



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-52

LAW SOCIETY OF BRITISH COLUMBIA

Emily Kraft
Adjudicator

June 29, 2023

CanLII Cite: 2023 BCIPC 60
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 60

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, including records related to an investigation that he was the subject of. The Law Society withheld the records in dispute in their entirety under ss. 13(1) (advice or recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy). The adjudicator determined that the Law Society was authorized to withhold the records in dispute under s. 14. As a result, it was not necessary to consider ss. 13(1) or 22(1).

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

INTRODUCTION

[1] A lawyer (applicant) requested 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.¹

[2] The Law Society provided some records to the applicant, but withheld other records in their entirety under ss. 13 (advice or recommendations), 14 (solicitor-client privilege), 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. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

¹ Applicant's access request dated November 1, 2019.

[4] During the inquiry, the Law Society reconsidered its decision and disclosed two records to the applicant that it previously withheld under s. 13.² I conclude those records are no longer at issue in this inquiry.

[5] The records in dispute in this case overlap significantly with some of the records in dispute in Order F23-53³ which is being issued concurrently with this order.

PRELIMINARY MATTER

Section 6(1)

[6] In his response submission, the applicant raises a new issue that was not listed in the notice of inquiry or investigator's fact report: he submits that the Law Society has failed to comply with its duty to assist under s. 6(1) of FIPPA.⁴ 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.⁵ The OIPC investigator's fact report in this case explicitly states that the applicant's complaint about the adequacy of the Law Society's search for records was investigated and does not form part of this inquiry.⁶ 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.⁷ 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.⁸ 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.

ISSUES

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

² The Law Society did not release these records 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.

³ Order F23-53, 2023 BCIPC 61.

⁴ Applicant's response submission dated September 22, 2022 at para 7.

⁵ Order F22-46, 2022 BCIPC 52 at para 7.

⁶ Investigator's fact report at para 5.

⁷ Order F16-34, 2016 BCIPC 38 at para 9.

⁸ Notice of written inquiry dated July 11, 2022.

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

[9] Under s. 57(1), the Law Society has the burden of proving that it is authorized under ss. 13 and 14 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).⁹

DISCUSSION

Background

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

[11] 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.

[12] 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.¹⁰

Records in dispute

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

- Emails between the External Lawyer and Law Society staff, some of which include attachments (External Lawyer Emails);¹¹

⁹ 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.

¹⁰ Order F23-25, 2023 BCIPC 29.

¹¹ Records 2, 4, 5, 8-27, 29-33, 35-43, and 45 in the Table of Records.

- Notes taken by the External Lawyer;¹²
- Emails between Law Society Discipline Counsel and Law Society staff (Discipline Counsel Emails);¹³ and
- Emails between Law Society staff (Internal Emails).¹⁴

[14] The Law Society withheld the records in dispute in their entirety under s. 14.

Section 14 – solicitor-client privilege

[15] 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.¹⁵ The Law Society is only claiming legal advice privilege.

[16] Legal advice privilege 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.¹⁶

[17] 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.¹⁷

[18] 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.¹⁸

¹² Record 3 in the Table of Records.

¹³ Record 34 in the Table of Records.

¹⁴ Records 6, 7, and 28 in the Table of Records.

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

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

¹⁷ *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*].

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

[19] 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.¹⁹

Evidentiary basis for s. 14

[20] The Law Society did not provide me with a copy of the records it withheld under s. 14. Instead, it provided an affidavit sworn by its Director of Discipline and External Litigation (Director), a lawyer, who oversees the department that prosecutes citations issued against lawyers.²⁰ The Director deposes that she has reviewed all of the records in dispute.²¹ Her affidavit also includes a table of records that briefly describes each record, including the type of record (i.e. email correspondence or notes), the date, and the names of the people involved in the communication.

[21] In his response submission, the applicant argued that the Director’s description of the records in dispute was not sufficient and that I should order the Law Society to produce the records for my review.²²

[22] 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.²³

[23] After reviewing the parties’ submissions, I determined that the Law Society had not provided a sufficient evidentiary basis for its claim of privilege over several records in dispute. 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 the Director. 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.²⁴

[24] 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 has reviewed all of the records in dispute and has direct knowledge of the content and context of the communications. Further, as a lawyer and officer of the court, the Director has a professional duty to ensure that privilege is

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

²⁰ Affidavit #1 of TM at para 4.

²¹ *Ibid* at para 24. I note that she was also included in some of the disputed emails.

²² Applicant’s response submission dated September 22, 2022 at para 1.

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

²⁴ 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.

properly claimed.²⁵ I conclude it is not necessary to exercise my discretion under s. 44 to order production of the records.

[25] The applicant raised another argument about why I should order production of the records, which I will briefly address here.

[26] As mentioned above, the Law Society reconsidered its severing decision during this inquiry and released two records 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.”²⁶ The applicant appears to be suggesting that the Law Society improperly applied s. 14 to the remaining records in dispute.

[27] 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.

Analysis and findings

Role of External Lawyer

[28] Before I consider the specific records at issue, I will first address the parties’ arguments about 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.²⁷ 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.²⁸

[29] 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.²⁹ The Director deposes that, in this case, the Law Society retained the External Lawyer as legal counsel to carry out the Investigation and

²⁵ *Nelson and District Credit Union v Fiserv Solutions of Canada, Inc.*, 2017 BCSC 1139 at para 54.

²⁶ Applicant’s response submission dated September 22, 2022 at para 8.

²⁷ *College*, *supra* note 14 at para 32.

²⁸ *Ibid* at para 32; *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11 at paras 37-38.

²⁹ Affidavit #1 of TM at para 13.

provide the Law Society with a legal opinion concerning the complaint made against the applicant.³⁰

[30] The applicant says that investigations conducted by lawyers do not automatically attract solicitor-client privilege.³¹ He says that whether investigation-related communications or reports are privileged will depend on the retainer between the investigator and client, the content of the investigation report, and who the investigator spoke with during the investigation.³² The applicant says that it is impossible for me to analyze what the External Lawyer was hired to do in this case because the Law Society did not provide me with the retainer letter used to hire the External Lawyer.³³ He also submits that the Law Society appears to hire lawyers as investigators in order to frustrate FIPPA requests.³⁴

[31] The applicant cites *Howard v London (City)*³⁵ to support his assertion that the retainer letter is a vital piece of evidence in determining the existence of a solicitor-client relationship. In that case, the Master held that solicitor-client privilege did not apply to communications between a client and an investigating lawyer because the retainer letter did not establish that the lawyer was retained or consulted in his capacity as a lawyer.³⁶

[32] The Law Society submits that the Director's evidence clearly establishes that the External Lawyer was retained to provide legal advice. It says that further evidence in the form of a retainer letter or otherwise is not needed, and that such a document would be subject to privilege.³⁷ It submits that the uncontradicted evidence in this case establishes that the External Lawyer was given a mandate by the Law Society and did provide legal advice.³⁸

[33] While a retainer letter or similar document would have been helpful evidence in this case, in my view, the Director's sworn evidence that the External Lawyer was hired as legal counsel to carry out the Investigation and provide a legal opinion on the matter is sufficient to establish that the External Lawyer conducted the Investigation in her capacity as a lawyer. In Order F23-25, I also

³⁰ *Ibid* at para 10.

³¹ Applicant's response submission dated October 17, 2022 at para 2.

³² *Ibid* at para 2(a)-(c).

³³ *Ibid* at para 7.

³⁴ *Ibid* at para 8.

³⁵ *Howard v London (City)*, 2015 ONSC 156.

³⁶ I note that this decision was appealed and Mr. Justice Faieta found that the Master "misapprehended the evidence" and held that the retainer letter made it clear that the lawyer was retained in his capacity as a lawyer: *Howard v City of London*, 2015 ONSC 3698 at para 27.

³⁷ Law Society's reply submission at para 7(a)-(c).

³⁸ *Ibid* at para 7(d).

found that the External Lawyer provided the Law Society with legal advice in relation to this same Investigation.³⁹

[34] I will now consider whether the records in dispute are subject to legal advice privilege. The applicant's submissions on the specific records in dispute are very brief. He submits that he has "no ability to...counter the affidavit evidence purporting to assert privilege in a global fashion..."⁴⁰ He says he relies on the specialized skill and knowledge of the adjudicator to assess the Law Society's claims.⁴¹

External Lawyer Emails

[35] The Director deposes that the External Lawyer Emails are written communications for the purposes of providing legal advice and related services to the Law Society.⁴² 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.⁴³ She further deposes that the communications are confidential in nature and have been treated as such by the Law Society.⁴⁴

[36] 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.⁴⁵ However, it is well established that privilege applies broadly to the continuum of communications that underlie legal advice.⁴⁶ 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.

[37] Additionally, I accept the Director's evidence that the External Lawyer Emails have been treated as confidential communications by the Law Society. The Director deposes that all of the individuals included in the External Lawyer Emails are Law Society staff.⁴⁷ As such, I am satisfied that the communications do not include anyone outside of the solicitor-client relationship and that they

³⁹ Order F23-25, 2023 BCIPC 29 at para 32.

⁴⁰ Applicant's response submission dated September 22, 2022 at para 18.

⁴¹ *Ibid* at para 1.

⁴² Affidavit #1 of TM at para 31(a) and (c).

⁴³ *Ibid* at para 27 and Affidavit #2 of TM at para 6.

⁴⁴ Affidavit #1 of TM at para 31(d).

⁴⁵ Applicant's response submission dated June 1, 2023 at para 1.

⁴⁶ *Camp, supra* note 16 at para 42; *British Columbia (Attorney General) v Lee*, 2017 BCCA 219 at paras 33-35 [*Lee*].

⁴⁷ Affidavit #1 of TM at para 30.

were intended to be confidential. As a result, I am satisfied that legal advice privilege applies to the External Lawyer Emails.

[38] 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.⁴⁸ 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.⁴⁹ Accordingly, these communications are also protected by legal advice privilege.

[39] 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.⁵⁰ The Director 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.⁵¹
- 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.⁵²
- 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.⁵³
- A draft communication prepared by the External Lawyer and provided to the Law Society. The Director deposes that the External Lawyer provided the Law Society with legal advice about the content of the draft communication and the matters discussed therein.⁵⁴

[40] The applicant says that some of the attachments should not have been withheld because they do not actually contain legal advice.⁵⁵ However, I am satisfied that the email attachments are privileged because they would reveal or

⁴⁸ Record 19 in the Table of Records.

⁴⁹ *Descôteaux*, *supra* note 18 at p 893.

⁵⁰ *British Columbia (Minister of Finance) v British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras 110-111.

⁵¹ Affidavit #2 of TM at para 5(a).

⁵² *Ibid* at para 5(b).

⁵³ *Ibid* at para 5(c).

⁵⁴ *Ibid* at para 5(e).

⁵⁵ Applicant's response submission dated June 1, 2023 at paras 2-3.

allow accurate inferences to be made about the legal advice sought and provided.

[41] The Director says that several of the External Lawyer Emails attach a document that was prepared by Law Society Discipline Counsel, SC.⁵⁶ I will consider this document in my analysis of the Discipline Counsel Emails below.

External Lawyer's notes

[42] 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.⁵⁷ The Director explains that the External Lawyer was instructed by the Deputy Chief Legal Officer during the Investigation.⁵⁸ 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.⁵⁹ 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

[43] The Director 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.⁶⁰ In cases where the investigator intends to recommend that the Discipline Committee issue a citation, the complaint is assigned to a Law Society staff lawyer in the role of Discipline Counsel. The Director says 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.⁶¹ Discipline Counsel are instructed by the Director of Discipline and External Litigation.⁶²

⁵⁶ Affidavit #2 of TM at para 5(d).

⁵⁷ Record 3 in the Table of Records and Exhibit A of TM's Affidavit #1.

⁵⁸ Affidavit #1 of TM at para 16.

⁵⁹ *Ibid* at para 27.

⁶⁰ *Ibid* at paras 14-15.

⁶¹ *Ibid* at paras 16-17.

⁶² *Ibid* at para 17.

[44] The Director deposes that some of the disputed records are communications between herself and Discipline Counsel, SC.⁶³ She deposes that the communications were for the purposes of providing legal advice to the Law Society.⁶⁴ The Director further deposes that the communications are confidential in nature and have been treated as such by the Law Society.⁶⁵

[45] 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,⁶⁶ 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.

[46] 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."⁶⁷ 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.⁶⁸ 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

[47] The Internal Emails are internal communications between Law Society staff to which the External Lawyer was not a party. The Director deposes that these emails discuss communications between 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.⁶⁹

[48] I accept the Director's evidence and I am satisfied that the Internal Emails would reveal privileged communications between the Law Society and the

⁶³ Record 34 in the Table of Records.

⁶⁴ Affidavit #1 of TM at paras 28 and 29(b).

⁶⁵ *Ibid* at para 31(d).

⁶⁶ *Ibid* at para 30.

⁶⁷ Affidavit #2 of TM at para 5(d).

⁶⁸ *Ibid* at para 5(d).

⁶⁹ Affidavit #1 of TM at para 29(a).

External Lawyer. Therefore, I find that legal advice privilege applies to the Internal Emails.

Waiver

[49] 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).⁷⁰

[50] 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.⁷¹ The party asserting waiver has the burden of showing that there has been a waiver.⁷²

[51] The applicant says that, if privilege applies to the records in dispute, which he disputes, the Law Society 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.⁷³ He does not provide any further explanation about how implied waiver applies.

[52] 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.⁷⁴

[53] The applicant cites *Kaplan v Casino Rama Services Inc.*⁷⁵ 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.

[54] 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

⁷⁰ *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para 6.

⁷¹ *Maximum Ventures Inc. v de Graaf et al.*, 2007 BCSC 1215 at para 40.

⁷² *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

⁷³ Applicant’s response submission dated September 22, 2022 at paras 19 and 29.

⁷⁴ *Soprema Inc. v Wolrige Mahon LLP*, 2016 BCCA 471 at para 30.

⁷⁵ *Kaplan v Casino Rama Services Inc.*, 2018 ONSC 3545.

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.⁷⁶

[55] I am not persuaded that there was an implied waiver of the records in dispute. 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.⁷⁷

Severing

[56] The applicant says he is not confident 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.

[57] The applicant says that the Law Society has withheld the records in their entirety without any explicit recognition of his right of access to information that can be reasonably severed from the records.⁷⁸ He submits that the records should be produced to me so that I can determine whether any information can reasonably be severed.⁷⁹

[58] The Law Society says that the courts have determined that the duty to sever does not apply to privileged records.⁸⁰ 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).⁸¹ More recently, the Court of Appeal in *British Columbia (Attorney General) v Lee* clarified 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.⁸²

⁷⁶ Law Society's reply submission at para 27.

⁷⁷ I also rejected the applicant's argument about waiver in Order F23-25, 2023 BCIPC 29 at paras 50-59.

⁷⁸ Applicant's response submission dated September 22, 2022 at para 13.

⁷⁹ *Ibid* at para 14.

⁸⁰ Law Society's reply submission at para 17.

⁸¹ *College*, *supra* note 14 at para 68.

⁸² *Lee*, *supra* note 45 at para 40.

[59] In this case, I have found that all of the records in dispute are privileged. There are no discrete portions of the records that are not privileged. Therefore, this is not a case where s. 4(2) applies.

Discretion

[60] 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.⁸³

[61] The Law Society submits that it properly exercised its discretion in applying s. 14.⁸⁴ It provided affidavit evidence from its Information and Privacy Officer who deposes that it is her understanding and belief that the Law Society exercised its discretion to apply s. 14.⁸⁵

[62] 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.⁸⁶ He says that I should review all of the records in dispute to ensure that the Law Society has properly exercised its discretion.⁸⁷

[63] 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.

Sections 13(1) and 22(1)

[64] The Law Society withheld some information in the records under ss. 13(1) and 22(1) as well as s. 14. Since I found that s. 14 applies to all of the information in the records, it is not necessary to consider whether ss. 13(1) and 22(1) also apply.

⁸³ Order F18-33, 2018 BCIPC 36 at para 33; Order F18-38 2018 BCIPC 41 at para 52.

⁸⁴ Law Society's initial submission at para 59.

⁸⁵ Affidavit of JD at para 12.

⁸⁶ Applicant's response submission dated September 22, 2022 at paras 34-35.

⁸⁷ *Ibid* at paras 36 and 37(b)(ii)

CONCLUSION

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

June 29, 2023

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F20-83648