



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F23-110

LAW SOCIETY OF BRITISH COLUMBIA

Carol Pakkala
Adjudicator

December 20, 2023

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to records relating to professional practice complaints he filed against multiple lawyers. The Law Society of British Columbia (Law Society) withheld information from the responsive records under several FIPPA exceptions to access. The adjudicator confirmed the Law Society's decision to withhold information from the responsive records under ss. 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 14, 22(1), 22(2), 22(2)(a), 22(2)(e), 22(3), 22(3)(b), 22(3)(d), and 22(4).

INTRODUCTION

[1] This inquiry is about the Law Society's response to an applicant's access request for records related to complaints he filed against certain lawyers licenced to practice law in British Columbia.

[2] The Law Society withheld five pages of records in their entirety under ss. 13 (advice or recommendations) and 14 (solicitor-client privilege) and withheld some information from 16 pages of records under s. 22 (unreasonable invasion of a third party's personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Law Society's decision. Mediation did not resolve the matter and the applicant requested that it proceed to inquiry. Both the applicant and the Law Society provided submissions in this inquiry.

¹ For clarity, unless otherwise specified, when I refer to sections in this order, I am referring to sections of FIPPA.

Preliminary Issue - scope of applicant's submissions

[4] From the entirety of his response submissions, the applicant appears to be dissatisfied with the Law Society's response to his complaints. He also asserts a variety of other wrongdoings related to a civil forfeiture of property. These issues are clearly very important to the applicant, but I will not consider or make any decision on their merits. This inquiry is strictly about the application of FIPPA to the applicant's access request.

[5] The applicant's submissions do not clearly address the issues under FIPPA. As a result, while I have read and considered his entire submission, I will refer to only those parts that relate to the issues I must decide in this inquiry.

ISSUES

[6] The issues I must decide in this inquiry are:

1. Is the Law Society authorized to refuse to disclose the information at issue under ss. 13 or 14?
2. Is the Law Society required to refuse to disclose the information at issue under s. 22(1)?

[7] Section 57 of FIPPA sets out the burden of proof. The Ministry has the burden of proving that ss. 13(1) and 14 apply. The applicant has the burden of proving disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).²

DISCUSSION

Background

[8] The Law Society is the professional body 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 and the Law Society is responsible for responding to those complaints.

[9] The applicant was involved in a civil forfeiture matter dating back more than ten years. The applicant filed complaints against the lawyers who were involved in that civil forfeiture matter. The Law Society considered the applicant's complaints in light of the rulings of the court in the civil forfeiture case and declined to investigate.³ The applicant's access request is for the Law Society's

² However, the public body has the initial burden of proving the information is personal information; Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

³ Law Society's letter to the applicant dated August 9, 2021, Records at pp. 96-97.

records related to his complaints against the lawyers.

Records at issue

[10] The Law Society found 281 pages of records responsive to the applicant's request. Most of those pages were disclosed to the applicant. Only 21 pages are in dispute. There are 16 partially-severed pages of Law Society membership records and five pages of completely-severed emails.

Solicitor-client privilege, s.14

[11] The Law Society applied both ss. 13 and 14 to the email communications. I will first consider the Law Society's application of s. 14 to those emails.

[12] Section 14 says the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.⁴ The Law Society submits the information at issue is protected under legal advice privilege.

[13] The purpose of legal advice privilege is to protect confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion, or analysis.⁵

[14] In order for information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that is intended by the solicitor and client to be confidential; and
- that entails the seeking or providing of legal advice.⁶

[15] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied however, then privilege applies.⁷ A communication does not satisfy this test merely because it was sent to a lawyer.⁸ That said, solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.⁹ The confidentiality

⁴ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para 26.

⁵ *College* at para 31.

⁶ *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.

⁷ *Ibid*, at p. 829.

⁸ *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras 61 and 81 [Keefer Laundry] and *R. v. McClure*, 2001 SCC 14 at para 36.

⁹ *McClure*, *ibid* at para 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras 10 and 13 [Camp].

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.¹⁰

[16] The courts have established certain principles for deciding if privilege applies:

- Lawyers, their staff and other firm members working together on a file may share privileged information amongst themselves so long as those discussions remain confidential relative to the rest of the world.¹¹
- 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.¹²
- Solicitor-client privilege extends to in-house counsel provided they are acting in a legal capacity and not a business or management capacity.¹³

[17] I adopt the above principles in making my decision.

Evidentiary basis, s.14

[18] The Law Society did not provide a copy of the records it is refusing to disclose under s. 14 for my review. Instead, it provided an index which describes each document at issue. The Law Society also provided affidavits from its Information and Privacy Officer who is a paralegal and from its Manager of Privacy, Records and Information Management.

[19] After reviewing the parties' submissions, I determined the Law Society had not provided a sufficient evidentiary basis for its claim of privilege over some of the information at issue.

[20] Section 44(1) gives me, as the commissioner's delegate, the power to order production of records for the purposes of conducting an inquiry. However, due to the importance of solicitor-client privilege to the proper functioning of the legal system, I would only order production of records being withheld under s. 14 when it is absolutely necessary to adjudicate the issues and never before giving the public body an opportunity to provide further evidence. Therefore, I provided the Law Society with an opportunity to submit additional evidence and submissions.

¹⁰ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 34.

¹¹ *Shuttleworth v. Eberts et. al.*, 2011 ONSC 6106 at paras 67 and 70-71.

¹² *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para 83; *Camp* at para 42.

¹³ *Keefer Laundry* at para 63 and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para 20.

[21] In response, the Law Society provided an affidavit from a Law Society staff lawyer who was directly involved in the email communications in her (then) role as the Manager, Professional Conduct (Manager). The person in the Manager role must be a practicing lawyer with no less than ten years of practice experience.¹⁴ Her affidavit includes a table of records that describes each document withheld under s.14 and explains the basis for each privilege claim.¹⁵

[22] I considered whether fairness requires I give the applicant the opportunity to respond to the Law Society's additional evidence. In my view, fairness does not require a reply in this instance. The substance of the Law Society's description of the email communications and the position of the Law Society on the application of s. 14 has not changed. The Law Society's initial evidence was hearsay evidence describing the email communications. The additional evidence is direct evidence from the lawyer involved in the email communications, confirming its earlier evidence. The applicant already had the chance to respond to the earlier evidence and to the Law Society's application of s.14 to the email communications. For this reason, I find fairness does not require the opportunity to respond to the additional evidence.

[23] I find that I now have sufficient evidence to decide if s. 14 applies. Therefore, it is not necessary to order production of the records for my review.

Parties' submissions, s. 14

[24] The Law Society says the s. 14 records are internal emails between its intake officer and the Manager.¹⁶ The Law Society further says the emails were confidential in nature, and each of them is related to the seeking, formulating, and provision of legal advice.¹⁷

[25] The applicant challenges the Law Society's motivation for asserting privilege and says it is to immunize the lawyers and because the Law Society "has skin in the game."¹⁸

Analysis, s.14

[26] For the reasons that follow, I find solicitor-client privilege applies to the emails.

¹⁴ Affidavit of Manager, Privacy, Records, and Information Management at para 9.

¹⁵ Table of Records attached as Exhibit A to the Manager's affidavit.

¹⁶ Law Society's initial submissions at para 14.

¹⁷ Law Society's initial submissions at para 27.

¹⁸ Applicant's response submissions at paras 17-19.

[27] From my review of the records and evidence, I find the Law Society is refusing to disclose the following information under s. 14:

- email communications from the Intake Officer requesting legal advice from the Manager;
- email communications from the Manager to the Intake Officer providing the requested legal advice (copied to an assistant at the Law Society); and
- email communications from the Manager to the Intake Officer setting out the information required to formulate legal advice.¹⁹

[28] For legal advice privilege to apply to these email communications, the Manager must have been acting in a legal capacity and not as a business or policy advisor.²⁰ To decide if the Manager was acting in a legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered.²¹

[29] The Manager attests to her role as including providing legal advice to the Law Society.²² She further attests to having managerial responsibilities in relation to the intake, assessment, processing, investigation, and disposition of professional conduct complaints submitted to the Law Society”.²³ Her evidence is that the emails contain a request for legal advice, discussion of the process of formulating her legal advice, and the subsequent legal advice that she provided in response to the request. On the basis of this evidence, I find, on the balance of probabilities, she was acting in her legal, not managerial, capacity in relation to the email communications. I conclude therefore, that the first requirement of the legal test is met as the communications at issue were between a solicitor and a client.

[30] I am also satisfied, on the basis of the Manager’s evidence, that the parties to the emails intended those communications to be confidential²⁴. There is no evidence that those communications were shared with people from outside the solicitor-client relationship or that their contents were widely distributed. As a result, I conclude the parties intended for the communications to be confidential and the communications were treated in that manner. I conclude therefore, that the second requirement of the legal test is met as the communications at issue were intended to be confidential.

¹⁹ Table of Records attached as Exhibit A to the Manager’s affidavit.

²⁰ *Keefer Laundry* at para 63.

²¹ *Keefer Laundry* at para. 64, citing *R v. Campbell*, 1999 CanLII 676 (SCC) at para 50.

²² Manager’s affidavit at para 3.

²³ *Ibid.*

²⁴ Manager’s affidavit at para 7.

[31] Lastly, for legal advice privilege to apply, the communications between the lawyer and the client must also entail the seeking or giving of legal advice. I can see from the table of records that the communications include both actual legal advice and requests for legal advice. I am further satisfied that the Manager's email setting out the information required to formulate legal advice is part of the continuum of communications in respect of the legal advice. I conclude therefore that the third part of the legal test is met.

Conclusion, s. 14

[32] In summary, I find that disclosing the information the Law Society withheld under s. 14 would reveal confidential communications between the Law Society and its lawyer about the seeking and giving of legal advice. I conclude the Law Society is authorized to refuse to disclose the information it withheld under s. 14.

Advice or recommendations, s.13

[33] The Law Society also applied s. 13 to the emails. Given my finding that the Law Society is authorized under s. 14 of FIPPA to refuse to disclose the emails, I do not need to consider s. 13.

Disclosure harmful to personal privacy, s. 22

[34] The Law Society applied s. 22(1) to certain information in its membership records about lawyers including their: identification numbers, birth dates, personal telephone numbers and email addresses, indemnity status (full time or part-time), and other information about the scope and extent of their professional insurance.

[35] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. This provision of FIPPA is mandatory. Previous orders have considered the proper approach to the application of s. 22 and I apply those same principles here.²⁵

Personal information

[36] Section 22(1) only applies to personal information, so the first step in a s. 22 analysis is to decide if the information in dispute is personal information.

[37] FIPPA defines personal information as "recorded information about an identifiable individual other than contact information." Contact information is

²⁵ Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58 sets out a summary of the steps in a s. 22 analysis which I follow here.

defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”²⁶

[38] I will first consider whether the information withheld from the membership records is about identifiable individuals. I will then consider whether any of the information that I find is about identifiable individuals is contact information.

[39] I can see that all of the information withheld from the membership records is about lawyers who are identified by name in the records. Each piece of severed information is unique to a particular lawyer. I find that this information is clearly about identifiable individuals.

[40] I will now consider whether the information that is about identifiable individuals is contact information. There are several telephone numbers and email addresses at issue. The phone numbers are described in the records as “home” or “cellular” phone numbers. One of the email addresses is from a domain name commonly associated with personal email addresses. I find this information is personal information, not contact information. Two email addresses are from a BC government domain name and are clearly business email addresses. I find these two email addresses are contact information, not personal information, and cannot be withheld under s. 22(1).²⁷

[41] For the reasons above, I find most of the information severed from the membership records is personal information.

Not an unreasonable invasion of privacy, s. 22(4)

[42] The next step in a s. 22 analysis is to assess whether the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is not an unreasonable invasion of a third party’s personal privacy. The Law Society submits that none of the exceptions in s. 22(4) apply. The applicant makes no comment about the applicability of s. 22(4). None of the exceptions appear to me to apply. Therefore, I find that none of the personal information in the membership records falls within s. 22(4).

Presumed invasion of privacy, s. 22(3)

[43] Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy. The Law Society says s. 22(3)(d) applies. The applicant makes no submissions about s. 22(3). However, I will also consider s. 22(3)(b) because

²⁶ FIPPA, Schedule 1.

²⁷ Pages 234 and 267 of the Records.

I find it is relevant.

Investigation into a possible violation of law, s. 22(3)(b)

[44] Section 22(3)(b) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[45] Section 22(3)(b) requires two things: (1) an investigation into a violation of law, and (2) the compilation of information that is identifiable as part of that investigation. The compilation of information involves some exercise of judgment, knowledge, or skill on behalf of the public body.²⁸

[46] For the first part of s. 22(3)(b), previous orders establish that professional regulation investigations qualify as investigations into a possible violation of law.²⁹ Here the applicant's complaints did not proceed to an investigation. The Law Society declined to investigate, declaring the complaints to be unsubstantiated.³⁰ Absent any formal investigation, I find the first part of 22(3)(b) is not met so I need not consider the second part of the s. 22(3)(b) test.

[47] For these reasons, I find that s. 22(3)(b) does not create a presumption against disclosure of the personal information in the membership records.

Employment, educational or occupational history, s. 22(3)(d)

[48] Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history. I find most of the information severed from the membership records, with the exception of birth dates, is about the lawyers' employment history as legal professionals. Therefore, I find a disclosure of that information is presumed to be an unreasonable invasion of the lawyers' personal privacy under ss. 22(3)(d).

Relevant circumstances, s. 22(2)

[49] The final step in a s. 22 analysis is to consider the impact of disclosing the personal information in light of all relevant circumstances, including those listed in s. 22(2). These circumstances can weigh either in favour or against disclosure.

²⁸ Order F19-02, 2019 BCIPC at para 39.

²⁹ Order 02-20, 2002 CanLII 42445 (BC IPC) at paras. 28-31. See also: Order F23-78, 2023 CanLII 90556 (BC IPC) at para 95 and Order F08-16, 2008 CanLII 57359 (BC IPC) at para 22.

³⁰ Law Society's letter to the applicant dated August 9, 2021, Records at pp. 96-97.

It is at this step, after considering all relevant circumstances, that any presumptions under s. 22(3) presumption may be rebutted.

[50] The Law Society says that none of the s. 22(2) factors weigh in favour of disclosure and that s. 22(2)(e) weighs against disclosure.³¹ The applicant does not address the specific factors in s. 22(2) but I find that he does say things that pertain to ss. 22(2)(a). I will consider all these relevant circumstances below.

Public scrutiny, s. 22(2)(a)

[51] Section 22(2)(a) states that a relevant circumstance to consider under s. 22(1) is whether the disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny.

[52] The applicant raises concerns with how the Law Society conducts its investigations.³² The applicant is clearly dissatisfied with the outcome of his complaints against the lawyers. The applicant also questions the motivation of the Law Society in asserting privilege over the records. He says it is to immunize the lawyers and because the Law Society “has skin in the game.”³³

[53] One of the purposes of s. 22(2)(a) is to make public bodies more accountable.³⁴ Therefore, for s. 22(2)(a) to apply, the disclosure of the specific personal information at issue must be desirable for subjecting the public body’s activities to public scrutiny as opposed to subjecting an individual third party’s activities to public scrutiny³⁵. For the reasons that follow, I find disclosing the personal information at issue is not desirable for subjecting the Law Society’s activities to public scrutiny.

[54] The withheld personal information is related to the identity of the Law Society’s members, not to their individual actions or to the activities of the Law Society. In my view, the release of this personal information would not help to scrutinize the activities of those individuals, let alone the activities of the Law Society.

[55] I find the personal information withheld under s. 22 would not add anything to further the public’s understanding of the Law Society’s complaint investigation activities. What the applicant says in his submissions about the Law Society’s actions does not persuade me that disclosing the third-party personal information

³¹ Law Society’s initial submissions at para 39(d).

³² Applicant’s submissions at para 21.

³³ As noted in the s. 14 analysis, the applicant says the Law Society’s motivation for asserting privilege is to immunize the lawyers and because the Law Society “has skin in the game”. Applicant’s response submissions at paras 17-19.

³⁴ See Order F23-48, 2023 BCIPC 56 (CanLII) at para 48 citing Order F18-47, 2018 BCIPC 50 (CanLII) at para 32.

³⁵ *Ibid*, citing Order F16-14, 2016 BCIPC 16 (CanLII) at para 40.

in this case is desirable for the purpose of subjecting the Law Society's activities to public scrutiny under s. 22(2)(a).

[56] For these reasons, I find that s. 22(2)(a) does not weigh in favour of disclosure of the personal information.

Exposure to financial or other harm, s. 22(2)(e)

[57] Section 22(2)(e) requires the public body to consider whether disclosure of personal information will unfairly expose a third party to financial or other harm. If so, this factor weighs in favour of withholding the personal information.

[58] The Law Society says disclosure of some of the severed information in the membership records could expose its members to harm. The Law Society says it is the type of information that could be used to perpetrate identity theft, fraud, reputational harm or other categories of similar harm and mischief.³⁶

[59] I considered the Law Society's submissions on s. 22(2)(e) from the position that disclosure of information under FIPPA is to be regarded as disclosure to the world.³⁷ In considering the Law Society's arguments about what someone *could* do with the information, I am not suggesting that the applicant has any malicious intentions.

[60] In my view, disclosing the combination of personal details in the membership records could reasonably be expected to unfairly expose the third parties to identity theft and financial loss, for the purposes of s. 22(2)(e).³⁸

[61] For these reasons, I find that s. 22(2)(e) weighs against disclosure of the personal information.

Conclusion on s. 22(1)

[62] I found that two of the email addresses were contact information and the balance of the information withheld from the membership records under s. 22 was personal information. I found that s. 22(4) did not apply to any of the personal information. I found that, with the exception of birth dates, the personal information is subject to a presumption against disclosure under ss. 22(3)(d). I find this presumption has not been rebutted. Section 22(2)(e) weighs against disclosing any of the personal information, including the birthdates. No factors weigh in favour of disclosure. Therefore, I find that disclosure of any of the personal information in the membership records constitutes an unreasonable

³⁶ Law Society's initial submissions at para 39(d).

³⁷ Order 03-25, 2003 CanLII 49204 (BC IPC) at para 24.

³⁸ Order F18-48, 2018 BCIPC 51 at para 23.

invasion of the lawyers' personal privacy.

CONCLUSION

[63] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm the Law Society is authorized to refuse access to the information that it severed under s. 14.
2. I require the Law Society to refuse access to the information that it severed under s. 22(1), with the exception of the business email addresses described above.
3. I require the Law Society to give the applicant access to the information I have highlighted in yellow at pages 234 and 267 of the copy of the records, which are provided to the Law Society with this order.
4. The Law Society must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records/pages described at item 3 above.

[64] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by February 5, 2024.

December 20, 2023

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

OIPC File No.: F21-88015