

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 216-1998
February 27, 1998**

INQUIRY RE: An applicant's request for records related to his complaints made to the Law Society of British Columbia

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on October 31, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review from the applicant of a decision by the Law Society of British Columbia (the Law Society) to withhold records in their entirety. The applicant is also challenging the adequacy of the Law Society's search for records in response to his access request.

2. Documentation of the inquiry process

On April 16, 1997 the applicant submitted a request under the Act to the Law Society for access to records pertaining to his October 24, 1996 complaint against the President, the Deputy Secretary, and a member of the Law Society.

By letters dated April 24 and 28, 1997, the Law Society confirmed that it was disclosing four records to the applicant but that it was withholding two records: a letter from an officer for the Ombudsman to counsel for the Law Society on the basis of section 3(1)(c) of the Act and a memorandum to file created by Counsel to the Law Society on the basis of section 14 of the Act.

In his May 5, 1997 request for review made to my Office, the applicant contended that the Law Society had misapplied sections 3(1)(c) and 14 of the Act to the withheld records and that it had not conducted an adequate search for records in accordance with a public body's duty to assist under section 6 of the Act.

During the mediation process, the Law Society notified the applicant that it was also applying section 3(1)(c) of the Act to the memorandum to file as a reason for refusing disclosure of this record. With the consent of the parties, the deadline for the inquiry process was extended to October 31, 1997.

It should be noted that, after the inquiry process started, the Law Society disclosed additional records to the applicant and notified him that a third record (a letter from counsel for the Law Society to an officer for the Ombudsman) was being withheld under section 3(1)(c) of the Act.

3. Issues under review and the burden of proof

There are several issues under review in this inquiry. The first two are the Law Society's application of sections 3(1)(c) and 14 of the Act to a memorandum to file and section 3(1)(c) of the Act to the two letters between the officer for the Ombudsman and counsel for the Law Society.

The third issue is the application of section 6 of the Act to the adequacy of the Law Society's search for records in response to the applicant's April 16, 1997 access request.

The relevant sections of the Act are as follows:

Scope of this Act

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
 - ...
 - (c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

- (b) creating the record would not unreasonably interfere with the operations of the public body.

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 3(1)(c) or 14, it is up to the public body to prove that the applicant has no right of access to the record or part of the record.

Section 57 of the Act is silent with respect to a request for review about the issue of adequate search. As I decided in Order No. 103-1996, May 23, 1996, the burden of proof in such instances is on the public body.

4. Procedural objections

Following the deadline for making submissions, the applicant submitted three letters challenging specific issues in the submissions that had been made by the Law Society. A copy of each letter was sent to the Law Society, and its counsel responded. The applicant has requested that I disregard the submissions made by the Law Society after the deadline. I have accepted these “late” submissions.

5. The records in dispute

There are three records in dispute in this inquiry, and they have been described above.

6. The applicant’s case

The applicant has made voluminous submissions, a portion of them *in camera*. I have reviewed them carefully but do not consider it necessary to present his arguments here in detail, because the issues are so clear-cut. His concern that he did not receive a response to his complaint to the Law Society against its leading members is not a matter that I can address under the Act. (Submission of the Applicant, paragraph 7.04)

The applicant’s fundamental submission is that the Law Society breached its duty to assist him and should give him access to all of the records pertaining to his complaint against its former Treasurer and former Deputy Secretary. (Submission of the Applicant, paragraph 8.01) His main contention that he “will not legitimise the Society’s mischief by presenting any arguments relating to the records allegedly withheld under sections 3(1)(c) and 14” is not helpful. (Submission of the Applicant, paragraph 7.18)

7. The Law Society's case

The Law Society submits that it has made a comprehensive and complete search for responsive records in accordance with section 6 of the Act. (Submission of the Law Society, paragraphs 7 to 10; and the Reply Submission of the Law Society, paragraphs 1 to 4) It argues that its actions are in compliance with Order No. 176-1997, July 21, 1997; and Order No. 178-1997, July 25, 1997.

The Law Society submits that it has correctly applied section 3(1)(c) of the Act to the memorandum to file in dispute “on the basis that it relates to a process initiated by an Officer of the Legislature,” that is the Ombudsman. It argues that this is in compliance with Order No. 170-1997, June 12, 1997. I have also reviewed an *in camera* submission from the Law Society on this point. (Submission of the Law Society, paragraphs 11 to 14)

The Law Society submits, with respect to the memorandum to file, that it can also be protected from disclosure on the basis of section 14 of the Act, but that if I conclude that section 3(1)(c) applies, then I need not address the section 14 issue. My conclusion on this point will be evident below. (Submission of the Law Society, paragraph 6 and 15 to 17)

8. The Ombudsman's Case

The Ombudsman's submission refers to the confidential nature of her public obligations and the importance and scope of section 3(1)(c) of the Act. Because of my findings in previous Orders, as noted above by the Law Society, there is no need for me to revisit these matters here. (See Order No. 170-1997; and Order No. 188-1997, August 22, 1997)

9. Discussion

The adequacy of a search for records under section 6(1) of the Act is a question of fact. Based on my review of the evidence filed by the Law Society, I am satisfied that the search for records was adequate in this case. I accept that the Freedom of Information Analyst carried out a comprehensive search and pursued appropriate avenues to obtain files and records (Affidavits of Jason Eamer-Goult). The applicant alleges that the affidavit sworn October 23, 1997 contains false statements and should be disregarded on this basis. Since there is insufficient evidence to support such a serious allegation, I am not prepared to accede to the applicant's request.

Section 3(1)(c):

I accept the submissions presented by the Law Society and the Ombudsman with respect to the application of section 3(1)(c) of the Act to two of the records in dispute.

The applicant made no submissions on the application of section 3(1)(c). Based on my review of the records in dispute, there is no question that the letter from the officer for the Ombudsman to counsel for the Law Society and the counsel's response to the officer for the Ombudsman's are excluded from the application of the Act by virtue of section 3(1)(c).

The Law Society and the Ombudsman submit that section 3(1)(c) of the Act applies to the memorandum to file. Although the evidence establishes that counsel to the Law Society created the memorandum to file in relation to communications with an Officer of the Legislature, this record was not created by, nor is it in the custody of, an Officer of the Legislature as required by section 3(1)(c). I cannot accept the Ombudsman's submission that the words "created by" include an internal record written by an employee of a public body concerning a communication with an Officer of the Legislature. The officer for the Ombudsman communicated with counsel for the Law Society, but the officer did not "create" counsel's internal memorandum to file. The memorandum to file was created by counsel to the Law Society, reflecting what she told the officer for the Ombudsman.

I have carefully considered the concern expressed by the Law Society and the Ombudsman that the exclusion of internal records created by employees of a public body concerning communications with an Officer of the Legislature, from the scope of section 3(1)(c) may lead to an anomalous result. Specifically, it would mean that written communications from the Ombudsman concerning an investigation would be excluded from the scope of the Act, as would the Ombudsman's records of oral communications concerning the investigation to outside parties. Yet a public body's records relating to oral communications from the Ombudsman concerning the same investigation may not be excluded.

I considered this issue in Order No. 170-1997 and concluded, not without difficulty, that the views or recommendations of an employee of an Officer of the Legislature, made into a record under the Act by an employee of a public body, could be protected from disclosure under section 3(1)(c). However, the present case would require me to go even further, because the memorandum to file does not record the views or recommendations of the officer for the Ombudsman.

In Order No. 188-1997, I concluded that the records of interaction between the Workers' Compensation Board and the Ombudsman were properly excluded from disclosure on the basis of section 3(1)(c). All of the records withheld under section 3(1)(c) in that case were correspondence exchanged between the WCB and the Ombudsman. The difficult issue of dealing with internal documents created by the public body did not arise.

While the Ombudsman's ongoing concern may have legitimate foundation, the interpretation urged upon me is one which, in my view, cannot be reconciled with the present language of section 3(1)(c). Since the memorandum to file was not created by,

nor is it in the custody of, an Officer of the Legislature, I find that this record does not fall within the scope of section 3(1)(c) of the Act.

However, I find that the record clearly falls within the scope of section 14 of the Act, because the author of the memorandum was acting in her capacity as legal advisor to the Law Society. (Affidavit of Jean Whittow)

10. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the search conducted by the Law Society of British Columbia in this case was a reasonable effort within the meaning of section 6(1).

Under section 58(3)(a), I require the Law Society of British Columbia to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search conducted was reasonable, I find that the Law Society of British Columbia has complied with this Order and discharged its duty under section 6(1) of the Act.

I also find that two of the records in dispute fall outside the scope of the Act on the basis of section 3(1)(c). Under section 58(2)(b) of the Act, I confirm the decision of the Law Society of British Columbia to refuse access to these two records.

I also find that the Law Society of British Columbia was authorized to withhold the memorandum to file on the basis of section 14 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Law Society of British Columbia to refuse access to this record in dispute that has been withheld on the basis of section 14.

David H. Flaherty
Commissioner

February 27, 1998