



Order F23-53

## LAW SOCIETY OF BRITISH COLUMBIA

Emily Kraft  
Adjudicator

June 29, 2023

CanLII Cite: 2023 BCIPC 61

Quicklaw Cite: [2023] B.C.I.P.C.D. No. 61

**Summary:** The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Law Society of British Columbia (Law Society) for records about himself and other records related to the Law Society's enforcement, complaints, investigations, and disciplinary procedures. The Law Society withheld the records and information in dispute under ss. 13(1), 14, 15(1)(l), and 22(1). The adjudicator found that the Law Society was authorized to refuse to disclose the records and information it withheld under ss. 14 and 15(1)(l) and required to refuse to disclose some of the information it withheld under s. 22(1). The adjudicator found that the Law Society is not required or authorized to refuse to disclose some information it withheld under ss. 13(1) and 22(1) and ordered the Law Society to disclose that information to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 13(1), 14, 15(1)(l), 22(1), 22(4)(e), 22(3)(d), and 22(2).

### INTRODUCTION

[1] A lawyer (applicant) requested that the Law Society of British Columbia (Law Society) provide him with copies of all records about himself, including records related to a professional misconduct investigation that he was the subject of.<sup>1</sup> He also requested copies of policies, manuals, and memoranda related to the Law Society's enforcement, complaints, investigations, and disciplinary procedures.<sup>2</sup>

[2] The Law Society released some records to the applicant but withheld other records and portions of records under ss. 13(1) (advice or

---

<sup>1</sup> Applicant's access request dated November 1, 2019 (OIPC File F20-83604).

<sup>2</sup> Applicant's access requests dated November 1, 2019 and February 20, 2020 (OIPC File F20-83694).

recommendations), 14 (solicitor-client privilege), 15(1)(l) (harm to the security of a property or system), and 22(1) (unreasonable invasion of third-party personal privacy).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Law Society's decision. During mediation, the Law Society released additional information and records to the applicant. However, mediation did not resolve the remaining issues and they proceeded to this inquiry.

[4] During the inquiry, the Law Society disclosed further information to the applicant that it previously withheld under s. 13. I conclude that information is no longer at issue in this inquiry.<sup>3</sup>

[5] Some of the records in dispute in this case overlap significantly with the records in dispute in Order F23-52<sup>4</sup> which is being issued concurrently with this order.

## **PRELIMINARY MATTERS**

### **Section 6(1) – duty to assist**

[6] In his response submission, the applicant raises a new issue that was not listed in the notice of inquiry or investigator's fact reports: he submits that the Law Society has failed to comply with its duty to assist under s. 6(1) of FIPPA.<sup>5</sup> Section 6(1) requires public bodies to make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely. A component of the duty under s. 6(1) is the requirement to conduct an adequate search for records.<sup>6</sup> The OIPC investigator's fact reports in this case explicitly state that the applicant's complaints about the adequacy of the Law Society's search for records were investigated and do not form part of this inquiry.<sup>7</sup> The applicant seems to be saying that the Law Society otherwise failed to comply with s. 6(1).

[7] Past OIPC orders have said that parties may only introduce new issues at the inquiry stage if they request and receive permission from the OIPC to do so.<sup>8</sup>

---

<sup>3</sup> The Law Society did not release this information to the applicant until after he submitted his response submission dated September 22, 2022. Accordingly, the OIPC registrar of inquiries permitted the applicant to make a further response submission in light of the disclosure, which he did.

<sup>4</sup> Order F23-52, 2023 BCIPC 60.

<sup>5</sup> Applicant's response submission dated September 22, 2022 at paras 7 and 40.

<sup>6</sup> Order F22-46, 2022 BCIPC 52 at para 7.

<sup>7</sup> Investigator's fact report for OIPC File F20-83604 at para 5; investigator's fact report for OIPC File F20-83694 at para 9.

<sup>8</sup> Order F16-34, 2016 BCIPC 38 at para 9.

The notice of inquiry, which was provided to both parties at the start of this inquiry, also states that parties may not add new issues into the inquiry without the OIPC's prior consent.<sup>9</sup> In this case, the applicant did not request prior permission from the OIPC to add s. 6(1) as an issue or explain what circumstances would justify adding it at this late stage. Accordingly, I decline to add s. 6(1) as an issue in this inquiry.

### **Section 70(1) – records available without request**

[8] In his response submission, the applicant also raises s. 70(1), which requires public bodies to make available to the public, without a request for access under FIPPA, certain manuals, instructions or guidelines issued to the officers or employees of the public body. Section 70(1) was not listed as an issue in the notice of inquiry or investigator's fact reports. The applicant did not request permission from the OIPC to add this issue or explain why he did not raise it at an earlier stage. Therefore, I decline to add s. 70(1) as an issue in this inquiry. In any event, s. 70(2) states that a public body may sever from a record made available under s. 70(1) any information it would be entitled to refuse to disclose under the various exceptions to disclosure in Part 2 of FIPPA.

### **ISSUES**

[9] The issues I must decide in this inquiry are as follows:

1. Is the Law Society authorized to refuse to disclose the information it withheld under ss. 13, 14, and 15(1)(l)?
2. Is the Law Society required to refuse to disclose the information it withheld under s. 22(1)?

[10] Under s. 57(1), the Law Society has the burden of proving that it is authorized under ss. 13, 14, and 15(1)(l) to refuse to disclose the information in dispute. Under s. 57(2), the applicant has the burden of proving that disclosing any personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).<sup>10</sup> However, the Law Society has the initial burden of proving the information it is withholding under s. 22(1) is personal information.<sup>11</sup>

---

<sup>9</sup> Notice of written inquiry dated July 8, 2022.

<sup>10</sup> Schedule 1 of FIPPA says that a "third party" in relation to a request for access to a record or for correction of personal information means any person, group of persons or organization other than the person who made the request, or a public body.

<sup>11</sup> Order 03-41, 2003 CanLII 49220 (BCIPC) at para 10.

## DISCUSSION

### Background

[11] The Law Society regulates the legal profession in British Columbia. Its responsibilities include investigating and assessing complaints made against lawyers practicing in British Columbia.

[12] The applicant is a lawyer licensed to practice law in British Columbia. The applicant and his colleague were the subjects of a professional conduct complaint made to the Law Society. The Law Society retained an external lawyer (External Lawyer) to conduct an investigation (Investigation) and provide an opinion to the Law Society about the complaint. The External Lawyer prepared two opinions regarding the complaint, one concerning the applicant and the other concerning his colleague (External Lawyer's Opinions). After considering the External Lawyer's Opinions, the Law Society issued a citation against the applicant and his colleague.

[13] The applicant made several requests for records following the citation. One of his requests, which was made jointly with his colleague, led to Order F23-25, in which I found that the External Lawyer's Opinions were protected by legal advice privilege.<sup>12</sup>

### Records and information at issue

[14] Based on the Law Society's evidence, I find the records in dispute are as follows:

- communications involving Law Society staff and the External Lawyer related to the Investigation (Investigation Records);<sup>13</sup> and
- manuals, information sheets, memoranda, and templates related to the Law Society's complaint, investigation, and discipline procedures (Memoranda and Guidance Documents).<sup>14</sup>

[15] The Law Society withheld most of the records in their entirety under s. 14 and disclosed others with some information redacted under ss. 13(1), 15(1)(I), and 22(1).

### Section 14 – solicitor-client privilege

[16] Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice

---

<sup>12</sup> Order F23-25, 2023 BCIPC 29.

<sup>13</sup> OIPC File F20-83604. The Law Society listed these records in the Table of Records for the First Request.

<sup>14</sup> OIPC File F20-83694. The Law Society listed these records in the Table of Records for the Second Request.

privilege and litigation privilege.<sup>15</sup> The Law Society is only claiming legal advice privilege.

[17] Legal advice privilege applies to applies to communications that:

1. are between solicitor and client (or their agent);
2. entail the seeking or giving of legal advice; and
3. are intended by the solicitor and client to be confidential.<sup>16</sup>

[18] Courts have found that solicitor-client privilege extends beyond the actual requesting or giving of legal advice to the “continuum of communications” between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.<sup>17</sup>

[19] Legal advice privilege also applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged information. For instance, legal advice privilege applies to internal client communications that relate to the legal advice received and discuss its implications.<sup>18</sup>

[20] Further, legal advice privilege applies to communications involving a lawyer’s support staff and communications dealing with administrative matters if the communications were made with a view to obtaining legal advice.<sup>19</sup>

[21] The Law Society withheld all of the Investigation Records in their entirety under s. 14. I find that they consist of:

- Emails between the External Lawyer and Law Society staff, some of which include attachments (External Lawyer Emails);<sup>20</sup>
- Notes taken by the External Lawyer;<sup>21</sup>
- Emails between Law Society Discipline Counsel and Law Society staff (Discipline Counsel Emails);<sup>22</sup> and

---

<sup>15</sup> *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26 [College].

<sup>16</sup> *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at p 837; *R v B*, 1995 CanLII 2007 (BC SC) at para 22.

<sup>17</sup> *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para 83; *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 42 [Camp].

<sup>18</sup> *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893 at para 24.

<sup>19</sup> *Descôteaux et al v Mierzwinski*, 1982 CanLII 22 (SCC) at p 893 [Descôteaux].

<sup>20</sup> Records 2, 4, 5, 8-26, 28-32, 34-42, and 44 in the Table of Records for the First Request.

<sup>21</sup> Record 3 in the Table of Records for the First Request.

<sup>22</sup> Record 33 in the Table of Records for the First Request.

- Emails between Law Society staff (Internal Emails).<sup>23</sup>

[22] The Law Society also withheld several Memoranda and Guidance Documents in their entirety under s. 14. I find they are as follows:

- Memo to the Executive Committee;<sup>24</sup>
- Memo to Professional Conduct staff;<sup>25</sup>
- Memo from Paralegal to Staff Lawyer;<sup>26</sup>
- Memo from Paralegal to External Counsel;<sup>27</sup>
- Discipline Committee Resource Manual;<sup>28</sup>
- Discipline Counsel Resource Manual;<sup>29</sup> and
- Templates for legal opinions.<sup>30</sup>

### ***Evidentiary basis for s. 14***

[23] The Law Society did not provide me with a copy of the records it withheld under s. 14. To support its claim of privilege over the Investigation Records, the Law Society provided an affidavit sworn by its Director of Discipline and External Litigation, who is a lawyer. Her affidavit includes a table of records that briefly describes each of the Investigation Records, including the type of record (i.e. email correspondence or notes), the date, and the names of the people involved in the communication. To support its claim of privilege over the withheld Memoranda and Guidance Documents, the Law Society provided affidavits sworn by its Director of Policy and Planning and its Deputy Chief Legal Officer, both of whom are lawyers. The Deputy Chief Legal Officer's affidavit includes a table of records that lists all of the Memoranda and Guidance Documents in dispute by title and page number.

[24] In his response submission, the applicant argued that the Law Society's description of some of the records in dispute was not sufficient and that I should order the Law Society to produce the records for my review.<sup>31</sup>

[25] Section 44 gives the Commissioner or his delegate the power to order production of records over which solicitor-client privilege is claimed. However, the

---

<sup>23</sup> Records 6, 7, and 27 of the Table of Records for the First Request.

<sup>24</sup> Record 5 in the Table of Records for the Second Request.

<sup>25</sup> Record 10 in the Table of Records for the Second Request.

<sup>26</sup> Record 11 in the Table of Records for the Second Request.

<sup>27</sup> Record 12 in the Table of Records for the Second Request.

<sup>28</sup> Record 13 in the Table of Records for the Second Request.

<sup>29</sup> Record 14 in the Table of Records for the Second Request.

<sup>30</sup> Records 7, 16, and 18 in the Table of Records for the Second Request.

<sup>31</sup> Applicant's response submission dated September 22, 2022 at para 1.

Commissioner or his delegate will only exercise their discretionary power under s. 44 when it is absolutely necessary to adjudicate the issues in dispute.<sup>32</sup>

[26] After reviewing the parties' submissions, I determined that the Law Society had not provided a sufficient evidentiary basis for its claim of privilege over some of the Investigation Records. Given the importance of solicitor-client privilege, I provided the Law Society with an opportunity to submit additional evidence and submissions in support of its s. 14 claim. In response, the Law Society submitted a second affidavit sworn by its Director of Discipline and External Litigation. The applicant responded to this additional evidence and argued that the Director did not have "first hand nor direct knowledge" of the communications at issue.<sup>33</sup>

[27] Based on my review of the additional affidavit evidence, I conclude that I have sufficient evidence to decide whether s. 14 applies. I am satisfied that the Director of Discipline and External Litigation has reviewed all of the Investigation Records and has direct knowledge of the content and context of the communications at issue.<sup>34</sup> I am also satisfied that the affidavit evidence from the Director of Policy and Planning and the Deputy Chief Legal Officer is sufficient to allow me to determine whether s. 14 applies to the disputed Memoranda and Guidance Documents. Further, all three deponents are lawyers and officers of the court, and therefore they have a professional duty to ensure that privilege is properly claimed.<sup>35</sup> I conclude it is not necessary to exercise my discretion under s. 44 to order production of the records.

[28] The applicant raised other arguments about why I should order production of the records, which I will briefly address here.

[29] As mentioned above, the Law Society reconsidered its severing decision during this inquiry and released further records and information to the applicant that it previously withheld under s. 13. The applicant says that I should draw an adverse inference from this late reconsideration and that "it is an additional reason why any records that are still being withheld should be reviewed by the Adjudicator to determine whether there has been full compliance with the Act."<sup>36</sup> The applicant says that the reconsidered records should never have been

---

<sup>32</sup> Order F22-23, 2022 BCIPC 25 at para 13.

<sup>33</sup> Applicant's response submission dated June 1, 2023 at para 4. I invited the applicant to provide a response to the Law Society's additional s. 14 evidence in my letter to the parties dated May 16, 2023.

<sup>34</sup> The Director deposes that she has reviewed all of the Investigation Records (see Affidavit #1 of TM at para 24). I also note that she was a sender or recipient of some of the Investigation Records.

<sup>35</sup> *Nelson and District Credit Union v Fiserv Solutions of Canada, Inc.*, 2017 BCSC 1139 at para 54.

<sup>36</sup> Applicant's response submission dated September 22, 2022 at para 8.

withheld, so he doubts the Law Society has properly withheld the remaining records in dispute.<sup>37</sup>

[30] The applicant also submits that the OIPC does not have an accurate list of the responsive records because the Law Society failed to list in its submissions multiple records that were disclosed to him with no severing. He says I should draw an adverse inference against the Law Society and that “[i]t is another reason why the Adjudicator should review the actual records withheld to ensure compliance with the Act.”<sup>38</sup>

[31] I decline to draw an adverse inference from the Law Society’s late reconsideration decision. Section 13 is a discretionary exception and the fact that the Law Society decided to disclose some records that it previously withheld under s. 13 is not relevant to the issue of whether the other records in dispute are protected by solicitor-client privilege. I also decline to draw an adverse inference from the Law Society’s failure to list all of the responsive records that have been fully disclosed to the applicant and are therefore not in dispute. I am satisfied that the Law Society properly listed all of the records that are in dispute in this inquiry. I see no basis to order production of the records.

## ***Analysis and findings***

### *Investigation Records*

#### Role of External Lawyer

[32] Before I consider the specific records at issue, I will first consider the role of the External Lawyer during the Investigation. As outlined above, legal advice privilege only arises where a solicitor is acting as a lawyer.<sup>39</sup> For instance, when a lawyer is hired as an investigator only, solicitor-client privilege does not apply to the communications between the lawyer and client. However, where a lawyer is conducting an investigation for the purposes of giving legal advice, privilege will attach to those communications.<sup>40</sup>

[33] The Law Society explains that when it receives a complaint about a lawyer, it may appoint a staff lawyer or external lawyer to investigate the allegations, provide legal advice on matters arising from the investigation and, in cases where the matter will be referred to the Law Society Discipline Committee for a disciplinary response, prepare a privileged legal opinion for the Law Society about the complaint.<sup>41</sup> The Director of Discipline and External Litigation deposes that, in this case, the Law Society retained the External Lawyer as legal counsel

---

<sup>37</sup> Applicant’s response submission dated October 12, 2022 at para 2(a).

<sup>38</sup> *Ibid* at p 5.

<sup>39</sup> *College*, *supra* note 14 at para 32.

<sup>40</sup> *Ibid* at para 32; *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 at paras 37-38.

<sup>41</sup> Affidavit #1 of TM at para 13.



to carry out the Investigation and provide the Law Society with a legal opinion concerning the matter.<sup>42</sup>

[34] The Director's evidence satisfies me that the External Lawyer conducted the Investigation in her capacity as a lawyer. In Order F23-25, I also found that the External Lawyer provided the Law Society with legal advice in relation to this same Investigation.<sup>43</sup>

[35] I will now consider whether the Investigation Records are subject to legal advice privilege. The applicant's submissions about the Investigation Records are very brief. He submits that he has "no ability to...counter the affidavit evidence purporting to assert privilege in a global fashion..."<sup>44</sup> He says he relies on the specialized skill and knowledge of the adjudicator to assess the Law Society's claims.<sup>45</sup>

#### External Lawyer Emails

[36] The Director of Discipline and External Litigation deposes that the External Lawyer Emails are written communications for the purposes of providing legal advice and related services to the Law Society.<sup>46</sup> Specifically, she deposes that that the communications are all concerned with the Investigation or the preparation and delivery of the External Lawyer's Opinions and form part of the continuum of communications in which the External Lawyer provided legal advice to the Law Society.<sup>47</sup> She further deposes that the communications are confidential in nature and have been treated as such by the Law Society.<sup>48</sup>

[37] The applicant argues that some of the External Lawyer Emails should not have been withheld because the Law Society's evidence does not indicate that they actually contain legal advice.<sup>49</sup> However, it is well established that privilege applies broadly to the continuum of communications that underlie legal advice.<sup>50</sup> I am satisfied that the External Lawyer Emails are written communications made within the framework of the solicitor-client relationship and are part of the continuum of communications in which the External Lawyer provided legal advice to the Law Society.

[38] Additionally, I accept the Director's evidence that the External Lawyer Emails have been treated as confidential communications by the Law Society.

---

<sup>42</sup> *Ibid* at para 10.

<sup>43</sup> Order F23-25, 2023 BCIPC 29 at para 32.

<sup>44</sup> Applicant's response submission dated September 22, 2022 at para 18.

<sup>45</sup> *Ibid* at para 1.

<sup>46</sup> Affidavit #1 of TM at para 31(a) and (c).

<sup>47</sup> *Ibid* at para 27 and Affidavit #2 of TM at para 6.

<sup>48</sup> Affidavit #1 of TM at para 31(d).

<sup>49</sup> Applicant's response submission dated June 1, 2023 at para 1.

<sup>50</sup> *Camp*, *supra* note 16 at para 42; *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at paras 33-35 [*Lee*].

The Director deposes that all of the individuals included in the External Lawyer Emails are Law Society staff.<sup>51</sup> As such, I am satisfied that the communications do not include anyone outside of the solicitor-client relationship and that they were intended to be confidential. As a result, I am satisfied that legal advice privilege applies to the External Lawyer Emails.

[39] I note that one email thread withheld under s. 14 is between a Law Society paralegal and the External Lawyer's legal assistant, not the External Lawyer herself.<sup>52</sup> However, as mentioned above, legal advice privilege also applies to communications between a lawyer's client and the lawyer's employees if they were made for the purpose of obtaining legal advice.<sup>53</sup> Accordingly, these communications are also protected by solicitor-client privilege.

[40] Some of the External Lawyer Emails include attachments. Not all attachments to privileged communications are necessarily privileged, but they are if they would provide some basis for a reader to determine some or all of the legal advice.<sup>54</sup> The Director of Discipline and External Litigation describes the various attachments as follows:

- Legal opinion templates used to instruct external lawyers about the form, content, and issues that must be addressed in their legal opinions. The Director deposes that this document was provided to the External Lawyer for the purposes of communicating the Law Society's expectations for her legal opinion about the complaint.<sup>55</sup>
- Final and draft copies of the External Lawyer's Opinions. The Director deposes that these records are confidential communications that set out the External Lawyer's legal opinion and legal advice.<sup>56</sup>
- Copies of the appendices listed, referenced, discussed and attached to the External Lawyer's Opinions. The Director deposes that the appendices form part of the External Lawyer's legal opinion and would permit accurate inferences to be drawn about the content of the legal opinion.<sup>57</sup>
- A draft communication prepared by the External Lawyer and provided to the Law Society. The Director deposes that the External Lawyer

---

<sup>51</sup> Affidavit #1 of TM at para 30.

<sup>52</sup> Record 19 in the Table of Records for the First Request.

<sup>53</sup> *Descôteaux*, *supra* note 18 at p 893.

<sup>54</sup> *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras 110-111.

<sup>55</sup> Affidavit #2 of TM at para 5(a).

<sup>56</sup> *Ibid* at para 5(b).

<sup>57</sup> *Ibid* at para 5(c).

provided the Law Society with legal advice about the content of the draft communication and the matters discussed therein.<sup>58</sup>

[41] The applicant says that some of the attachments should not have been withheld because they do not actually contain legal advice.<sup>59</sup> However, I am satisfied that the email attachments are privileged because they would reveal or allow accurate inferences to be made about the legal advice sought and provided.

[42] The Director says that several of the External Lawyer Emails attach a document that was prepared by Law Society Discipline Counsel, SC.<sup>60</sup> I will consider this document in my analysis of the Discipline Counsel Emails below.

#### External Lawyer's notes

[43] The Law Society is withholding the External Lawyer's notes of a telephone conversation she had with the Law Society's Deputy Chief Legal Officer on a specific date.<sup>61</sup> The Director of Discipline and External Litigation explains that the External Lawyer was instructed by the Deputy Chief Legal Officer during the Investigation.<sup>62</sup> The Director does not specifically address the External Lawyer's notes in her affidavits, but her evidence establishes that all of the direct communications with the External Lawyer in the records are concerned with the Investigation or the preparation and delivery of the External Lawyer's Opinions.<sup>63</sup> I am therefore satisfied that the telephone conversation between the External Lawyer and the Deputy Chief Legal Officer was a confidential communication between solicitor and client for the purposes of seeking or giving legal advice and, therefore, legal advice privilege applies to the External Lawyer's notes of that conversation.

#### Discipline Counsel Emails

[44] The Director of Discipline and External Litigation explains that, at the conclusion of an investigation, a file may be referred to the Law Society Discipline Committee for a disciplinary response. The Discipline Committee must decide how to dispose of the matter, which may include taking no further action, carrying out a conduct review, or issuing a formal citation, which gives rise to a public discipline hearing and a ruling.<sup>64</sup> In cases where the investigator intends to recommend that the Discipline Committee issue a citation, the file is assigned to a Law Society staff lawyer in the role of Discipline Counsel. The Director says

---

<sup>58</sup> *Ibid* at para 5(e).

<sup>59</sup> Applicant's response submission dated June 1, 2023 at paras 2-3.

<sup>60</sup> Affidavit #2 of TM at para 5(d).

<sup>61</sup> Record 3 in the Table of Records for the First Request and Exhibit A of TM's Affidavit #1.

<sup>62</sup> Affidavit #1 of TM at para 16.

<sup>63</sup> *Ibid* at para 27.

<sup>64</sup> *Ibid* at paras 14-15.

that Discipline Counsel assists the investigator in reviewing the evidence, provides legal advice, and drafts the allegations for consideration by the Discipline Committee. Additionally, Discipline Counsel represents the Law Society at disciplinary proceedings in circumstances where the Discipline Committee issues a citation against a lawyer.<sup>65</sup> Discipline Counsel are instructed by the Director of Discipline and External Litigation.<sup>66</sup>

[45] The Director deposes that some of the Investigation Records are confidential communications between herself and Discipline Counsel, SC.<sup>67</sup> She deposes that the communications were for the purposes of providing legal advice to the Law Society.<sup>68</sup> The Director further deposes that the communications are confidential in nature and have been treated as such by the Law Society.<sup>69</sup>

[46] Given the Director's evidence about the role of Discipline Counsel generally, I accept that the communications between the Director and SC, as Discipline Counsel, were made within the context of a solicitor-client relationship and were for the purposes of providing legal advice to the Law Society. I also accept that the communications were confidential and have been treated as such by the Law Society. The Director deposes that the individuals included in the Discipline Counsel Emails are Law Society staff, so I am satisfied that the communications do not include anyone outside of the solicitor-client relationship. Accordingly, I find that legal advice privilege applies to the Discipline Counsel Emails.

[47] As mentioned above, the Director deposes some of the External Lawyer Emails attach a document that was prepared by SC. The Director deposes that this document is "in the nature of [SC's] legal advice to the Law Society concerning the [c]omplaint."<sup>70</sup> The Director deposes that this document was provided by SC to the Law Society and the External Lawyer to facilitate the provision of legal advice to the Law Society.<sup>71</sup> I am satisfied that this attachment is subject to solicitor-client privilege because it would reveal or allow accurate inferences to be made about SC's legal advice or it falls under the continuum of communications in which legal advice was provided.

#### Internal Emails

[48] The Internal Emails are internal communications between Law Society staff to which the External Lawyer was not a party. The Director of Discipline and External Litigation deposes that these emails discuss communications between

---

<sup>65</sup> *Ibid* at paras 16-17.

<sup>66</sup> *Ibid* at para 17.

<sup>67</sup> Record 33 in the Table of Records for the First Request.

<sup>68</sup> Affidavit #1 of TM at paras 28 and 29(b).

<sup>69</sup> *Ibid* at para 31(d).

<sup>70</sup> Affidavit #2 of TM at para 5(d).

<sup>71</sup> *Ibid* at para 5(d).

the Law Society and the External Lawyer (or the External Lawyer's legal assistant) regarding the External Lawyer's Opinions. She deposes that these emails would reveal solicitor-client privileged communications between the Law Society and the External Lawyer.<sup>72</sup>

[49] I accept the Director's evidence and I am satisfied that the Internal Emails would reveal privileged communications between the Law Society and the External Lawyer. Therefore, I find that legal advice privilege applies to the Internal Emails.

#### *Memoranda and Guidance Documents*

[50] The Law Society is withholding the Memoranda and Guidance Documents in dispute under s. 14 on the basis that they contain confidential communications from Law Society staff lawyers for the purpose of giving legal advice. The applicant correctly points out that just because a Law Society employee is a lawyer does not mean that everything done by the employee attracts solicitor-client privilege.<sup>73</sup>

[51] As stated by the BC Supreme Court, solicitor-client privilege applies to a client's communications with in-house counsel provided counsel is acting in a legal capacity.<sup>74</sup> To determine whether the lawyer is acting in a legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered.<sup>75</sup>

[52] The applicant does not make further arguments about the application of s. 14 to the specific records in dispute, but I have considered his general position in my analysis below.

#### Memo to Executive Committee

[53] The Law Society provided affidavit evidence from its Director of Policy and Planning, ML, who is a lawyer. ML deposes that the Memo to Executive Committee is about potential changes to the Law Society Rules related to professional conduct complaints and contains analysis, advice, and recommendations under s. 13(1). He deposes that it also contains his legal advice, "including in relation to the legal principles applicable to the interpretation and application of the Rules and any proposed amendments under consideration."<sup>76</sup> He further deposes that the memo is a confidential

---

<sup>72</sup> Affidavit #1 of TM at para 29(a).

<sup>73</sup> Applicant's response submission dated September 22, 2022 at para 39.

<sup>74</sup> *Keefer Laundry Ltd. v Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at para 63.

<sup>75</sup> *Ibid* at para 64.

<sup>76</sup> Affidavit of ML at para 6.

communication between “in-house legal counsel” and the Executive Committee for the purposes of providing legal advice.<sup>77</sup>

[54] Based on ML’s evidence, I understand that his role at the Law Society includes acting as in-house counsel. I am satisfied that the Memo to Executive Committee contains his legal advice and that he was acting in a professional legal capacity when he provided that legal advice. I also accept that the Memo is confidential. Accordingly, I find that legal advice privilege applies to the Memo to Executive Committee.

#### Memo to Professional Conduct Staff

[55] The Law Society provided affidavit evidence from its Deputy Chief Legal Officer, who is a lawyer, that the Memo to Professional Conduct Staff was prepared by a staff lawyer and paralegal in response to a request from the Discipline Committee for legal advice and analysis. The Deputy Chief Legal Officer deposes that the document identifies and analyzes case law and legal principles relevant to the decisions made by the Discipline Committee. She deposes that it is a confidential communication between the Law Society and its in-house counsel and that it was prepared for the purposes of providing legal advice to the Discipline Committee.<sup>78</sup>

[56] I accept the Law Society’s evidence regarding this record and I am satisfied that solicitor-client privilege applies. Given that the record was prepared by a staff lawyer in response to a specific request for legal advice, it is clear that the lawyer was acting in a legal capacity at the time this record was created. Further, I accept that it contains legal analysis and is confidential in nature. Accordingly, I find that s. 14 applies to this record.

#### Memo from Paralegal to Staff Lawyer

[57] The Deputy Chief Legal Officer deposes that this document was prepared by a Law Society paralegal on the instructions of a Law Society staff lawyer and contains legal research carried out by the paralegal as well as confidential information about licensees that were the subject of referrals to the Discipline Committee.<sup>79</sup> The Deputy Chief Legal Officer deposes that she spoke with the staff lawyer involved who informed her that she commissioned the Memo for the purposes of providing legal advice to the Law Society in the course of her investigation of a complaint. The Deputy Chief Legal Officer says that, in her opinion, disclosing this document would allow a reader to ascertain the subject matter and nature of the advice that the staff lawyer provided.<sup>80</sup>

---

<sup>77</sup> Affidavit of ML at para 7.

<sup>78</sup> Affidavit of GB at paras 21-22.

<sup>79</sup> *Ibid* at para 23.

<sup>80</sup> *Ibid* at para 24.

[58] I accept the Law Society’s evidence and I am satisfied that solicitor-client privilege applies to this record, which the Law Society’s staff lawyer asked the paralegal to create. The Law Society’s evidence is that the staff lawyer provided legal advice to the Law Society in the context of her investigation of a complaint. The Law Society did not further explain the staff lawyer’s role during the investigation. However, based on the Law Society’s submissions about the role of investigating lawyers generally,<sup>81</sup> I am satisfied on a balance of probabilities that the staff lawyer in this case was acting in a legal capacity during her investigation and provision of legal advice. I find that this record qualifies as part of the staff lawyer’s “working papers” and disclosing it would allow one to infer what legal advice she provided to the Law Society.<sup>82</sup> I am also satisfied that this record is confidential in nature and has been treated as such by the Law Society. Accordingly, I find that s. 14 applies to this record.

#### Memo from Paralegal to External Counsel

[59] The Deputy Chief Legal Officer deposes that this document was prepared by a Law Society paralegal for external legal counsel engaged by the Law Society to carry out an investigation and provide the Law Society with legal advice concerning allegations of professional misconduct by a lawyer. She deposes that this document is comprised of legal research that was carried out by the paralegal at the request of the external counsel. She further deposes that this document would reveal the subject matter and the nature of the advice that the external counsel provided to the Law Society.<sup>83</sup>

[60] I accept the Law Society’s evidence with respect to this record and I find that solicitor-client privilege applies. I am satisfied that there was a solicitor-client relationship between the Law Society and the external counsel, and I conclude that this record qualifies as the external counsel’s “working papers” and its disclosure would allow a reader to infer what legal advice was provided by the external counsel.<sup>84</sup> Further, I find that this record is confidential in nature and there is no indication that it has been shared with anyone outside of the solicitor-client relationship. Accordingly, I find that s. 14 applies.

#### Discipline Committee Resource Manual

[61] The Deputy Chief Legal Officer explains that every year, the president of the Law Society appoints members to sit on the Discipline Committee.<sup>85</sup> The Discipline Committee is composed of elected and appointed Law Society

---

<sup>81</sup> Affidavit #1 of TM at paras 13 and 21.

<sup>82</sup> See *Susan Hosiery Ltd v MNR*, [1969] 2 Ex. C.R. 27 at p 359 [*Susan Hosiery*] where the court held that solicitor-client privilege applies to a lawyer’s working papers directly related to the seeking, formulating, or giving of legal advice.

<sup>83</sup> Affidavit of GB at para 26-28.

<sup>84</sup> See *Susan Hosiery*, *supra* note 81.

<sup>85</sup> Affidavit of GB at para 30.

benchers and includes non-lawyers.<sup>86</sup> The Law Society submits that it is necessary for legal counsel to provide the Discipline Committee with legal advice concerning, among other things, their roles, responsibilities, and the exercise of their powers.<sup>87</sup>

[62] The Deputy Chief Legal Officer deposes that on an annual basis several Law Society lawyers review and update a document known as the Discipline Committee Resource Manual. She says that this document includes factual information about the role, mandate, and functions of the Discipline Committee, as well as legal advice about matters including the interpretation of the Law Society Rules and other relevant legislation. She deposes that this document attaches and incorporates legal opinions that legal counsel have provided to the Law Society. Finally, she deposes that the document is maintained in confidence by the Law Society.<sup>88</sup>

[63] I accept that the Discipline Committee Resource Manual contains legal advice and that the Law Society lawyers who provided that legal advice did so in their professional legal capacity. I also accept that this document is maintained in confidence by the Law Society. Accordingly, I find that legal advice privilege applies to the Discipline Committee Resource Manual, including the attached legal opinions.<sup>89</sup>

#### Discipline Counsel Resource Manual

[64] As mentioned above, staff lawyers in the Discipline Counsel role provide legal advice and services to the Law Society and are responsible for representing the Law Society at discipline hearings before the Law Society Tribunal.<sup>90</sup> The Deputy Chief Legal Officer deposes that the Discipline Counsel Resource Manual is prepared by Law Society staff lawyers and used to instruct Discipline Counsel about the duties, responsibilities and expectations of their role. She deposes that it is analogous to the instructions a client would provide to their legal counsel. She also deposes that this record includes legal advice that has been prepared by Law Society lawyers about the interpretation and application of the Law Society Rules and applicable case law.<sup>91</sup>

[65] I am satisfied that when a lawyer is acting as Discipline Counsel they are acting as legal counsel for the Law Society. I accept the Deputy Chief Legal Officer's evidence that the Discipline Counsel Resource Manual is provided to Discipline Counsel and is analogous to the instructions a client would provide to

---

<sup>86</sup> *Ibid* at para 29.

<sup>87</sup> Law Society's initial submission at para 72.

<sup>88</sup> Affidavit of GB at paras 30-33.

<sup>89</sup> For another decision where manuals were found to be subject to solicitor-client privilege, see *Ontario (Ministry of Community and Social Services) v Cropley*, 2004 CanLII 11694 (ON SCDC).

<sup>90</sup> Affidavit of GB at para 34.

<sup>91</sup> *Ibid* at paras 35-36.



their legal counsel. I also accept the Deputy Chief Legal Officer's evidence that this record includes legal advice regarding the Law Society Rules and applicable case law. There is no indication that this record is not treated as confidential by the Law Society and Discipline Counsel. I am satisfied that disclosing the Discipline Counsel Resource Manual would reveal legal advice and instructions to legal counsel and therefore solicitor-client privilege applies.

[66] The applicant says that the Law Society disclosed several other manuals in response to his access request that did not contain any information withheld under s. 14. The applicant questions why these manuals were treated differently from the Discipline Committee Resource Manual and the Discipline Counsel Resource Manual.<sup>92</sup> In my view, the Law Society's disclosure of the other manuals does not suggest that s. 14 does not apply to the Discipline Committee Resource Manual or the Discipline Counsel Resource Manual. The evidence establishes that these manuals are confidential communications between the Law Society and the Discipline Committee or Discipline Counsel, and either contain legal advice provided by lawyers acting in a professional legal capacity or consist of instructions to legal counsel. I am satisfied that both manuals are protected by legal advice privilege.

### Templates

[67] The Deputy Chief Legal Officer describes three of the records in dispute as "templates" for legal opinions.<sup>93</sup> Specifically, she describes one record as a template for the legal opinion that is prepared by an investigating lawyer and provided to the Discipline Committee when a matter is referred for a disciplinary response.<sup>94</sup> She describes two other records as templates for the legal opinions that are prepared by investigators and provided to the Chair of the Discipline Committee for an order to investigate the books, records, and accounts of a lawyer under the Law Society Rules.<sup>95</sup>

[68] The Deputy Chief Legal Officer deposes that these templates have "been used to instruct investigators about the requirements" of their legal opinions.<sup>96</sup> She does not describe the content of the templates in detail, but she deposes that they are analogous to the written instructions that a client may provide to legal counsel in that they provide details on the specific matters on which legal advice is sought and the form and content the legal opinion should take.<sup>97</sup> She

---

<sup>92</sup> Applicant's response submission dated October 12, 2022 at pp 4-5.

<sup>93</sup> Records 7, 16 and 18 in the Table of Records for the Second Request.

<sup>94</sup> Affidavit of GB at paras 16 and 19.

<sup>95</sup> *Ibid* at para 38.

<sup>96</sup> *Ibid* at paras 19 and 38.

<sup>97</sup> *Ibid* at paras 19 and 39.

says the records would reveal confidential communications between the Law Society and legal counsel for the purposes of receiving legal advice.<sup>98</sup>

[69] I accept the Deputy Chief Legal Officer's evidence that the templates have been provided to investigating lawyers and that they are analogous to the instructions that a client may provide to legal counsel. There is no indication that the templates have not been treated as confidential by the Law Society and its lawyers. Accordingly, I find that disclosing the templates would reveal the Law Society's confidential instructions to counsel regarding the legal opinions described above. I conclude that solicitor-client privilege applies to the templates.

#### *Waiver*

[70] Having found that solicitor-client privilege applies to all of the records the Law Society withheld under s. 14, a further question arises relating to waiver of privilege.

[71] Privilege may be waived in either of the following scenarios:

1. The possessor of the privilege knows of the existence of the privilege and has demonstrated a clear intention to waive that privilege (i.e. express waiver); or
2. In the absence of an intention to waive privilege, where fairness and consistency require disclosure (i.e. implied waiver).<sup>99</sup>

[72] Given the importance of solicitor-client privilege in the functioning of the legal system, evidence justifying a finding of waiver, whether express or implied, must be clear and free of ambiguity.<sup>100</sup> The party asserting waiver has the burden of showing that there has been a waiver.<sup>101</sup>

[73] The applicant says that, if privilege applies to the Investigation Records, which he disputes, the Law Society has impliedly waived "all privilege" because it relied on the information obtained in the Investigation "and as set out in the resulting opinion/report" to issue the citation against him.<sup>102</sup> He does not provide any further explanation about how implied waiver applies.

[74] Implied waiver may occur where a party relies on legal advice it received as an element of its claim or defense. If a party raises legal advice to justify or

---

<sup>98</sup> *Ibid* at paras 20 and 40.

<sup>99</sup> *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

<sup>100</sup> *Maximum Ventures Inc. v de Graaf et al.*, 2007 BCSC 1215 at para 40.

<sup>101</sup> *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

<sup>102</sup> Applicant's response submission dated September 22, 2022 at paras 17 and 29.

explain its conduct, they cannot in fairness assert privilege to prevent an opposing party from exploring the validity of the claim.<sup>103</sup>

[75] The applicant cites *Kaplan v Casino Rama Services Inc.*<sup>104</sup> in support of his position. In that case, the plaintiffs brought a motion for an order requiring the defendants to produce an investigation report that they relied on as evidence in the proceedings. The court found that defendants had waived privilege over the report because they disclosed and relied on information in the report.

[76] The Law Society says that this case is distinguishable from *Kaplan v Casino Rama Services Inc.* because the Law Society has not disclosed or cited from the External Lawyer's Opinions nor has it indicated whether or not it relied on the External Lawyer's Opinions to issue the citation.<sup>105</sup>

[77] I am not persuaded that there was an implied waiver of the Investigation Records. The applicant did not provide any evidence to demonstrate that the Law Society disclosed or relied on any privileged information in the citation against him. There is also no evidence to suggest there was an express waiver. Accordingly, I find the applicant has failed to establish waiver over any of the Investigation Records.<sup>106</sup>

[78] The applicant did not make any arguments about waiver regarding the Memoranda and Guidance Documents. I find there has been no waiver.

### *Severing*

[79] The applicant says that he is not confident that the Law Society has complied with s. 4(2) of FIPPA, which provides as follows:

**4 (2)** The right of access to a record does not extend to information that is excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[80] The applicant says that the Law Society has withheld the disputed records in their entirety without any explicit recognition of his right of access to information that can be reasonably severed from the records.<sup>107</sup> He submits that the records should be produced to me so that I can determine whether any information can reasonably be severed.<sup>108</sup>

---

<sup>103</sup> *Soprema Inc. v Wolrige Mahon LLP*, 2016 BCCA 471 at para 30.

<sup>104</sup> *Kaplan v Casino Rama Services Inc.*, 2018 ONSC 3545.

<sup>105</sup> Law Society's reply submission at para 28.

<sup>106</sup> I also rejected the applicant's argument about waiver in Order F23-25, 2023 BCIPC 29 at paras 50-59.

<sup>107</sup> Applicant's response submission dated September 22, 2022 at para 13.

<sup>108</sup> *Ibid* at para 14.

[81] The Law Society says that the courts have determined that the duty to sever does not apply to privileged records.<sup>109</sup> However, this is not a complete statement of the law. The BC Court of Appeal in *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)* confirmed that where part of a record is privileged and a separate part is not privileged, the non-privileged part can be severed in accordance with s. 4(2).<sup>110</sup> More recently, the Court of Appeal in *British Columbia (Attorney General) v Lee (Lee)* confirmed that advice given by a lawyer outside of the solicitor-client relationship is not protected and may be severed.<sup>111</sup> However, the Court in *Lee* cautioned that severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment.<sup>112</sup>

[82] It appears to me that some of the records in dispute under s. 14 may contain information that is not privileged. For instance, the Law Society says that some of the information in the Memo to Executive Committee is analysis, advice, and recommendations under s. 13(1).<sup>113</sup> The Law Society also says that some of the information in the Discipline Committee Resource Manual is factual information about the role, mandate, and functions of the Discipline Committee.<sup>114</sup> However, given the nature of these documents, I am not satisfied that severance can be accomplished *without any risk* of revealing privileged legal advice. I find that s. 4(2) does not apply in this case and the Law Society is authorized to withhold the records at issue under s. 14 in their entirety.

### *Discretion*

[83] Section 14 gives discretion to public bodies over whether to refuse to disclose information that is subject to solicitor-client privilege. In adjudicating matters of discretion, I must be satisfied that the Law Society considered whether to exercise discretion and did so with regard to appropriate factors. If the public body exercised discretion in bad faith or if it took into account irrelevant considerations, I can return the matter back to the public body for reconsideration.<sup>115</sup>

[84] The Law Society submits that it properly exercised its discretion in applying s. 14.<sup>116</sup> It provided affidavit evidence from its Information and Privacy

---

<sup>109</sup> Law Society's reply submission at para 18.

<sup>110</sup> *College*, *supra* note 14 at para 68.

<sup>111</sup> *Lee*, *supra* note 49 at para 36.

<sup>112</sup> *Ibid* at para 40.

<sup>113</sup> Affidavit of ML at para 5.

<sup>114</sup> Affidavit of GB at para 31.

<sup>115</sup> Order F18-33, 2018 BCIPC 36 at para 33; Order F18-38 2018 BCIPC 41 at para 52.

<sup>116</sup> Law Society's initial submission at para 102.

Officer who deposes that it is her understanding and belief that the Law Society exercised its discretion to apply s. 14.<sup>117</sup>

[85] The applicant submits that it is unclear whether the Law Society actually exercised discretion under s. 14. He submits that the Law Society's evidence is insufficient because the Information and Privacy Officer did not definitively state that discretion was exercised.<sup>118</sup> He says that I should review all of the records in dispute to ensure that the Law Society has properly exercised its discretion.<sup>119</sup>

[86] Contrary to what the applicant suggests, I do not need to see the records in order to decide if the Law Society has failed to properly exercise discretion. My role is not to substitute my discretion for that of the public body. In this case, there is no evidence to suggest the Law Society acted in bad faith, failed to consider relevant factors or took into account irrelevant factors. I am satisfied that the Law Society properly exercised its discretion.

### **Section 13(1) – advice or recommendations**

[87] The Law Society applied s. 13(1) to the same records it withheld under s. 14, as well as some information in a record called the Interviewing Guide. Given my findings above, it is not necessary to consider whether s. 13(1) also applies to any information in the records I have found are protected by s. 14. Accordingly, I will only make a decision about whether s. 13(1) applies to the withheld information in the Interviewing Guide.<sup>120</sup>

[88] Section 13(1) says that a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or minister.

[89] The purpose of s. 13(1) is to allow public bodies to engage in free and frank discussion of advice and recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of decision-making were subject to excessive scrutiny.<sup>121</sup>

[90] “Recommendations” include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised.<sup>122</sup> “Advice” has a broader meaning than the term “recommendations.”<sup>123</sup> It includes

---

<sup>117</sup> Affidavit of JD at para 27.

<sup>118</sup> Applicant's response submission dated September 22, 2022 at paras 49-50.

<sup>119</sup> *Ibid* at paras 51 and 52(b)(ii).

<sup>120</sup> The Law Society did not withhold any information in the Interviewing Guide under s. 14.

<sup>121</sup> Order 01-15, 2001 CanLII 21569 (BCIPC) at para 22; Order F15-61, 2015 BCIPC 67 at para 28.

<sup>122</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 23-24.

<sup>123</sup> *Ibid* at para 24.

an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.<sup>124</sup>

[91] The Interviewing Guide is a 10-page guide used by Law Society investigators. The Law Society says that the entire record has an advisory purpose, but it disclosed most of the information in the record to the applicant because it says it is not sensitive. However, the Law Society is withholding some information on page 9 of the record because it says it “relates to advice and guidance [the Law Society] provides to its investigators.”<sup>125</sup> The Law Society does not provide any further explanation about how s. 13(1) applies.

[92] The applicant does not make arguments about s. 13(1) in his submissions other than to say that he is concerned that the Law Society “is not wanting to be accountable to the standards set out in its ‘policies, handbooks, and procedures, etc.’ and consequently it has improperly withheld such records from [him] on the basis of section 13...”<sup>126</sup>

[93] Previous OIPC decisions have established that s. 13(1) does not apply to directions or instructions that recipients have no freedom to accept or reject.<sup>127</sup> Section 13(1) does not typically capture material in a manual because, while it generally provides a degree of discretion to the intended user of the manual, it represents a public body’s settled policy or position about how to approach an issue.<sup>128</sup>

[94] I note that the Interviewing Guide states that it is “intended to assist staff in conducting interviews” and that “staff will continue to use their judgement in determining how best to gather information in individual cases.”<sup>129</sup> Although the Interviewing Guide gives some discretion to its users, in my view, the specific withheld information is directions and instructions about how to approach certain interview-related issues. It is not advice or recommendations that its users are free to accept or reject. Accordingly, s. 13(1) does not apply to this information and the Law Society is not authorized to withhold it.

### **Section 15(1)(l) - harm to the security of a property or system**

[95] The Law Society is withholding a small amount of information in the records under s. 15(1)(l), which allows a public body to refuse to disclose information if the disclosure could reasonably be expected to harm the security of

---

<sup>124</sup> *College*, *supra* note 14 at para 113.

<sup>125</sup> Law Society’s initial submission at para 92.

<sup>126</sup> Applicant’s response submission dated September 22, 2022 at para 37.

<sup>127</sup> See for example Order F19-27, 2019 BCIPC 29 at para 32 and Order F21-41, 2021 BCIPC 49 at para 29.

<sup>128</sup> Order F14-34, 2014 BCIPC 37 at para 18.

<sup>129</sup> Interviewing Guide (Record 8 in the Table of Records for the Second Request) at p 2.

any property or system, including a building, a vehicle, a computer system or a communications system.

[96] The standard of proof for s. 15(1)(l) is a reasonable expectation of probable harm, which is “a middle ground between that which is probable and that which is merely possible.”<sup>130</sup> In order to meet that standard, a public body “must provide evidence ‘well beyond’ or ‘considerably above’ a mere possibility of harm.”<sup>131</sup>

[97] The information in dispute under s. 15(1)(l) appears on one page of a record called the Intake Resource Manual.<sup>132</sup> The information is about a voicemail account used by the Law Society to receive information from members of the public about professional misconduct complaints. Specifically, it is the voicemail box number, password, and instructions to access the account.

[98] The Law Society says that disclosure of this information would allow one to gain access to the voicemail system.<sup>133</sup>

[99] The applicant did not make submissions about s. 15(1)(l).

[100] I am satisfied that disclosing the withheld information could reasonably be expected to harm the security of the voicemail account, which is a communications system, because it would allow unauthorized users to access it. Accordingly, the Law Society is authorized under s. 15(1)(l) to refuse to disclose that information.

## **Section 22 – unreasonable invasion of third-party personal privacy**

[101] The Law Society relied on s. 22(1) to withhold information in numerous records, including records it withheld under s. 14. Given my findings respecting s. 14, I will only consider the application of s. 22(1) to the remaining records in dispute.

[102] Section 22(1) requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

[103] The applicant did not make submissions on s. 22(1). I will discuss the Law Society’s submissions on s. 22(1) below.

---

<sup>130</sup> *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.

<sup>131</sup> *Ibid* at para 54.

<sup>132</sup> The Law Society identifies this page as Record A in its Table of Records for the Second Request.

<sup>133</sup> Law Society’s initial submission at para 100.

### ***Personal information***

[104] Section 22(1) only applies to personal information, so the first step in the s. 22(1) analysis is to determine whether the information in dispute is personal information.

[105] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.<sup>134</sup> Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.<sup>135</sup>

[106] Contact information is defined in FIPPA as information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, address, business email or business fax number of the individual.<sup>136</sup>

[107] The Law Society withheld under s. 22(1) the names or initials of Law Society employees that appear in several records in dispute.<sup>137</sup> Most of these records are training manuals that relate to the Law Society's intake process and forensic accounting process and they identify the named employees' roles and responsibilities during these processes.<sup>138</sup> One of the records consists of organizational charts for different Law Society departments and identifies the employees' positions and whether they are in a temporary position, a part time position, or on leave.<sup>139</sup>

[108] I am satisfied that most of the employee names are personal information and not contact information in this context because they do not appear in the records to enable the employees to be contacted at a place of business. However, I find that the name and telephone number of a Law Society employee that appears in one of the records is contact information.<sup>140</sup> In my view, it was included in the record to enable the employee to be contacted at their place of work. Therefore, it is contact information and not personal information and s. 22(1) does not apply.

[109] The Law Society also withheld information about lawyers who were the subject of investigations, including their names, member IDs, gender, birth year, call date, practicing status and type of insurance (e.g. full time). The Law Society also withheld the file numbers for the investigations, the dates the files were

---

<sup>134</sup> Schedule 1 of FIPPA.

<sup>135</sup> Order F19-42, 2019 BCIPC 47 at para 15.

<sup>136</sup> Schedule 1 of FIPPA.

<sup>137</sup> Records 1, 2, 4, 9, 15, and B in the Table of Records for the Second Request.

<sup>138</sup> Records 1, 2, 4, 9 and 15 in the Table of Records for the Second Request.

<sup>139</sup> Record B in the Table of Records for the Second Request.

<sup>140</sup> Page 1 of Record 15 in the Table of Records for the Second Request. This page is numbered page 375 in the records package.



opened, and the dates the work started and ended on the files. This information appears in two training manuals.<sup>141</sup>

[110] I accept that most of this information is the personal information of the lawyers in question. However, I do not see, and the Law Society does not explain, how the file numbers, file open and close dates, practicing status or type of insurance are personal information. In my view, this information is not reasonably capable of identifying a particular individual, so it is not personal information and s. 22(1) does not apply.

[111] Finally, the Law Society withheld a page number and several headings under s. 22(1). This information is clearly not personal information and the Law Society is not required or authorized to withhold it under s. 22(1).

### **Sections 22(4) and 22(3)**

[112] Having found that most of the information is personal information, the next step is to consider whether ss. 22(4) or 22(3) apply. Section 22(4) sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of third-party personal privacy. Section 22(3) sets out circumstances in which disclosure of personal information is presumed to be an unreasonable invasion of personal privacy.

[113] The following provisions are relevant in this case:

**22(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,

...

**22(4)** A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[114] Regarding the names of the Law Society employees that appear in the training manuals, the Law Society says that, although the names appear in relation to the employees' performance of routine administrative duties, "these documents are all older documents that are no longer in use and do not reflect the current staffing, duties and responsibilities of staff members."<sup>142</sup> The Law

---

<sup>141</sup> Records 4 and 15 in the Table of Records for the Second Request.

<sup>142</sup> Law Society's initial submission at para 97.

Society says that s. 22(3)(d) applies to the identities of its past and present employees because disclosure would reveal their employment histories.<sup>143</sup>

[115] I find that s. 22(4)(e) applies to the names of Law Society employees, not s. 22(3)(d).

[116] Previous OIPC decisions have held that s. 22(3)(d) applies to “information about a person’s work history, leave transactions, disciplinary action taken, reasons for leaving a job and comments about an individual’s workplace actions or behaviour in the context of a workplace complaint or discipline investigation.”<sup>144</sup> In this case, the information is only about the employees’ positions and functions as employees of the Law Society at the time the records were created. Accordingly, s. 22(4)(e) applies. The fact that the employees no longer hold the same positions or perform the same functions does not mean that this information relates to their employment history for the purposes of s. 22(3)(d).<sup>145</sup> I find that disclosing this information is not an unreasonable invasion of personal privacy under s. 22(4)(e), so the Law Society is not required to withhold it under s. 22(1). I will not consider this information any further.

[117] Regarding the employee names withheld in the organizational charts, the Law Society is only withholding the names of those employees who were listed as being on leave.<sup>146</sup> The Law Society submits that disclosing this information is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(d).<sup>147</sup>

[118] As explained above, previous OIPC orders have found that s. 22(3)(d) applies to information about an employee’s leave transactions. I accept that disclosing the withheld employee names in the organizational charts would reveal that those employees were on leave at the time the record was created. Consistent with previous orders, I find that disclosure is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(d).<sup>148</sup>

[119] Finally, I find that disclosing the lawyers’ personal information would reveal that they were the subjects of professional misconduct investigations. Accordingly, disclosing this information is presumed to be an unreasonable

---

<sup>143</sup> *Ibid.*

<sup>144</sup> Order 02-56, 2002 CanLII 42493 (BC IPC) at para 71, referring to Order 00-53, 2000 CanLII 14418 (BC IPC). Order 02-56 was upheld on judicial review. See *Architectural Institute of BC v Information and Privacy Commissioner for BC*, 2004 BCSC 217 (CanLII).

<sup>145</sup> For a similar finding, see Order F20-54, 2020 BCIPC 63 at para 58.

<sup>146</sup> The employees’ names were listed in the chart followed by “(L)” to indicated that they were on leave.

<sup>147</sup> Law Society’s initial submission at para 97; Affidavit of JD at para 24.

<sup>148</sup> For example, see Order F22-15, 2022 BCIPC 17 at para 66 and Order F15-17, 2015 BCIPC 18 at para 36.

invasion of personal privacy under s. 22(3)(d) because it relates to the lawyers' occupational history.<sup>149</sup>

[120] The parties did not make submissions about any other ss. 22(4) or 22(3) provisions. In my view, no other provisions apply.

### **Section 22(2)**

[121] The final step in the analysis is to determine whether disclosure of the remaining personal information in dispute would be an unreasonable invasion of personal privacy, considering all relevant circumstances including those listed in s. 22(2). It is at this stage that the presumptions under s. 22(3) may or may not be rebutted.

[122] I have considered the factors listed in s. 22(2) and I see no basis to rebut the s. 22(3)(d) presumption. I conclude that it would be an unreasonable invasion of personal privacy to disclose the names of Law Society employees on leaves of absence and the personal information of the lawyers who were subject to misconduct investigations.

### **Summary and conclusion on s. 22(1)**

[123] To conclude, I find that some of the information the Law Society is withholding under s. 22(1) is not personal information because it is contact information or it is not reasonably capable of identifying a particular individual. The Law Society is not required under s. 22(1) to withhold this information.

[124] I find that s. 22(4)(e) applies to the personal information about Law Society employees that appears in the records relating to intake and forensic accounting procedures. The Law Society is not required under s. 22(1) to withhold this information.

[125] I find that disclosing the remaining personal information in dispute is presumed to be an unreasonable invasion of personal privacy under s. 22(3)(d) because it relates to the employment or occupational history of Law Society employees or lawyers. I see no basis to rebut this presumption. Therefore, I find that disclosing this information would be an unreasonable invasion of personal privacy and the Law Society is required to refuse to disclose it under s. 22(1).

## **CONCLUSION**

[126] For the reasons given above, I make the following order under s. 58 of FIPPA:

---

<sup>149</sup> For a similar finding, see Order 02-01, 2002 CanLII 42426 (BCIPC) at para 55 and Order F18-29, 2018 BCIPC 32 at para 35.

1. I confirm the Law Society's decision to refuse to disclose the information in dispute under s. 14.
2. I confirm the Law Society's decision to refuse to disclose the information in dispute under s. 15(1)(l).
3. The Law Society is not authorized under s. 13(1) to refuse to disclose the information in the Interviewing Guide and it is required to give the applicant access to this information.
4. I confirm, in part, the Law Society's decision to refuse to disclose the information in dispute under s. 22(1). The Law Society is required to refuse to disclose only the information I have highlighted in the pages provided to the Law Society with this order.<sup>150</sup>
5. The Law Society must give the applicant access to the non-highlighted information that it withheld under s. 22(1).
6. The Law Society must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at items 3 and 5 above.

[127] Pursuant to s. 59(1) of FIPPA, the Law Society is required to comply with this order by August 14, 2023.

June 29, 2023

**ORIGINAL SIGNED BY**

---

Emily Kraft, Adjudicator

OIPC File Nos: F20-83604  
F20-83694

---

<sup>150</sup> Pp 4-8 of Record B; p 13 of Record 4 (numbered as p 27 in the records package); pp 28-29 of Record 15 (numbered as pp 398-399 in the records package).