



Order F20-19

LAW SOCIETY OF BRITISH COLUMBIA

Ian C. Davis
Adjudicator

May 4, 2020

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Summary: The applicants made a joint request for access to records relating to a complaint they made to the Law Society of British Columbia (Law Society) about a lawyer. The Law Society withheld the disputed information under ss. 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* and s. 88(2) (privileged and confidential information) of the *Legal Profession Act*. The adjudicator confirmed the Law Society's decision under s. 14 of FIPPA and s. 88(2) of the LPA regarding solicitor-client privilege and concluded that it was unnecessary to consider s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 22; *Legal Profession Act*, s. 88(2).

INTRODUCTION

[1] Two applicants made a joint request for access to records relating to a complaint they made to the Law Society of British Columbia (Law Society) about a lawyer (Lawyer). Specifically, the applicants requested "all written documents" supplied by the Lawyer to the Law Society in response to their complaint.¹

[2] The Law Society provided the applicants with partly severed records. Some of the information in the records was severed under s. 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and other information was severed under s. 22 (unreasonable invasion of third-party personal privacy) of FIPPA.²

¹ Email from the applicants to the Law Society dated May 17, 2018.

² Letter from the Law Society to the applicants dated June 25, 2018.

[3] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the Law Society's decision.³ During mediation, the Law Society advised that the information it was refusing to disclose under s. 14 was also being withheld under s. 22 of FIPPA and s. 88(2) (privileged and confidential information) of the *Legal Profession Act* (LPA).⁴

[4] Mediation failed to resolve the matter and the applicants requested an inquiry.

PRELIMINARY MATTERS

Information being withheld under s. 22

[5] The Law Society is withholding the Lawyer's gender, birthdate, work telephone number and Law Society identification number solely under s. 22 of FIPPA. Section 22 provides that 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. The applicants state in their submissions that they have "no objection" to the Lawyer's "personal information such as age, gender and ID being redacted."⁵ Based on the applicants' submission, I conclude the above-noted information about the Lawyer is no longer in dispute.⁶

[6] The balance of the information being withheld under s. 22 is also being withheld under ss. 14 of FIPPA and s. 88(2) of the LPA. The applicants say in their submissions that they do not challenge the Law Society's application of s. 22 "where solicitor client privilege exists."⁷ The Law Society submits that this means the applicants do not dispute the Law Society's decision to refuse access under s. 22.⁸ I do not read the applicants' submission as the Law Society does. I understand the applicants to mean that since they dispute whether solicitor-client privilege applies, s. 22 is still in issue. Accordingly, I will consider whether s. 22 applies to the disputed information if I find that s. 14 of FIPPA and s. 88(2) of the LPA do not apply.

ISSUES

[7] The issues to be decided in this inquiry are:

1. Is the Law Society authorized to refuse to disclose the disputed information under s. 14 of FIPPA?

³ Letter from the applicants to the OIPC dated July 12, 2018.

⁴ OIPC Investigator's Fact Report at paras. 4-5.

⁵ Applicants' submissions dated November 29, 2019 at p. 6.

⁶ Although the applicants do not specifically refer to the Lawyer's phone number, I find this is part of the "personal information" they were referring to.

⁷ Applicants' submissions dated November 29, 2019 at p. 3.

⁸ Law Society's reply submissions dated December 16, 2019 at para. 1.

2. Is the Law Society required to refuse to disclose the disputed information under s. 88(2) of the *Legal Profession Act*?
3. Is the Law Society required to refuse to disclose the disputed information under s. 22 of FIPPA?

[8] According to s. 57(1) of FIPPA, the Law Society has the burden of proof under s. 14. Based on s. 57(2) of FIPPA, the applicants have the burden under s. 22 to show that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

BACKGROUND

[9] The applicants' access request relates to a complaint they made about the Lawyer to the Law Society. The Law Society's Director of Policy and Planning (Director) provided affidavit evidence about the Law Society and its complaints process. The Director stated that:

- the Law Society is a professional regulatory body governed by the LPA, responsible for regulating the legal profession in British Columbia;
- any member of the public may complain to the Law Society about the professional conduct of a lawyer authorized to practice law in British Columbia, and the Law Society is responsible for investigating and responding to complaints;
- when a complaint is received, the Law Society is authorized to appoint an employee to investigate the complaint; and
- lawyers must cooperate fully in an investigation into a complaint, and provide information or records requested by the Law Society despite the fact that such information or records may be confidential or privileged.⁹

[10] The Lawyer is a member of the Law Society and, therefore, subject to the complaints process described above. The applicants complained that the Lawyer engaged in professional misconduct during a civil law suit between the Lawyer's client (Client) and the applicants.¹⁰ The litigation concerned a recreational property owned by the Client and occupied by the applicants. The Client wanted to sell the property. According to the Lawyer, the Client asked the applicants to leave the property, but they declined to do so. As a result, the Client sued the applicants for vacant possession.

⁹ Affidavit #1 of Director at paras. 3 and 12-13.

¹⁰ Affidavit #1 of Lawyer at paras. 4-5; Affidavit #1 of Director at paras. 4-5.

[11] The applicants made their complaint to the Law Society while the litigation was ongoing.¹¹ The Law Society appointed one of its staff lawyers to investigate the complaint (Investigator).¹² The Investigator contacted the Lawyer by telephone.¹³ The Investigator did not ask the Lawyer to provide a formal written response to the complaint. Instead, the Lawyer provided background information and a verbal response to certain aspects of the applicants' complaint.

RECORDS AND INFORMATION IN DISPUTE

[12] There are two pages of records in dispute. Both were created by the Investigator in the course of investigating the applicants' complaint about the Lawyer. The information severed from these records is the Investigator's summaries of two telephone calls she had with the Lawyer regarding the complaint.¹⁴

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[13] Section 14 of FIPPA provides that the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." This section encompasses both legal advice privilege and litigation privilege.¹⁵ The Law Society submits that legal advice privilege applies to the disputed information.

[14] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client (or their agent¹⁶);
2. that entails the seeking or giving of legal advice; and
3. that is intended to be confidential by the parties.¹⁷

[15] A communication does not satisfy this test merely because it was sent to a lawyer.¹⁸ That said, solicitor-client privilege is so important to the legal system

¹¹ Affidavit #1 of Lawyer at para. 6.

¹² Affidavit #1 of Director at para. 9.

¹³ Affidavit #1 of Lawyer at para. 7.

¹⁴ Affidavit #1 of Lawyer at para. 8; Affidavit #1 of Director at para. 9; Applicants' submissions dated November 29, 2019 at p. 3.

¹⁵ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.

¹⁶ *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879.

¹⁷ *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837, cited in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15; *R. v. B.*, 1995 CanLII 2007 (BC SC); *Festing v. Canada (Attorney General)*, 2001 BCCA 612 at para. 92.

¹⁸ *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81 [*Keefer Laundry*]; *R. v. McClure*, 2001 SCC 14 at para. 36.

that it should apply broadly and be as close to absolute as possible.¹⁹ The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.²⁰

[16] Solicitor-client privilege obviously applies to communications in which the lawyer actually provides legal advice to a client. However, the privilege also applies more broadly to “all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity.”²¹

Is it necessary to review the records?

[17] The Law Society did not provide me with access to the information it severed under s. 14. Instead, the Law Society submitted affidavit evidence from the Lawyer and the Director to support its decision under s. 14.

[18] The applicants object to the Law Society not providing me with unsevered copies of the records so that I can assess the Law Society’s claim of privilege.²² The Law Society replies that this is not necessary or appropriate in this case.²³

[19] The procedure for determining whether solicitor-client privilege applies is well-established.²⁴ Section 44 of FIPPA gives the Commissioner or his delegate the power to order production of records over which solicitor-client privilege is claimed. However, the Commissioner only exercises this power where it is necessary to fairly decide whether information is privileged.²⁵ For example, there may be some cases where the party asserting privilege cannot support their claim of privilege through affidavit evidence without revealing the privileged information. In those circumstances, it may be appropriate for the Commissioner to review the records.

[20] However, in *Keefer Laundry v. Pellerin Milnor Corp.*, the Court explained that for most cases:

¹⁹ *McClure*, *ibid* at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].

²⁰ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

²¹ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.

²² Applicants’ submissions dated November 29, 2019 at p. 4.

²³ Law Society’s reply submissions dated December 16, 2019 at paras. 17-20.

²⁴ See e.g. *Camp*, *supra* note 19 at paras. 15-21.

²⁵ See Order F19-21, 2019 BCIPC 23 (CanLII) for a full discussion and analysis on when it would be appropriate for the Commissioner to exercise his or her discretionary power under s. 44.

... it is preferable to resolve disputes over whether documents are privileged on the basis of affidavits rather than review of the document by the court. That ensures that the process is open rather than secret, and as a result, the parties can understand the basis for the decision.²⁶

[21] In this case, the Law Society submitted two affidavits in support of its claim of privilege from individuals with personal knowledge of the disputed records and information. I am satisfied this is ample evidence for me to decide whether solicitor-client privilege applies to the disputed information. Therefore, I find this is not an appropriate case for me to order the Law Society to produce the records for my review.

Does solicitor-client privilege apply?

[22] The Law Society submits that solicitor-client privilege applies because the disputed information would reveal the content of confidential communications between the Lawyer and the Client relating to the litigation.²⁷

[23] The applicants submit that privilege does not apply because the disputed information is not a communication between the Lawyer and the Client.²⁸ Rather, the applicants say the disputed information is a communication between the Lawyer and the Law Society Investigator, who was not the Lawyer's client.

[24] I disagree with the applicants that solicitor-client privilege does not apply to the disputed information because it is in a communication between the Lawyer and the Investigator (a non-client). Solicitor-client privilege protects the content of communications between lawyers and their clients.²⁹ The question is whether the disputed information reveals the content of communications between the Lawyer and the Client.

[25] The Lawyer reviewed both the severed and unsevered copies of the disputed records,³⁰ and states that the information withheld in the records includes the details of advice and services the Lawyer provided to the Client regarding the litigation.³¹ Specifically, the Lawyer states that the disputed information includes:

- a description of the Client's instructions;
- a description of the work the Lawyer did for the Client;

²⁶ *Kefer Laundry*, *supra* note 18 at para. 74.

²⁷ Law Society's submissions dated November 8, 2019 at paras. 32-33.

²⁸ Applicants' submissions dated November 29, 2019 at p. 3.

²⁹ *Maranda v. Richer*, 2003 SCC 67 at para. 22; *R. v. Amsel*, 2017 MBPC 52 at para. 23.

³⁰ Affidavit #1 of Lawyer at paras. 3 and 8-10.

³¹ Affidavit #1 of Lawyer at paras. 9-10.

- the Lawyer’s legal opinion and advice on the litigation;
- the content of communications between the Lawyer and the Client regarding the litigation; and
- information from which the content of these communications could be inferred.³²

[26] The Director also reviewed the disputed records and his evidence on this point is essentially the same as the Lawyer’s evidence.³³

[27] I accept the Law Society’s evidence. It makes sense in the context of the complaint process that the Lawyer would have shared the content of solicitor-client communications with the Investigator. The Investigator would have needed information such as the Client’s instructions and the Lawyer’s legal assessment of the situation in order to understand and evaluate the Lawyer’s conduct during the litigation, which was the subject of the complaint. Therefore, I accept that the disputed information is the kind of solicitor-client communications that the Lawyer and the Director describe. I conclude the disputed information reveals the content of communications between the Lawyer and the Client. The first part of the test for privilege is met.

[28] The second part of the test asks whether the disputed information entails the seeking or providing of legal advice. I find that it does. The litigation was clearly a legal matter. I am satisfied that the legal opinions the Lawyer provided and the discussions the Lawyer had with the Client entailed the seeking and providing of legal advice regarding the litigation. As for the Client’s instructions and descriptions of the work done by the Lawyer, I accept this information would reveal what legal advice was sought and provided. For these reasons, I conclude the Law Society has satisfied the second part of the test for privilege.

[29] The last part of the test asks whether the communications between the Lawyer and the Client were intended to be confidential. I am satisfied they were. The Client is apparently deceased, so evidence as to his intentions regarding confidentiality is not available.³⁴ However, the Lawyer deposes that their communications, as revealed in the disputed records, were intended to be confidential.³⁵ I accept this evidence in the circumstances. In the result, I find that the disputed information is privileged.

³² Affidavit #1 of Lawyer at paras. 9-10.

³³ Affidavit #1 of Director at para. 15.

³⁴ Law Society’s reply submissions dated December 16, 2019 at paras. 12-16; Applicants’ submissions dated November 29, 2019 at p. 13.

³⁵ Affidavit #1 of Lawyer at para. 10(d).

Was there a waiver of privilege?

[30] Having found that s. 14 applies to the disputed information, a further question arises relating to waiver of privilege. Solicitor-client privilege belongs to the client, and only the client may waive it.³⁶ Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.³⁷ The question that arises is whether the Client waived privilege when the Lawyer disclosed the privileged information to the Investigator in the course of responding to the applicants' complaint.

[31] To establish waiver, the party asserting it must show that:

- a) the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
- b) in the absence of an intention to waive, fairness and consistency require disclosure.³⁸

[32] First, there is no evidence before me that the Client intended to waive privilege or was even aware that the Lawyer had given the privileged information to the Investigator.³⁹ Therefore, I am not satisfied that there was an express waiver by the Client.

[33] Second, I find there was no implied waiver based on fairness and consistency. When disclosure of privileged information is compelled by statute, no implied waiver occurs.⁴⁰ Section 88(1.1) of the LPA provides that a person who is required to provide privileged information to the Law Society "must do so", despite the privilege. Therefore, I find the Lawyer was compelled by statute to provide the Investigator with the disputed information. As a result, I conclude there was no implied waiver by the Client.

Does s. 88(2) of the LPA apply?

[34] The Law Society submits that it was also required to refuse to disclose the disputed information pursuant to s. 88(2) of the LPA, which provides:

³⁶ *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.

³⁷ *Malimon v. Kwok*, 2019 BCSC 1972 at para. 20.

³⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) at para. 6.

³⁹ Affidavit #1 of Lawyer at para. 12; Law Society's reply submissions dated December 16, 2019 at paras. 12-16.

⁴⁰ *Blank v. Canada (Minister of Justice)*, 2005 FC 1551 at paras. 41-42, rev'd in part 2007 FCA 87 (but not on this point); *Stevens v. Canada (Prime Minister)*, 1997 CanLII 4805 (FC), aff'd 1998 CanLII 9075 (FCA).

88(2) Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of exercising powers or carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same obligation respecting the disclosure of that information as the person from whom the information, files or records were obtained.

[35] The effect of this provision is that, where the Law Society acquires privileged information during the course of carrying out its duties under the LPA, it does not have the discretion to decide whether or not to refuse access under s. 14 of FIPPA.⁴¹ Section 88(2) takes that decision-making power away and requires the Law Society to assert and maintain the privilege. This recognizes that the privilege attaching to the information acquired by the Law Society, and any discretion to waive privilege, belongs to the client, not to the Law Society or the client's lawyer.

[36] Accordingly, I agree with the Law Society that it was required under s. 88(2) of the LPA to refuse to disclose the disputed information.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[37] Given my finding that the Law Society is authorized under s. 14 of FIPPA and required under s. 88(2) of the LPA to refuse to disclose the information in dispute, I do not need to consider s. 22.

CONCLUSION

[38] For the reasons given above, under s. 58(2) of FIPPA, I confirm that the Law Society is authorized under s. 14 of FIPPA and required under s. 88(2) of the LPA to refuse to disclose the disputed information.

May 4, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F18-76058

⁴¹ See Order 02-01, 2002 CanLII 42426 (BC IPC) at paras. 107-110; Order 04-16, 2004 CanLII 7058 (BC IPC) at paras. 23-26.