



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

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Order F18-33

## LAW SOCIETY OF BRITISH COLUMBIA

Erika Syrotuck  
Adjudicator

August 10, 2018

CanLII Cite: 2018 BCIPC 36  
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 36

**Summary:** The applicant requested records from the Law Society relating to its involvement a specific case before the Court of Appeal. The Law Society withheld all the records in their entirety on the basis of ss. 14 (solicitor client privilege) and 22 (harm to third party personal privacy). The adjudicator confirmed the decision of the Law Society to withhold the records under s. 14. As a result, the adjudicator did not consider s. 22.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1).

### INTRODUCTION

[1] The applicant requested records relating to the Law Society of British Columbia's (Law Society) involvement in a specific case before the British Columbia Court of Appeal, including records of instructions given to its external lawyer, such as to refuse any settlement of the appeal. The Law Society identified a number of responsive records but withheld them entirely on the basis of ss. 14 (solicitor client privilege) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Law Society's response. Mediation failed to resolve the issues and the matter proceeded to inquiry.

[2] After the Law Society and the applicant made their submissions to the OIPC in this inquiry, the Senior Adjudicator reviewed the Law Society's evidence and determined that the Law Society had not provided enough evidence for the

OIPC to decide if s.14 properly applies. The OIPC has the power to order production of records under s. 44(1) of FIPPA, however, given the importance of solicitor client privilege, the OIPC's practice is to first give the public body another opportunity to provide evidence about the records over which it is claiming privilege. Accordingly, the Senior Adjudicator wrote to the Law Society to give it an opportunity to provide more evidence regarding s. 14. The Law Society provided a further affidavit with an attached index of records. The Senior Adjudicator accepted the index *in camera*. I have determined that this evidence is sufficient for me to decide if s. 14 applies to the records in dispute.

### **Background**

[3] The applicant filed two civil claims against his deceased father's lawyer (Defendant Lawyer).

[4] The Defendant Lawyer was insured by the Lawyer's Insurance Fund (LIF), the department at the Law Society that manages the compulsory insurance program for lawyers in British Columbia. In the course of defending the Defendant Lawyer, LIF hired an external lawyer (External Lawyer).

[5] The applicant's second claim against the Defendant Lawyer resulted in a case heard before the BC Supreme Court. The applicant then appealed to the BC Court of Appeal. The BC Court of Appeal made a decision in 2016.

[6] The applicant requested records relating to LIF or the Law Society's involvement in the Court of Appeal case, including records of instructions given to the External Lawyer, such as to refuse any settlement of the appeal.

[7] The applicant has provided extensive submissions, much of which relate to the merits of his claims against the Defendant Lawyer. While I have considered all of his submissions, I have only referenced them in this order where they are relevant to the specific issues in this inquiry.

### **Preliminary Issue – issues in this inquiry**

[8] In his submissions, the applicant complains that the Law Society failed to include certain records in response to his access request.<sup>1</sup> The OIPC can investigate whether a public body has conducted an adequate search for records under s. 6(1) of FIPPA, however, this issue is not in the Investigator's Fact Report or Notice of Inquiry.

[9] In this case, it is evident from the parties' submissions<sup>2</sup> that the OIPC investigator identified adequate search for records as an issue and considered

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<sup>1</sup> Applicant's submissions at para. 4 (last page). Applicant's submissions at para. 96.

<sup>2</sup> Affidavit of the Information and Privacy Officer for the Law Society, Exhibit H.

it during his investigation. Combined with the fact that the Investigator's Fact Report and Notice of Inquiry do not list s. 6(1) as an issue to be decided in this inquiry, I conclude that the investigator decided that s.6(1) did not warrant further consideration through an inquiry. I further note that, after receiving the Notice of Inquiry, the applicant did not seek permission to add this issue to the inquiry. For all of these reasons, I do not consider s. 6(1) of FIPPA to be an issue properly before me in this inquiry.

## ISSUES

[10] The issues in this inquiry are:

1. Is the Law Society authorized to withhold the information in dispute under s. 14 of FIPPA?
2. Is the Law Society required to withhold the information in dispute under s. 22 of FIPPA?

[11] Section 57(1) states that the burden of proof is on the Law Society to establish that the applicant has no right of access to the information in dispute withheld under s. 14. Under s. 57(2), the applicant has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22.

## DISCUSSION

### *Records in Dispute*

[12] The Law Society did not provide the records for my review. Instead it provided an *in camera* index of the records in dispute attached to the affidavit of the Claims Manager for the LIF. The Claims Manager's affidavit states that he is a lawyer and that he has reviewed the records in dispute and confirms that the index accurately represents the purpose and content of the records.<sup>3</sup> In the index, the Law Society describes the date of each communication, type of communication, parties involved in the communication and how the communication relates to the seeking, formulating or giving of legal advice.<sup>4</sup>

[13] Based on the descriptions in the index, I find that the records in dispute are:

- correspondence between the LIF and the External Lawyer;
- correspondence between the LIF, the External Lawyer and the Defendant Lawyer; and

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<sup>3</sup> Affidavit of the LIF Claims Manager, sworn March 18, 2018, at para. 4.

<sup>4</sup> Affidavit of the LIF Claims Manager, sworn March 18, 2018, Exhibit A.

- notes recorded by LIF employees about the appeal.

[14] The Law Society withheld the records in dispute entirely on the basis of both ss. 14 and 22.

### **Section 14**

#### *Legal Advice Privilege*

[15] Section 14 permits a public body to refuse to disclose information that is subject to solicitor client privilege, including legal advice privilege. Previous OIPC orders<sup>5</sup> have applied the following test for legal advice privilege:

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.<sup>6</sup>

[16] I will apply the same test here.

1. Communication, written or oral

[17] The Claims Manager states that the records in dispute constitute communications or records of communications between LIF, the Defendant Lawyer and the External Lawyer.<sup>7</sup> After reviewing the index, I am satisfied that all of the notes and correspondence reflect written or oral communications between these parties.

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<sup>5</sup> Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10.

<sup>6</sup> *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.

<sup>7</sup> Affidavit of the LIF Claims Manager, sworn March 18, 2018 at para. 6.

## 2. Confidential character

[18] The Claims Manager deposes that it is LIF's practice to maintain confidentiality of its legal files and that to the best of his knowledge, the records in dispute have been maintained in confidence by the Law Society.<sup>8</sup> Additionally, the Law Society referred me to Rule 3-46 which says that "unless permitted by this rule, no one is permitted to disclose any information or records associated with a claim."<sup>9</sup>

[19] I am satisfied that the communications were only between LIF, the Defendant Lawyer and the External Lawyer. Therefore, I find that the communications are of a confidential character.

## 3. Communication between client and legal advisor

[20] With regards to the third element, the communications are between the LIF and the External Lawyer and some also include the Defendant Lawyer. When a lawyer is hired to represent an insured (i.e. the Defendant Lawyer) and an insurer (i.e. LIF), the lawyer is regarded as being jointly retained to represent both parties.<sup>10</sup> In *Corp. of the District of North Vancouver v BC (The Information and Privacy Commissioner)*, the BC Supreme Court described the tripartite relationship as follows:

"[the insured], [insurer] and solicitors are in a relationship by virtue of the special responsibilities and duties created when insurers retain solicitors to represent and advise insureds, and then necessarily deal with those solicitors in certain aspects as principal, in others as agent for the insured. A solicitor has in effect two clients: the insurer and the insured. Information or communications may well be passed through one to the other."<sup>11</sup>

[21] The applicant submits that there was a significant conflict of interest between the LIF and the Defendant Lawyer because those parties hired different lawyers and took different positions on some aspects of the litigation.<sup>12</sup> He seems to be suggesting that the External Lawyer was not jointly retained by the LIF and the Defendant Lawyer. However, I note that later in his submissions, the applicant says that both parties had a common interest in settling the dispute before the Court of Appeal.<sup>13</sup>

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<sup>8</sup> Affidavit of the LIF Claims Manager, sworn March 18, 2018 at para. 7.

<sup>9</sup> Law Society's initial submissions, citing Rule 3-46 of the Law Society Rules.

<sup>10</sup> *Chersinoff v Allstate Insurance Co.* 1968 CanLII 671 (BC SC).

<sup>11</sup> *Corp. of the District of North Vancouver v BC (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BC SC) at para. 22.

<sup>12</sup> Applicant's submissions at para. 59.

<sup>13</sup> Applicant's submissions at para. 62.

[22] I find that, while the LIF selected and hired the External Lawyer, both the LIF and the Defendant Lawyer are clients of the External Lawyer. I am not persuaded by the applicant's submissions that the Defendant Lawyer and the LIF had divergent interests such that they should not be regarded as being jointly represented by the External Lawyer. Therefore, I am satisfied that all of the communications were between a client and legal advisor.

4. Communication related to seeking, formulating or giving legal advice

[23] While I cannot provide detailed reasons due to the *in camera* nature of the Law Society's evidence, I have reviewed the Law Society's evidence and I am satisfied that all of the communications relate to the seeking, formulating or giving of legal advice. In general terms, the communications are about instructions, the provision of legal advice and the status of the litigation. I note that the applicant submits that the communications are not privileged because they are instructions rather than advice. This argument is based on a misunderstanding of the law; communicating for the purpose of instructing counsel is clearly related to seeking, formulating or giving legal advice. I am satisfied that the information in dispute is related to seeking, formulating or giving legal advice.

[24] In summary, the Law Society has established that all four parts of the test are met. Subject to waiver or any exceptions to privilege, the Law Society may withhold the information in dispute under s. 14.

*Exceptions to Privilege*

[25] The Supreme Court of Canada has stated that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case- by-case basis."<sup>14</sup>

[26] The applicant submits that the public interest in the prevention of crime is a fundamental principle that trumps solicitor-client privilege.<sup>15</sup> The applicant relies on a case which discusses the exception to privilege that arises where communications are for the purpose of obtaining legal advice to facilitate the commission of a crime.<sup>16</sup> The applicant alleges that the LIF's conduct "probably amounts to one or more criminal code offences, including obstruction of justice and other fraudulent means."<sup>17</sup> However, he has not provided any evidence that the LIF sought legal advice for the purpose of committing a crime. His

<sup>14</sup> *R v McClure*, 2001 SCC 14 at para. 35.

<sup>15</sup> Applicant's submissions, at para. 66.

<sup>16</sup> The applicant cited "*R v Shirose* 1999 SCC": the case he is referring to is indexed as *R v Campbell* 1999 CanLII 676 at para. 55.

<sup>17</sup> Applicant's submissions, at para. 47.

submission about “prevention of crime” is vague and I cannot find that it establishes an exception to privilege.

[27] He also states that “the right to independent legal advice is of higher priority than the protection of legal advice privilege.”<sup>18</sup> It is unclear to me what the applicant means by this. In any event, protecting legal advice privilege is an integral part of protecting a member of the public’s right to independent legal advice. As the Supreme Court of Canada stated “the right to communicate in confidence with one’s legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client.”<sup>19</sup>

[28] I find that no exceptions to privilege apply.

#### *Waiver*

[29] Waiver of privilege is ordinarily established where the possessor of the privilege knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.<sup>20</sup> The law is well established that the privilege belongs to, and may only be waived by, the client. The onus of establishing a waiver of solicitor client privilege is on the party seeking to displace it.<sup>21</sup>

[30] The applicant states that because one of the LIF lawyers disclosed notes and communications to him, this amounts to a waiver because it is evidence that there was no expectation of confidentiality as to the intentions of the LIF to finance litigation.<sup>22</sup> The applicant does not provide any further explanation.

[31] The Law Society says that the documents the applicant received were not documents over which privilege had been claimed, such as documents related to conversations LIF’s in-house lawyers had with the applicant.<sup>23</sup>

[32] I am not persuaded that there has been a waiver of privilege. I am not satisfied that the records the applicant says have been previously disclosed to him contain any information in dispute in this inquiry or are evidence of an intention to waive privilege. I find that there has been no waiver of privilege.

#### *Discretion*

[33] The word “may” in s. 14 gives discretion to public bodies over whether to refuse to disclose information that is subject to solicitor client privilege. In other

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<sup>18</sup> Applicant’s submissions, at para. 88.

<sup>19</sup> *Solosky v. The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC) at page 839.

<sup>20</sup> *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* 1983 CanLII 407 (BCSC) at para. 6.

<sup>21</sup> *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22.

<sup>22</sup> Applicant’s submissions at paras. 73 and 74.

<sup>23</sup> Law Society’s reply submissions, para. 24.

words, s. 14 permits the Law Society to disclose information that is privileged. In adjudicating matters of discretion, I must be satisfied that the Law Society considered whether to exercise its discretion and did so with regard to appropriate factors. I can order a public body to reconsider if I believe that it exercised discretion in bad faith or considered irrelevant factors.<sup>24</sup>

[34] The Law Society submits that it has exercised its discretion under s. 14 to refuse to produce the requested documents on the grounds that they are clearly privileged.<sup>25</sup> The Law Society also states that it is professionally obligated to claim privilege under the *Code of Professional Conduct for British Columbia*.<sup>26</sup>

[35] The applicant states that discretion under s. 14 is not a discretion to refuse to disclose on the grounds of privilege; it is discretion to disclose despite the privilege.<sup>27</sup>

[36] I see no basis to interfere with the Law Society's decision to refuse to disclose the information in dispute under s. 14. There is no evidence before me that the Law Society acted in bad faith, failed to consider relevant factors or took into account irrelevant factors. Further, in light of the nature of solicitor-client privilege, there would need to be significantly compelling evidence that the Law Society failed to properly exercise its discretion in refusing to disclose privileged information.<sup>28</sup>

### *Severance*

[37] Section 4(2) of FIPPA says that if information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[38] The applicant states that the Law Society made no attempt to sever.

[39] I have found that all the information in dispute is privileged. Therefore, there is no information that can be reasonably severed.

### **Section 22**

[40] Given that I have found that the Law Society is authorized to withhold the information in dispute on the basis of s. 14, it is unnecessary for me to address whether s. 22 applies.

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<sup>24</sup> Order F16-35, 2016 BCIPC 39 at para. 23.

<sup>25</sup> Law Society's reply submissions, para 3.

<sup>26</sup> Law Society's initial submissions, para. 55, citing Rule 3.3-2.1 of the Code of Professional Conduct.

<sup>27</sup> Applicant's submissions at para. 75.

<sup>28</sup> Order F17-35, 2017 BCIPC 37 at paras. 88-90.



**CONCLUSION**

[41] For the above reasons, under s. 58, I confirm the Law Society's decision to refuse to disclose the records in dispute under s. 14 of FIPPA.

August 10, 2018

**ORIGINAL SIGNED BY**

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Erika Syrotuck, Adjudicator

OIPC File No.: F16-67167