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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 219-1998
March 24, 1998**

INQUIRY RE: A review of a decision by the Law Society of British Columbia to refuse access to records regarding a complaint against a member; a review of the Law Society's decision to give an applicant access to other records containing third-party information.

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1. Description of the review

As Information and Privacy Commissioner, I conducted two written inquiries at the Office of the Information and Privacy Commissioner (the Office) on October 8, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). The first inquiry arose out of a request for review of a decision by the Law Society of British Columbia (the Law Society) to deny an applicant access to records concerning a complaint he had made against a member of the Law Society. The second arose out of a request for review of a decision by the Law Society to disclose to an applicant records containing personal information of the member (the third party). Since all records in dispute relate to the same Law Society complaint and involve the same parties, I have decided to dispose of the issues arising out of both inquiries in a single Order.

2. Documentation of the inquiry process

The applicant's request for review

On December 4, 1996 and January 18, 1997, the applicant submitted requests to the Law Society for access to records regarding a complaint the applicant had made about a member of the Law Society.

On January 13 and February 20, 1997, the Law Society notified the applicant that it was disclosing one record but was withholding or severing information in eight other records under sections 14 and 22 of the Act and section 63 (formerly section 57) of the *Legal Profession Act*.

On January 19, 1997 the applicant made a request for review to this Office. The Law Society agreed that the review would include both responses to the applicant's two access requests. With the consent of the parties, the inquiry process was extended to August 22, 1997.

During the mediation process, one additional record was disclosed to the applicant. By letter dated August 3, 1997 the applicant indicated that he was "not the applicant" and would not be participating in this review. On August 5, 1997 the Registrar of Inquiries for my Office wrote to the applicant indicating that a cancellation notice would be issued, if the applicant confirmed that he still did not wish to participate in the review. The applicant did not respond to this letter. On August 13, 1997 the Registrar contacted the applicant by telephone to ask whether the applicant intended to make a submission. The applicant requested an extension of time to file a submission, and the deadline for filing initial submissions was extended to September 30, 1997. I granted a further extension to October 8, 1997. No submissions were received from the applicant.

Since it was not clear whether the applicant regarded disclosure of the additional record during the mediation process as an adequate settlement of this request, the Director of Information and Privacy of my Office wrote to the applicant on February 10, 1998 requesting clarification of his position. By letter received in this Office on February 19, 1998, the applicant indicated that this matter was not settled and that he required further clarification before deciding whether or not to "close" this matter. This Office was unable to respond to the applicant's request for clarification. In the circumstances, I must proceed to issue an order under section 58 of the Act.

The third party's request for review

The records that respond to the two access requests contained third party personal information. The Law Society therefore sent notices to the third party on December 16, 1996 and to his counsel on January 29, 1997 inviting comments on the disclosure of some of those records.

The Law Society notified the third party on January 13, 1997 and his counsel on February 28, 1997 that, after considering the third party's representations, it had decided to disclose eleven records to the applicant.

Counsel for the third party made requests for review to this Office on February 3 and March 12, 1997, alleging that the Law Society's decisions constituted an unreasonable invasion of his client's personal privacy. The third party agreed to treat both requests for review as one.

With the consent of the parties, I extended the inquiry process to August 22, 1997. I subsequently granted a further extension to October 8, 1997.

3. Issues under review and the burden of proof

The applicant's request for review

The first issue under review in this inquiry relates to the Law Society's decision to apply sections 14 and 22 of the Act to records concerning the applicant's complaint to the Law Society about a member of the Law Society.

Section 57 of the Act establishes the burden of proof on parties in an inquiry. Under section 57(1), where access to information in the record has been refused under section 14, it is up to the public body, in this case the Law Society, to prove that the applicant has no right of access to the record or part of the record. Under section 57(2), where access to information in a record has been refused under section 22, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

The third party's request for review

The second issue under review in this inquiry relates to the Law Society's decision to give the applicant access to records containing information that concerns the third party (the member who is the subject of the applicant's complaint to the Law Society).

Under section 57(3)(a), where a public body has decided to give an applicant access to all or part of a record containing personal information that relates to a third party, it is up to the applicant to prove that the disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy.

Under section 57(3)(b), where a public body has decided to give an applicant access to all or part of a record containing other information that relates to a third party, it is up to the third party to prove that the applicant has no right of access.

The relevant sections of the Act

Legal advice

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

Disclosure harmful to personal privacy

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- (g) the personal information is likely to be inaccurate or unreliable, and
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
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Section 63 of the Legal Profession Act

The Law Society also relies on section 63 of the *Legal Profession Act*, which reads as follows:

Non-disclosure of privileged and confidential information

- 63(1) Notwithstanding section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of carrying out duties under this Act, becomes privy to information, files or records that are confidential or are subject to solicitor and client privilege, has the same obligation respecting the disclosure of that information as the member from whom the information, files or records were obtained.
- (2) A member, former member or articulated student who, in accordance with this Act, provides the society with any information, files or records that are confidential, or subject to a solicitor and client privilege is deemed not to have breached any duty or obligation that he or she would otherwise have had to the society or the client not to disclose the information, files or records.
- (3) A person who, during the course of an appeal under section 64 or an application under the *Judicial Review Procedure Act* with

respect to a matter under this Act, becomes privy to information or records that are confidential or are subject to solicitor and client privilege, must not

- (a) use the information other than for the purpose for which it was obtained, or
- (b) disclose the information to any person.

...

- (6) Notwithstanding section 14 of the *Freedom of Information and Protection of Privacy Act*, the benchers may make rules that they consider necessary or advisable for the purpose of ensuring the non-disclosure of any confidential information or information that, but for this Act, would be subject to solicitor and client privilege, and the rules may be made applicable to any person who, in the course of any proceeding under this Act, would become privy to the confidential or privileged information.
- (7) Section 47(4) of the *Freedom of Information and Protection of Privacy Act* does not apply to information that, but for this Act and the production of the information to the commissioner under that Act, would be subject to solicitor and client privilege.

4. Procedural objections

Although there were no procedural objections, the applicant's letter of August 3, 1997 generated considerable confusion. His statement that he was "not the applicant" and was not prepared to participate in the review was difficult to reconcile with his subsequent request for an extension of time to file a submission. Since the applicant is not prepared to withdraw his request, I am required to issue an order under section 58 of the Act.

5. The records in dispute

For the applicant's request for review, the records in dispute include various memoranda, a telephone conversation record, a number of Law Society administration forms, and a computer printout of the third party's history as a member of the Law Society.

For the third party's request for review, the records in dispute are a series of letters exchanged between the third party and the Law Society relating to the applicant's complaint to the Law Society about him, including one substantial submission made by the third party.

6. The applicant's case

The applicant did not make any submissions in these inquiries.

7. The third party's case

The third party also did not make any submissions in these inquiries.

8. The Law Society's case

The Law Society submits that the notes, memoranda, and recorded opinions in dispute were prepared by a law student and a staff lawyer for the Law Society. It submits, with content to which I have become accustomed on the basis of previous submissions, that such records are covered by section 14 of the Act. (Submission of the Law Society, paragraphs 7 to 11).

In the circumstances of the applicant's request for review, there is no need to address the Law Society's submissions on section 22 of the Act. However, for the third party's request for review, the Law Society submits that its decision to disclose the records in dispute to the applicant should be upheld because it decided, in the circumstances of the matter, that disclosure would not be an unreasonable invasion of the third party's personal privacy under section 22 of the Act.

9. Discussion

I have established in previous Orders that the Law Society and its lawyers are entitled to the protection of section 14 of the Act for communications made during the investigation of a complaint against one of its members. (See Order No. 169-1997, June 11, 1997, pp. 4-5; and Order No. 179-1997, August 6, 1997, pp.4-5)

On the basis of my review of the records in dispute, I find that the Law Society properly withheld them on the basis of section 14. I also find that the applicant has not met his burden of proof under section 22 of the Act and that the Law Society properly withheld the records in dispute under section 22.

I find that the third party has not met his burden of proof respecting non-personal information relating to him. Although the applicant did not attempt to meet his burden of proof respecting the third party's personal information, I am aware, on the basis of an *in camera* submission by the Law Society, of various reasons why this inquiry is peculiar, to say the least.

I cannot publicly discuss the reason for the Law Society's conclusion that disclosure of the records would not constitute an unreasonable invasion of the third party's privacy because of the *in camera* nature of its submissions. I can say, however,

that I have reviewed the records in dispute and agree with the Law Society that disclosure to the applicant of the records for which the third party requested a review would not be an unreasonable invasion of the third party's personal privacy.

10. Order

I find that the Law Society of British Columbia was authorized under section 14 of the Act to refuse access to the records in dispute. Accordingly, under section 58(2)(b) of the Act, I confirm the decision of the head of the Law Society of British Columbia to refuse access.

I also find that the Law Society of British Columbia was required to refuse access under section 22 of the Act to personal information in the records in dispute. Under section 58(2)(c), I require the head of the Law Society of British Columbia to refuse access.

I also find that the Law Society of British Columbia was not required under section 22 of the Act to refuse access to some of the third party's personal information in the records in dispute. Accordingly, under section 58(2)(a), I require the head of the Law Society of British Columbia to disclose to the applicant the records which were placed in dispute by the third party.

David H. Flaherty
Commissioner

March 24, 1998