

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 201-1997
November 28, 1997**

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

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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 August 29, 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 member of the Law Society.

2. Documentation of the inquiry process

On January 24, 1997 the applicant requested records concerning the applicant's complaint against a member of the Law Society. On February 19, 1997 the Law Society provided the applicant with a number of records and withheld others under sections 14 and 22 of the Act and section 57(1) of the *Legal Profession Act*. On February 27, 1997 the applicant requested a review of the Law Society's decision. Various extensions of time occurred subsequently.

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 five records related to the applicant's complaint to the Law Society. 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
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
- (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,
-

The Law Society also relied on 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) as a basis for withholding confidential information in the records relating to the applicant's complaint 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 a third party's personal privacy.

4. The records in dispute

The records in dispute include various memos and committee meeting minutes pertaining to the applicant's complaint against the member of the Law Society, as well as a computer printout of the member's history with the Law Society. These records and the reasons under the Act for not disclosing them to the applicant are very usefully described in a two-page grid submitted by the Law Society. (Submission of the Law Society, attachment)

5. The applicant's case

The applicant has been seeking access to records pertaining to his complaint against a member of the Law Society, including a report and legal opinion to its Discipline Committee written by a staff lawyer. The applicant has a complete list of the five items not disclosed to him. (Submission of the Applicant, pp. 1, 5)

The applicant seeks the complete minutes of the Discipline Committee's meeting on a certain date and any notes taken by its members. (Submission of the Applicant, paragraph 4.02) The Law Society's appropriate response is that any such notes are beyond the scope of the present inquiry. (Reply Submission of the Law Society, p. 2)

As further discussed below, the applicant's view is that the Law Society misapplied section 22 and overreached with respect to its application of section 14 of the Act. (Submission of the Applicant, paragraph 5.01)

6. The Law Society's case

The Law Society submits that the applicant's request for access to the records in dispute should be denied. I have discussed its detailed submissions below.

7. Discussion

I simply note that the reply submission of the applicant, which I have reviewed, largely concerns a re-argument of the basis for his original complaint to the Law Society against one of its members. (Reply Submission of the Applicant, pp. 1-6)

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.

The Law Society claims solicitor-client privilege for each of the five documents in dispute. I have reviewed its detailed description of each such record and why section 14 applies to it. I agree that solicitor-client privilege protects the communications and work product, including legal opinions of in-house or staff counsel, the record of a legal

opinion contained in documents such as Discipline Committee Minutes, and memos or notes created in the process of providing legal advice and relating to the legal advice given. (Submission of the Law Society, pp. 3, 4)

The applicant holds the view that most of the records in dispute do not fall within the scope of solicitor-client privilege. He also questions the role of the staff lawyer for the Law Society in advising the Discipline Committee. (Reply Submission of the Applicant, pp. 5-8)

I accept the submissions of the Law Society on the application of solicitor-client privilege to the documents at issue. I find accordingly that the five records in dispute are legitimately protected from disclosure on the basis of section 14 of the Act. See Order No. 169-1997, May 14, 1997, p. 5.

The Definition of Personal Information

“personal information” means recorded information about an identifiable individual, including

- ...
- (g) information about the individual’s educational, financial, criminal or employment history,
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Section 22: Disclosure harmful to personal privacy

With respect to information not disclosed to him on the basis of section 22 of the Act, the applicant submits that the “member’s history” with the Law Society is not personal information, including the date of call to the Bar, any financial difficulties, and information about hearings, trust audits, investigations, special fund claims, suspensions, and disposals. (Submission of the Applicant, paragraphs 5.05, 5.06)

The Law Society states that the member’s history “is an index of the Law Society’s files concerning the member both open and closed.” In the present case, it argues that the member’s history is protected by solicitor-client privilege as part of the counsel’s brief and is also subject to the application of section 63 of the *Legal Profession Act* (Submission of the Law Society, p. 5) For reasons more fully expressed in a previous order, I find that a member’s history is protected from disclosure on the basis of sections 22(3)(d) and 22(3)(f) of the Act. See Order No. 179-1997, August 6, 1997, p. 5. The Law Society submits that the five records in dispute contain the details of a member’s history, which are similarly protected on the basis of section 22 of the Act. (Submission of the Law Society, pp. 5, 6) I agree that these records contain employment history and financial history of the member in question.

Section 22(4): A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if (a) the third party has, in writing, consented to or requested the disclosure,

The applicant submits that a letter from the Law Society indicated that the third parties involved in the access request had consented to the disclosure of information which would affect their interests. In his view, this means that the Law Society cannot invoke section 22 against him. (Submission of the Applicant, paragraphs 5.03, 5.04) For its part, the Law Society states that it “and the Discipline Committee of the Law Society have not consented to the release of any communications protected by solicitor-client privilege.” (Submission of the Law Society, p. 4) It further submits that the applicant has “misunderstood” the meaning of the scope of consent in a letter sent to him by the analyst for the Law Society. (Reply Submission of the Law Society, p. 2, including *in camera* portions) It is clear from the Law Society's submissions that the third parties only consented to the release of certain documents, which were disclosed to the applicant. I therefore agree with the Law Society that the third parties did not consent to disclosure of the five records in dispute. Section 22(4)(a) of the Act has no application to those records.

I agree with the Law Society that the information contained in the five records in dispute is personal information the disclosure of which would constitute an unreasonable invasion of the personal privacy of the third parties. The Law Society is required by section 22(1) of the Act to refuse to disclose the five records to the applicant in this case.

8. Order

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

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

David H. Flaherty
Commissioner

November 28, 1997