements.

As I pointed out in Order No. 169-1997, at page 7, “a party is not normally permitted an additional response to the other party’s reply, because the reply should not raise new issues.” In the present inquiry, however, I granted the applicant an opportunity to file a surreply restricted to “the new matters.” In turn, I granted the Law Society the opportunity to respond to the issues raised by the applicant in his surreply.

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. Under section 58(2)(b) of the Act, I confirm the decision of the head of the Law Society to refuse access.

I also find that the Law Society of British Columbia was required to refuse access under section 22 of the Act to the personal information in the records in dispute. Under section 58(2)(c), I require the head of the Law Society to refuse access to these records.

David H. Flaherty
Commissioner

August 6, 1997