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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 208-1998
January 5, 1998**

INQUIRY RE: A request for records in the custody or under the control of 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 July 22, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a series of requests for review of the application by the Law Society of British Columbia (the Law Society) of sections 13, 14, 15, and 22 of the Act to various records relating to two complaints filed against the applicant.

The original access request was initiated after a third party (a lawyer) laid a complaint with the Law Society concerning the conduct of the applicant. After the complaint was filed, the applicant sought access to the third party's 1992 and 1993 Annual Practice Declarations, which the Law Society refused to disclose on the basis of section 22 of the Act. The applicant then sought access to the Law Society's records regarding the complaint filed by the third party against the applicant. The Law Society provided partial access but withheld some records on the basis of sections 13, 14, 15, and 22 of the Act. The third party then requested a review of the necessity of disclosing any records to the applicant.

The applicant also sought access to records concerning a second complaint filed against her by another third party. The Law Society again provided partial access but withheld some records on the basis of sections 13, 14, 15, and 22 of the Act.

The applicant has requested a review of the Law Society's decisions in relation to all three of her requests. Since the applicant's request for a review and the third party's request are related and raise substantially the same issues, I propose to deal with them together.

2. Documentation of the inquiry process

On January 7, 1997 the applicant submitted a request to the Law Society for access to the third party lawyer's 1992 and 1993 Annual Practice Declarations. In that application the applicant also requested answers to a series of questions. Through the mediation process, the request was narrowed down to the records. On January 8, 1997 the applicant submitted a request to the Law Society for access to records concerning the complaints filed by both third parties.

The Law Society refused access to the Annual Practice Declarations on the basis of section 22 of the Act. The Law Society consulted with the third parties concerning disclosure of the records contained in the complaint files. On February 7, 1997 the Law Society disclosed a number of records that were not subject to third party notice. On February 14, 1997 the Law Society disclosed further records with some portions severed on the basis of section 22. Other records were withheld on the basis of sections 13, 14, and 15.

On March 3, 1997 the applicant requested a review of all records that were severed or withheld by the Law Society. On March 6, 1997 one of the third parties filed a request for a review of the necessity to disclose any records to the applicant. The parties agreed to extend the deadline for the inquiry from June 2, 1997 to June 27, 1997. As a result of requests by the parties, the inquiry was subsequently adjourned to July 22, 1997.

3. Issues under review and the burden of proof

The issues to be reviewed involve the Law Society's application of sections 13, 14, 15, and 22 of the Act to the records in question.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to records has been refused under sections 13, 14, and 15, 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 records or parts of the records.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

The relevant sections of the Act are as follows:

Policy advice, recommendations or draft regulations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a

minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

....

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 law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

....

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,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial

history or activities, or creditworthiness,

....

- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- (a) the third party has, in writing, consented to or requested the disclosure,

....

4. The records in dispute

The records in dispute are Annual Practice Declarations filed with the Law Society for two particular years and records contained in Law Society files relating to complaints filed by the third parties against the applicant. The complaint files include notes, memoranda, and opinion letters prepared by lawyers who investigated the complaints on behalf of the Law Society.

5. The applicant's case

The applicant seeks access to records and personal information from the Law Society concerning the third parties who filed complaints against her. It is the applicant's contention that she requires access to this information to respond to allegations made against her to the Law Society by the third parties.

The applicant submits that the third parties have waived solicitor-client privilege by filing complaints against her insofar as disclosure of the information is necessary to enable her to respond to the allegations. (Reply Submission of the Applicant, p. 1) She also submits that disclosure is required for a fair determination of her rights under section 22(2)(c) of the Act and that the failure to disclose the records raises issues of natural justice.

6. The Law Society's case

The Law Society submits that disclosure of the third party lawyer's Annual Practice Declarations for the years 1992 and 1993 would constitute an unreasonable invasion of the third party's personal privacy under section 22(3)(d) and (f) of the Act, particularly since the third party has not consented to disclosure. The Law Society further submits that the applicant has failed to discharge the burden of establishing that disclosure would not constitute an unreasonable invasion of the third party's privacy. (Submission of the Law Society, paragraph 4)

The Law Society submits that the applicant's arguments concerning solicitor-client privilege and natural justice are irrelevant to the issues in this inquiry.

The Law Society has provided partial access to records in the complaint files but has severed records on the basis of sections 13, 14, 15, and 22 of the Act. It maintains that section 14 of the Act affords a complete answer to the request for records in the complaint files with the exception of one particular record from which a small amount of information has been severed (Document No. 1). The Law Society's submissions regarding Document No. 1 were made *in camera* with respect to the third party lawyer, but were made available to the applicant.

7. The third party's case and the Law Society's response

The third party lawyer requests a review of the necessity for disclosing the records to the applicant.

The Law Society submits that it is not an unreasonable invasion of the third party's personal privacy to disclose records that have already been viewed by the applicant, that relate to matters within the applicant's knowledge, or relate to administrative matters. The Law Society points out that portions of the records were severed on the basis of section 22 of the Act, because disclosure would constitute an unreasonable invasion of the third party's personal privacy.

The third party did not file a response to the Law Society's submission.

8. Discussion

Access to the third party lawyer's Annual Practice Declarations

The applicant relies primarily on section 22(2)(c) for the position that disclosure of the information in the Annual Practice Declarations is relevant and necessary in order to reach a fair determination of her rights. She asserts that the "issue of full disclosure overrides any claim [by the third party] for privacy when he instituted a complaint against the applicant."

The Law Society Rules, Part 9, provide that Annual Practice Declarations must be filed in the required form each year by practicing lawyers. The form includes personal information concerning the member which is supplied in confidence to the Law Society. (Submission of the Law Society, paragraphs 2 and 3) The Law Society submits that disclosure of these records would constitute an unreasonable invasion of the third party's privacy because they contain personal information relating to "employment, occupational or educational history" and financial history or activities under sections 22(3)(d) and (f). The Law Society further submits that the applicant has not met her burden of proof under section 22 of the Act. (Reply Submission of the Law Society, p. 1) Based on my review of the records and the applicant's submissions in this inquiry, I agree with the Law Society.

The applicant put forward a natural justice argument for disclosing the disputed

personal information to her, which the Law Society went to considerable lengths to oppose. (Reply Submission of the Law Society, paragraphs 6 to 8) Section 22(2) of the Act outlines relevant circumstances that I am required to consider in making a determination on the basis of section 22(1). I have had regard to the applicant's argument that disclosure of this information is relevant to a fair determination of her rights but that consideration is, in my view, outweighed in this case by the nature of the information (falling as it does under sections 22(3)(d) and (f)) and the third party's opposition to disclosure. Ensuring a fair determination of one's rights is a component of natural justice; however, if the complaint to the Law Society results in disciplinary action, the applicant will have the right to know the case being made against her by the Law Society and will obtain access to all of the evidence that the Law Society intends to rely upon at that time.

The applicant also argues that the information must be disclosed because the third parties waived solicitor-client privilege by filing complaints against her. The applicant's argument misconceives the nature of the privilege being claimed. It is not the third parties who are seeking to invoke solicitor-client privilege but rather the Law Society, which is claiming privilege as a client with respect to communications with its solicitors who investigated the complaint. Communications between the Law Society and its legal counsel during the course of an investigation of a complaint are privileged. I agree with the Law Society that in "light of that privilege, the Law Society cannot be compelled to disclose the requested information pursuant to a request under the Act." (See Order No. 169-1997, June 11, 1997)

Having regard to all of the material submitted, I conclude that the applicant has failed to discharge the burden of establishing that disclosure of the third party lawyer's 1992 and 1993 Annual Practice Declarations would not constitute an unreasonable invasion of the third party's personal privacy.

Access to records concerning the complaints filed by the third parties

The Law Society provided partial access to the records contained in the complaint files but severed and withheld certain records on the basis of sections 13, 14, 15, and 22 of the Act.

The Law Society asserts that section 14 affords a complete answer to the entire application with the exception of one record (Document No. 1). Based on my review of the records in dispute, I accept that section 14 protects the records from disclosure to the applicant. I have addressed above the applicant's submissions regarding the waiver of solicitor-client privilege.

In addition, the Law Society contends that section 15(1)(a) applies because the result of its investigations could lead to disciplinary proceedings against the applicant in which she could be exposed to a penalty or sanction under the *Legal Profession Act* or the Law Society Rules. In Order No. 163-1997, May 14, 1997, I accepted that section

15(1)(a) applies to a Law Society investigation, because an investigation of this nature could lead to a penalty or sanction being imposed. I accept that section 15(1)(a) applies in this case.

Finally, the Law Society submits that any recommendations made by lawyers in this matter to the Law Society are protected from disclosure under section 13 of the Act.

In view of my conclusions regarding section 14 of the Act, it is not necessary to address the application of section 13. The recommendations are privileged information under section 14 of the Act.

The Law Society has severed a small amount of information from Document No. 1 on the basis of section 22(1) of the Act. Since the Law Society's submissions in relation to Document No. 1 were provided *in camera* with respect to the third party lawyer, I cannot outline the details of its submission. I am satisfied, however, based on my review of the Law Society's submissions and the record itself, that the information was properly withheld on the basis of section 22(1).

I have addressed above the applicant's argument concerning the need for disclosure to reach a fair determination of her rights under section 22(2)(c) and her arguments concerning solicitor-client privilege and natural justice. The same considerations apply in relation to the records severed or withheld from the complaint files.

I conclude that the Law Society has discharged its burden of proving that the applicant has no right of access to the records or portions thereof which were severed and withheld on the basis of sections 14 and 15. I further conclude that the applicant has failed to discharge her burden of proving that disclosure of records severed or withheld on the basis of section 22(1) would not constitute an unreasonable invasion of a third party's personal privacy.

Review of the necessity for disclosing records to the applicant

The final issue relates to the third party lawyer's request for a review of the necessity for disclosing any records to the applicant. The third party provided a letter to the Law Society in which he outlined the nature of his association with the applicant and the events which led up to the filing of the complaint. The third party expressed concern that disclosure of this information to the applicant could impair his ability to carry on practicing law. The third party indicated, however, that he would consider consenting to disclosure if he was provided with the identity of the person making the requests, the purpose for such requests, and immunity from liability.

I agree with the Law Society's submission that disclosure of records which have already been reviewed by the applicant, that relate to matters within the knowledge of the applicant, or relate to matters of an administrative nature, would not constitute an

unreasonable invasion of the personal privacy of the third party on the facts of this case. The third party did not provide any submissions to counter this position.

Based on my review of the material which has been severed and disclosed, I am satisfied that the Law Society properly applied section 22 to the records in dispute.

9. Order

I find that the Law Society of British Columbia was authorized under sections 14 and 15 of the Act to refuse access to the records withheld from the applicant under those sections. Under section 58(2)(b) of the Act, I confirm the decision of the Law Society of British Columbia to refuse access to the records severed or withheld on the basis of sections 14 and 15.

I also find that the Law Society of British Columbia was required under section 22 to refuse access to the records withheld from the applicant under section 22. Under section 58(2)(c) of the Act, I require the Law Society of British Columbia to refuse access to the records severed or withheld on the basis of section 22.

With respect to the third party, I also find that the Law Society of British Columbia was not required to withhold certain records from the applicant under section 22(1) of the Act. Under section 58(2)(a) of the Act, I require the Law Society of British Columbia to disclose those certain records to the applicant.

David H. Flaherty
Commissioner

January 5, 1998