



Order F23-25

LAW SOCIETY OF BRITISH COLUMBIA

Emily Kraft
Adjudicator

March 31, 2023

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Summary: The applicants 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 from a meeting of the Law Society's Discipline Committee. The Law Society disclosed some information to the applicants but withheld most of the responsive records in their entirety under ss. 14 (solicitor-client privilege) and 22 (unreasonable invasion of third-party personal privacy). The adjudicator confirmed the Law Society's decision that it is authorized to refuse to disclose the records in dispute under s. 14. As a result, the adjudicator did not consider s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s. 14.

INTRODUCTION

[1] Two lawyers (applicants) who were the subject of a complaint to the Law Society of British Columbia (Law Society) jointly requested access to records from a meeting of the Law Society's Discipline Committee. The Law Society disclosed some information to the applicants, but withheld most of the responsive records in their entirety 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* (FIPPA).

[2] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the Law Society's decision. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

PRELIMINARY MATTERS

Section 6

[3] In their response submission, the applicants raise a new issue that was not listed in the notice of inquiry or investigator's fact report: they submit that the Law Society has failed to comply with its duty to assist under s. 6(1) of FIPPA. 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.¹ The investigator's fact report in this case explicitly states that the applicants' complaint about the adequacy of the Law Society's search for records was investigated and does not form part of this inquiry.² The applicants seem to be saying that the Law Society otherwise failed to comply with s. 6(1).

[4] 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.³ 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.⁴ In this case, the applicants 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 13

[5] After the submissions period closed, the Law Society asserted that s. 13 (advice or recommendations) also applies to the information it withheld under s. 14.⁵ Section 13 was not listed in the investigator's fact report or notice of inquiry, and the Law Society did not make arguments about the application of s. 13 in its submissions. It says that, if I determine s. 14 does not apply to the records in dispute, then it expects a further opportunity to make submissions on s. 13.⁶ I decline to make a decision about whether it is appropriate to add s. 13 as a late issue. For the reasons discussed below, I am satisfied that s. 14 applies to the records in dispute, so it would serve no purpose to consider if s. 13 also applies.

¹ Order F22-46, 2022 BCIPC 52 at para 7.

² Investigator's fact report at para 6.

³ Order F16-34, 2016 BCIPC 38 at para 9.

⁴ Notice of written inquiry dated August 15, 2022.

⁵ Law Society's letter to the OIPC dated March 3, 2023.

⁶ Law Society's letter to the OIPC dated March 3, 2023.

Section 88 of the *Legal Profession Act*

[6] In its initial submission, the Law Society says that s. 88 of the *Legal Profession Act*, SBC 1998, c 9 (LPA) applies to the extent that the records contain privileged legal advice that lawyers provided to third parties (i.e., not the applicants).⁷ This was not listed as an issue in the investigator's fact report or notice of inquiry. However, it is not necessary to decide whether to add s. 88 of the LPA as an issue because I conclude below that this type of third-party information is no longer in dispute in this inquiry.

ISSUES

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

1. Is the Law Society authorized to refuse to disclose the information in dispute under s. 14?
2. Is the Law Society required to refuse to disclose the information in dispute under s. 22(1)?

[8] Under s. 57(1), the Law Society has the burden of proving that the applicants have no right of access to the records in dispute under s. 14. Under s. 57(2), the applicants have the burden of proving that disclosing the personal information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).⁸

DISCUSSION

Background

[9] The Law Society regulates the legal profession in British Columbia. Part of the Law Society's responsibilities include receiving and investigating complaints made about the conduct or competence of lawyers in British Columbia.⁹

[10] When the Law Society receives a complaint about a lawyer, it may appoint an employee or an external lawyer to investigate the complaint.¹⁰ At the conclusion of an investigation, a complaint file may be closed as warranting no further action, it may be referred to the Practice Standards Committee for remedial measures, or it may be referred to the Discipline Committee for a disciplinary response. If a file is referred to the Discipline Committee, the

⁷ Law Society's initial submission at paras 55-56. The Law Society also explains that privilege is not lost over such communications when they are included in a Law Society investigation.

⁸ 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.

⁹ Affidavit of TM at para 11.

¹⁰ Affidavit of TM at para 13.

investigator will prepare a written opinion regarding the complaint that is presented to the Discipline Committee at one of its meetings.¹¹ The Discipline Committee must decide how to dispose of the matter, which may include taking no further action, issuing a conduct letter expressing concerns about the lawyer's conduct, carrying out a conduct review, or issuing a formal citation which gives rise to a public discipline hearing.¹²

[11] The applicants are two lawyers who practice law together. Their professional conduct was the subject of a complaint (Complaint) made to the Law Society. The Law Society hired an external lawyer (External Lawyer) to investigate and provide an opinion to the Discipline Committee about the Complaint. The External Lawyer prepared two opinions (External Lawyer's Opinions) in respect of the Complaint, one regarding each applicant.¹³ The External Lawyer's Opinions were presented to the Discipline Committee at its October 24, 2019 meeting (Meeting).¹⁴

[12] After considering the External Lawyer's Opinions, the Discipline Committee decided to issue a citation against the applicants.¹⁵ The applicants deny the misconduct alleged in the citation.¹⁶

[13] The applicants' access request was for all documentation provided to and considered by the Discipline Committee at the Meeting, as well as the minutes from the Meeting.

Records and information at issue

[14] The Law Society identified the following records as responsive to the applicants' request:

- The Meeting minutes (Minutes);
- The Meeting agenda (Agenda);
- The External Lawyer's Opinions, including appendices; and
- Materials regarding numerous other lawyers whose professional conduct was also considered at the Meeting, specifically, written opinions, conduct review reports, and citation materials about them (Third-Party Materials).

[15] The Law Society made arguments about the Third-Party Materials in its initial submission. In their response submission, the applicants made it clear that they are only seeking access to information and records that concern

¹¹ Affidavit of TM at paras 15, 16 and 19.

¹² Affidavit of TM at para 18.

¹³ Affidavit of TM at para 7.

¹⁴ Affidavit of TM at para 8.

¹⁵ Minutes at p 1.

¹⁶ Applicants' response submission at para 21.

themselves, not third parties.¹⁷ After the submissions period closed, I requested that the Law Society provide the applicants and the OIPC with a table describing the responsive records in more detail. The Law Society did so and later sent a second, updated table. Although the applicants expressed a distrust of the Law Society's description of the records, it is abundantly clear that they are only seeking access to records and information about themselves.

[16] Based on the submissions and evidence provided by the Law Society, I am satisfied that the Third-Party Materials only relate to the conduct files of third-parties and they do not contain information about the applicants. Given the applicants' position, I conclude that the Third-Party Materials are not in dispute in this inquiry and it is not necessary for me to decide whether the Law Society is authorized or required to withhold them. I will not consider the Third-Party Materials any further.

[17] Additionally, the Law Society submits that it has disclosed to the applicants the only portion of the Minutes that relates to them.¹⁸ I am satisfied that the remaining portion of the Minutes does not contain the applicants' personal information and only relates to matters concerning third-parties. Therefore, I conclude that the Minutes are not in dispute in this inquiry and it is not necessary for me to make a decision about them.

[18] Based on my findings above, the only records in dispute in this inquiry are the Agenda and the External Lawyer's Opinions, including appendices. The Law Society has withheld these records in their entirety under s. 14.

Section 14

[19] Section 14 permits a public body to refuse to disclose information that is subject to solicitor-client privilege. This section encompasses both legal advice privilege and litigation privilege.¹⁹ The Law Society is relying on legal advice privilege to withhold the records in dispute.²⁰

[20] In order for legal advice privilege to apply, there must be:

1. a communication between solicitor and client (or their agent);
2. that entails the seeking or giving of legal advice; and

¹⁷ Applicants' response submission at paras 2(a), 34, 37, and 38.

¹⁸ Law Society's reply submission at para 41(v). See also the Law Society's letter to the applicants dated May 22, 2020.

¹⁹ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26 [*College*].

²⁰ Law Society's initial submission at para 7(a) and table of records provided on March 3, 2023.

3. that is intended by the solicitor and client to be confidential.²¹

[21] If these conditions are met, then legal advice privilege applies to the communication and the records relating to it.²²

Records not provided

[22] The Law Society did not provide me with access to the records in dispute. Instead, it relies on an affidavit sworn by its Director, Discipline and External Litigation (Director), who is a lawyer and who attended the Meeting.

[23] The applicants say they are “not confident” that the Law Society is complying with FIPPA, in part because it has not produced a “full and complete” description of the records in dispute.²³ They are concerned that the Law Society “is not wanting to be accountable” and has “improperly withheld” the disputed records.²⁴

[24] The applicants submit that I should order the Law Society to produce unsevered copies of the records in dispute to ensure that ss. 14 and 22 have been properly applied and that the Law Society has complied with s. 4(2), which requires public bodies to disclose information that can reasonably be severed from a record.²⁵

[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 Commissioner or his delegate will only exercise their discretionary power under s. 44 when it is absolutely necessary to adjudicate the issues in dispute.²⁶

[26] I find that the Law Society’s description of the records in dispute and the Director’s affidavit evidence is sufficient to allow me to determine whether solicitor-client privilege applies. As a result, I conclude it is not necessary for me to order production of the records. I take this approach recognizing that my task “is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege.”²⁷

²¹ *Solosky v The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 [*Solosky*] at p 837.

²² *R v B*, 1995 CanLII 2007 (BCSC) at para 22.

²³ Applicants’ response submission at para 2(d).

²⁴ Applicants’ response submission at para 41.

²⁵ Applicants’ response submission at paras 8 and 48.

²⁶ Order F22-23, 2022 BCIPC 25 at para 13.

²⁷ *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at para 86 [*Finance*].

Parties' submissions

[27] Regarding the External Lawyer's Opinions, the Director deposes as follows:

- The Law Society retained the External Lawyer to carry out an investigation into the Complaint and provide the Law Society with a legal opinion concerning the Complaint.²⁸
- The External Lawyer's Opinions provide a legal opinion and legal advice in relation to the Complaint.²⁹
- The External Lawyer's Opinions are confidential in nature and have been treated as such by the Law Society.³⁰
- The External Lawyer's Opinions were presented by the External Lawyer at the Meeting.³¹

[28] Regarding the Agenda, the Director deposes as follows:

- It is marked privileged and confidential.³²
- It was considered by the Discipline Committee at the Meeting.³³
- It refers to the matters being considered by the Discipline Committee at the Meeting, including a number of matters upon which the Discipline Committee received legal advice.³⁴
- It refers to or contains information about privileged communications that took place at the Meeting.³⁵

[29] The applicants dispute that s. 14 applies to the records, but they do not elaborate.³⁶ They submit that they have "no ability...to counter the affidavit evidence purporting to assert privilege in a global fashion" especially when the Law Society has not produced "a full and complete description" of the records.³⁷ They say that they have a limited ability to respond to the Law Society's submission.³⁸

²⁸ Affidavit of TM at para 7.

²⁹ Affidavit of TM at paras 40(b) and (c).

³⁰ Affidavit of TM at para 40(d).

³¹ Affidavit of TM at para 8.

³² Affidavit of TM at para 27.

³³ Affidavit of TM at para 26(a).

³⁴ Affidavit of TM at para 27.

³⁵ Affidavit of TM at para 41.

³⁶ Applicants' response submission at para 10.

³⁷ Applicants' response submission at para 11.

³⁸ Applicants' response submission at para 28.

Analysis and findings

External Lawyer's Opinions

[30] I am satisfied that legal advice privilege applies to the External Lawyer's Opinions for the following reasons.

[31] I find that External Lawyer's Opinions are clearly communications between a solicitor and client. I recognize that when a client hires a lawyer to do the work of an investigator only, privilege does not protect the communications between the client and lawyer.³⁹ However, I accept the Director's sworn evidence that the Law Society hired the External Lawyer as legal counsel to carry out the investigation and provide the Law Society with a legal opinion concerning the Complaint.⁴⁰ Therefore, I am satisfied that the External Lawyer's Opinions, which are written communications, were prepared in the context of a solicitor-client relationship. The first part of the test for legal advice privilege is met.

[32] I accept the Director's evidence that the External Lawyer's Opinions provide legal opinion and legal advice concerning the Complaint. Therefore, I am satisfied that the second part of the test is met.

[33] Finally, I accept the Director's evidence that the External Lawyer's Opinions are confidential in nature and have been treated as confidential communications by the Law Society. I find that the confidentiality component of the test is met.

Appendices

[34] The Law Society's updated table of records indicates that the External Lawyer's Opinions together total 447 pages with appendices.⁴¹

[35] The Law Society does not provide any description or evidence about the appendices except to say that they are discussed or referenced in the External Lawyer's Opinions.⁴² The appendices are not mentioned in the Law Society's submissions or supporting affidavits.

[36] The applicants submit that without a description of the appendices, it will be difficult for me to assess the Law Society's claim of privilege.⁴³

³⁹ *Wilson v Favelle*, 1994 CanLII 1152 (BCSC) at pp 4-5; *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11 at para 37; *College*, *supra* note 19 at para 32.

⁴⁰ Affidavit of TM at para 7.

⁴¹ Law Society's updated table of records provided on March 10, 2023.

⁴² Law Society's updated table of records provided on March 10, 2023.

⁴³ Applicants' letter to the OIPC dated March 7, 2023 at p 2.

[37] If a document is attached to a privileged communication, the attachment is not necessarily privileged. An attachment to a legal opinion will only be privileged if it is privileged on its own or if it is an integral part of the privileged communication to which it is attached and it would reveal that communication either directly or by inference.⁴⁴ The party claiming privilege over an attachment must provide some basis for that claim.⁴⁵

[38] It would have been preferable for the Law Society to provide further explanation about how privilege applies to the appendices. However, given the nature of the External Lawyer's Opinions and the context in which they were provided to the Law Society, I am satisfied, on a balance of probabilities, that the appendices are an integral part of the External Lawyer's Opinions and they would reveal or allow a reader to infer the legal opinion or legal advice provided in the External Lawyer's Opinions. Accordingly, I find that the appendices are privileged.

Agenda

[39] I accept the Director's evidence that the Agenda was presented to the Discipline Committee at the Meeting and that it refers to or contains information about privileged communications that took place at the Meeting.⁴⁶ Given that the Agenda was clearly prepared before the Meeting, I infer that the Director means the Agenda refers to or contains information about privileged communications *being considered* at the Meeting. The Director explains that the Discipline Committee considered numerous other legal opinions at the Meeting in addition to the External Lawyer's Opinions.⁴⁷

[40] Legal advice privilege does not only apply to direct communications between a solicitor and client. It also applies to communications that, if disclosed, would reveal or allow an accurate inference to be drawn about privileged communications.⁴⁸ For instance, legal advice privilege applies to internal client communications that relate to the legal advice received and discuss its implications.⁴⁹

[41] I find that disclosure of the Agenda could allow a reader to draw accurate inferences about the content of the legal advice considered at the Meeting. Therefore, I conclude that privilege applies to the Agenda.

⁴⁴ *Finance*, *supra* note 27 at paras 110-111.

⁴⁵ *Ibid* at para 111.

⁴⁶ Affidavit of TM at para 41.

⁴⁷ Affidavit of TM at paras 26(a)(3), 29, and 40.

⁴⁸ *Bilfinger Berger (Canada) Inc v Greater Vancouver Water District*, 2013 BCSC 1893 at para 24 citing *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para 46.

⁴⁹ *Ibid* at para 46.

Conclusion on s. 14

[43] To conclude, the Law Society has established that legal advice privilege applies to the External Lawyer's Opinions, including appendices, and the Agenda.

[44] I do not accept the applicants' assertion that they had a limited ability to respond to the Law Society's submission. In my view, the Director's affidavit described the nature of the records and the context in which they were prepared in sufficient detail to allow the applicants to fully respond to the Law Society's claim of privilege.

Severing

[45] The applicants say that they are 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.

[46] The applicants say that the Law Society has withheld the records in their entirety without any explicit recognition of their right of access to information that can be reasonably severed from the records.⁵⁰ They submit that the records should be produced to me so that I can determine whether any information can reasonably be severed.⁵¹

[47] The Law Society says that the duty to sever under s. 4(2) does not apply to privileged records. It says that, if part of a document is privileged, then no part of it is subject to disclosure under FIPPA.⁵²

[48] The BC Court of Appeal in *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)* has confirmed that s. 4(2) applies to a privileged document where part of the document is subject to legal advice privilege and a separate part is not privileged. In that case, the non-privileged part can "reasonably be severed."⁵³

[49] In this case, I have found that that the Agenda and the External Lawyer's Opinions, including appendices, are privileged. There are no discrete portions of

⁵⁰ Applicants' response submission at para 7(a).

⁵¹ Applicants' response submission at para 8.

⁵² Law Society's reply submission at para 10.

⁵³ *College*, *supra* note 19 at para 68.

these records that are not privileged. As such, this is not a case where s. 4(2) applies.⁵⁴

Waiver

[50] Privilege may be waived in either of the two 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).⁵⁵

[51] 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.⁵⁶ The party asserting waiver has the burden of showing that there has been a waiver.⁵⁷

[52] The applicants say that, if privilege applies to the records, which they dispute, the Law Society has impliedly waived privilege because it relied on the External Lawyer's Opinions to issue the citation against them.⁵⁸

[53] 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 explain its conduct, they cannot in fairness assert privilege to prevent an opposing party from exploring the validity of the claim.⁵⁹

[54] The applicants cite *Kaplan v Casino Rama Services Inc.*⁶⁰ in support of their 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 the defendants had waived privilege over the report because they disclosed and relied on information in the report.

[55] The Law Society says it has not disclosed or cited from the External Lawyer's Opinions and it has not indicated whether or not it relied on the External Lawyer's Opinions.⁶¹

⁵⁴ For a similar finding, see Order F18-38, 2018 BCIPC 41 at para 51.

⁵⁵ *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

⁵⁶ *Maximum Ventures Inc. v de Graaf et al.*, 2007 BCSC 1215 at para 40.

⁵⁷ *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

⁵⁸ Applicants' response submission at para 25.

⁵⁹ *Soprema Inc. v Wolrige Mahon LLP*, 2016 BCCA 471 at para 30.

⁶⁰ *Kaplan v Casino Rama Services Inc.*, 2018 ONSC 3545.

⁶¹ Law Society's reply submission at para 20.

[56] I am not persuaded that there was an implied waiver of privilege over the External Lawyer's Opinions.

[57] The applicants provided no evidence to show that the Law Society relied on the External Lawyer's Opinions. I note that the Minutes record that the Discipline Committee decided to issue the citation after "considering" the External Lawyer's Opinion; however, a reference to legal advice does not amount to reliance on that advice.⁶² I conclude that the applicants have failed to establish implied waiver.

[58] I have also considered whether there has been an express waiver of privilege. I note that the portion of the Minutes that was disclosed to the applicants provides as follows:

After considering an opinion from external counsel it was resolved to...issue a citation against [the applicants] substantially in the form attached to the opinion...

[59] The reference to a citation in the form attached to the External Lawyer's Opinions might allow a reader to speculate about the content of the legal advice; however, in my view, it is not clear or specific enough to constitute waiver.

Section 22

[60] The Law Society withheld some information in the External Lawyer's Opinions and the Agenda under s. 22 as well as s. 14. Since I found that s. 14 applies to all of the information in those records, it is not necessary to consider whether s. 22 also applies.

CONCLUSION

[61] For the reasons given above, under s. 58 of FIPPA, I confirm the Law Society's decision that it is authorized under s. 14 of FIPPA to refuse to disclose the records in dispute.

March 31, 2023

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F20-83705

⁶² *R v Bath*, 2009 BCSC 1853 at para 25.