

ISSN 1198-6182

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 233-1998  
April 30, 1998**

**INQUIRY RE: A refusal by the Law Society of British Columbia to disclose  
complaint records**

**Fourth Floor  
1675 Douglas Street  
Victoria, B.C. V8V 1X4  
Telephone: 250-387-5629  
Facsimile: 250-387-1696  
Web Site: <http://www.oipcbc.org>**

**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 February 17, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant of the decision of the Law Society of British Columbia (the Law Society) to refuse access to records in the Law Society's file on the applicant's complaint about a lawyer.

**2. Documentation of the inquiry process**

The applicant wrote to the Law Society on October 31, 1997 to request copies of all records related to her complaint about a third party, a lawyer. Since the Law Society received this request on November 3, 1997 the due date for its response was thus December 3, 1997. In mid-November 1997, the Law Society told the applicant that it would be giving two third parties the opportunity to make representations on the disclosure of certain records. Shortly after, the applicant requested a review by the Office of the Information and Privacy Commissioner (the Office) of the Law Society's decision to notify the third parties. The 90-day timeline for resolving this request for review began on November 19, 1997 and expired on February 17, 1998.

In early December 1997, the Law Society provided the first of its staged responses to the applicant's request, that is, by informing her of its decision regarding the records which had *not* been included in the third party consultations. The Law Society told the applicant that it was giving her access to some records and denying access to other records and information under sections 14 and 22 of the Act. It also told the applicant

that it was applying section 63 of the *Legal Profession Act* to some information in these records.

With respect to the records on which the Law Society had consulted the two third parties, the Law Society told the applicant that it had received a reply from one of the third parties: this person had consented to release of the one record on which she had been consulted, but the Law Society had decided to withhold it under section 14 of the Act. The Law Society also told the applicant that it had taken a 30-day extension (to mid-January 1998) to continue its consultations with the second third party on the remaining records, which were the subject of its third party consultations. It also told the applicant that it had applied for, and received, approval from my Office for a further extension (to mid-February 1998) in order to complete its consultations with the third party.

The Law Society's letter on these issues was dated December 2, 1997. The Law Society sent the response package to the applicant by courier on December 5, 1997. On December 10, 1997 the applicant requested a review of the decisions made by the Law Society as reflected in its letters of November 12, 1997 and December 2, 1997, and December 5, 1997. This entailed consideration of: (1) the Law Society's decision to refuse access to certain records and information under sections 14 and 22 of the Act and the Law Society's decision to apply section 63 of the *Legal Profession Act* to some of the information in these records; (2) the Law Society's decision to request an extension for its consultations with the second third party; and (3) the Law Society's alleged failure to meet its duty under the Act to respond within the timelines set out in section 7 of the Act. The 90-day time frame for the second request for review began on December 10, 1997 with an expiry date of March 10, 1998.

On January 26, 1998 the applicant told the Office that she wished to proceed to an inquiry on all the issues on which she had requested reviews. On the same day, the Office issued a notice of written inquiry to the applicant, the Law Society, and the second third party to resolve the issues in these two requests for review.

Meanwhile, on January 21, 1998 the Law Society had mailed the second of its staged responses to the applicant, having received a reply from the second third party regarding the remaining records on which it had consulted the third parties. The Law Society gave access to some of these records and denied access to the rest. Since the applicant did not request a review of this response, it does not form part of this inquiry.

On January 27, 1998 the Law Society informed the applicant that it was also relying on section 15(1)(I) with respect to the third party's member and entity numbers on three records, information previously withheld under section 22. The Law Society informed the applicant and the Office that it wished this new issue to be included with those to be considered in this inquiry.

### 3. Issue under review and the burden of proof

At this inquiry, I am reviewing the Law Society's application of sections 14, 15, and 22 of the Act, and section 63 of the *Legal Profession Act*, to records # 1, 2, 30, 31, 32, 40, 42, 43, 52, 56, 57, and 58, as described in the chart attached to its response of December 2, 1997. I am also reviewing the Law Society's decision to notify two third parties under section 23 of the Act: the first third party on record # 52 and the second third party on records # 8, 9, 11, 14, 16, 20, 37, 45, 47, 48, 51, 53, 55, 59, and 60.

In addition, I must also determine (a) whether or not the Law Society met its duty under section 6(1) to respond to the applicant's request within the timelines set out in section 7 of the Act; and (b) whether or not the Law Society's decision to notify the two third parties and its decision to request an extension to complete its consultations with the second third party was justified.

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 14 and 15, 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.

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.

Section 57 of the Act is silent with respect to a request for review about a public body's decision to notify a third party and a public body's decision to request an extension from the Office of the Information and Privacy Commissioner. I invited the parties to make submissions on this matter. In my view, the burden must fall on the public body as it possesses the information necessary to determine whether notification of a third party is necessary in the circumstances of the request and whether additional time is required to respond to a request in accordance with the criteria specified in the Act.

Section 57 of the Act is also silent with respect to a request for review about the duty to assist under section 6 of the Act. However, as I decided in Order No. 110-1996 June 5, 1996, the burden of proof is on the public body. Thus, the burden is on the public body to show whether or not it met its duty under section 6(1) to respond within the timelines set out in section 7 of the Act.

The relevant sections of the Act read as follows:

#### ***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.

***Time limit for responding***

7. The head of a public body must respond not later than 30 days after a request is received unless
- (a) the time limit is extended under section 10, or
- ....

***Extending the time limit for responding***

- 10(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the commissioner's permission, for a longer period if
- ...
- (c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record, or
- ....

***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
- ...
- (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

***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,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(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,

....

### ***Notifying the third party***

- 23(1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be exempted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).
- (2) If the head of a public body does not intend to give access to a record that contains information exempted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).
- (3) The notice must
- (a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,
  - (b) describe the contents of the record, and

- (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.
- (4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that
- (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,
  - (b) the third party is being given an opportunity to make representations concerning disclosure, and
  - (c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

The relevant portion of section 63 of the *Legal Profession Act* reads as follows:

***Non-disclosure of privileged and confidential information***

- 63(1) Despite 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.

**4. The records in dispute**

The records in dispute are a series of internal notes, records of telephone calls, computer printouts, memoranda and letters, both draft and final. One set of records was the subject of certain exceptions under the Act, while the other was the subject of consultations with the third parties. (Record #52 falls into both categories.) As noted above, while the Law Society subsequently issued a decision on the records on which it had consulted the second third party (granting access to some and denying access to others), the applicant did not request a review of this decision.

**5. Procedural Objections**

The applicant objected to the fact that the Law Society's initial submission was late in arriving at my Office. The deadline for filing initial submissions was 12:00 noon on Monday, February 9, 1998. The Law Society's submission was received via facsimile

at 12:36 p.m. on that date. I cannot accept the applicant's contention that the Law Society's submission is inadmissible on this basis. Counsel for the Law Society stated that attempts were made to fax the Law Society's submission to the Office prior to the deadline of 12:00 noon on February 9, 1998; however, the facsimile line was busy. Counsel contacted the Registrar of Inquiries to explain the difficulty and the submission was received shortly thereafter. In view of the difficulty which counsel for the Law Society encountered in trying to transmit submissions via facsimile to this Office and the very brief nature of the delay, I accept the Law Society's submission.

The public body objected to paragraph 3 of the applicant's initial submission, stating that it contained information about the mediation process. To the extent that paragraph 3 contained information concerning the mediation process, I confirm that it was not properly before me and I have disregarded it in reaching my decision. (See Order No. 174-1997, July 14, 1997, p. 9; and Order No. 175-1997, July 21, 1997, p.4)

#### **6. The applicant's case**

The applicant's initial submission primarily requested amendments to the Portfolio Officer's Fact Report, none of which has much relevance to the decision before me. She also, generally, rejected the Law Society's effort to apply sections 14, 15, and 22 of the Act to the records in dispute.

#### **7. The Law Society's case**

The Law Society submits that eleven out of the twelve records fall within the scope of section 14 of the Act. In addition, the Law Society submits that section 22(1) applies to nine records which contain personal information, the disclosure of which would be an unreasonable invasion of a third party's personal privacy. The Law Society further submits that section 15(1)(l) applies to the member and entity numbers in three of the records because disclosure of this information could reasonably be expected to harm the security of the Law Society's systems of identification.

#### **8. The third party's case**

I did not receive any submissions from the third party in this inquiry.

#### **9. Discussion**

##### ***Section 14: Legal Advice***

The Law Society has refused to disclose the notes, memoranda, and recorded opinions prepared or gathered by or on behalf of a staff lawyer that it employs to investigate complaints against its members. As I have indicated in previous decisions, such records may be protected on the basis of this section. (Submission of the Law

Society, paragraphs 18 to 21) See Order No. 169-1997, June 11, 1997, pp. 4-5; Order No. 179-1997, August 6, 1997, p. 5; Order No. 201-1997, November 28, 1997 p. 4.

I have reviewed each of the records and agree that all of the information withheld falls within the scope of solicitor-client privilege. I find that the Law Society may protect records 2, 30, 31, 32, 40, 42, 43, 52, 56, 57, and 58 on the basis of section 14. (Submission of the Law Society, paragraph 24)

***Section 15(1)(l): Disclosure harmful to law enforcement***

The Law Society seeks to invoke this section to protect the member and entity numbers of members of the Law Society. (Submission of the Law Society, paragraph 26) The Law Society submits that member and entity numbers are unique identifiers which are sometimes used to verify a member's identity and that disclosure of this information could reasonably be expected to harm the security of these systems of identification. (Affidavit of Jason Eamer-Goult) Beyond this bare assertion, there is no evidence to indicate how disclosure of this information could reasonably be expected to harm the security of the Law Society's identification system. In the absence of such evidence, I am not prepared to accept that this subsection has any application. Since records 2 and 57 are appropriately withheld on the basis of section 14 and information from record 1 is appropriately withheld on the basis of section 22(1), there is no real need to rely on section 15.

***Section 22: Disclosure harmful to personal privacy of third parties***

The Law Society has protected portions of records 1 and 2 from disclosure on the basis of section 22(1). As I have previously ruled, disclosure of information of this nature would be an unreasonable invasion of the privacy of the lawyers in question. See Order No. 179-1997, p. 4; Order No. 201-1997, p. 5. I accept that a member's number, firm number, birth date, employment status, and type are also subject to protection from disclosure under section 22(1).

I accept that section 22(1) was properly applied to all but three records. Section 22(1) did not appear to apply to records 31, 32, or 58. However, since all of those records were properly withheld on the basis of section 14, there is no requirement to disclose these records. I find that the applicant has not met her burden of establishing that disclosure would not be an unreasonable invasion of the privacy of third parties under section 22 of the Act. (Reply Submission of the Law Society, paragraph 13)

Since the Law Society is not required to provide access to record 2 on the basis of sections 14 and 22(1) of the Act, it is not necessary to address the Law Society's submissions in relation to section 63 of the *Legal Profession Act*.

***Section 6(1): Duty to assist applicants***



The applicant contends that the Law Society has not discharged its duty to assist in a timely manner under section 6(1) of the Act. I have reviewed the Law Society's submissions and affidavit evidence about its efforts to assist this applicant. The request for records was received by the Law Society on November 3, 1997. On November 12, 1997 Mr. Eamer-Goult told the applicant that certain records required third party notification which could necessitate an extension of time to complete consultation with the third parties. On November 28, 1998 Mr. Eamer-Goult faxed a request to the Office requesting an extension of the deadline to respond to the applicant's request in order to permit consultation with the second third party who was unavailable at that time. The Office granted the Law Society a forty-four day extension to provide the applicant with a response to those documents requiring third party consultation. The Law Society responded to the applicant concerning the remainder of the records on December 2, 1997 although the response was not couriered until December 5, 1997 because of some misunderstanding between the Law Society and the applicant.

I am satisfied that the Law Society has made every reasonable effort to respond to the applicant without delay. See, in particular, the affidavit of Jason Eamer-Goult, *passim*.

### ***Section 10(1): Extending the time limit for responding***

The applicant submits that the Law Society had no right to an extension of time to consult third parties. Section 10(1)(c) provides that the head of a public body may extend the time for responding to a request for up to 30 days or for a longer period with the Commissioner's permission if more time is needed to consult with a third party before the head can decide whether or not to give the applicant access to a requested record. The Law Society required an extension beyond 30 days because one of the third parties was not available. I accept the Law Society's submission that it properly applied for and received the permission of my Office for an extension beyond the 30-day deadline for responding to the applicant's request as required under section 7 of the Act. (Submission of the Law Society, paragraphs 15 and 16) There is no basis to conclude that the extension was not in accordance with section 10(1) of the Act.

### ***Section 23: Notifying the third party***

The Law Society explained in considerable detail its obligation to consult with two separate third parties about the contents of sixteen of these records. (Submission of the Law Society, paragraphs 10 to 14) The Law Society submits that the "test in this section [23(1)] requires consultation with a third party where there is reason to believe that the disclosure of personal information might lead to an unreasonable invasion of that third party's privacy under section 21 or 22. This suggests that a mere possibility triggers the obligation to consult." (Submission of the Law Society, paragraph 11)

There is no question that the head of a public body must notify a third party whenever it has reason to believe that the record contains information that might be

excepted from disclosure under section 21 or 22. There must be a reasonable basis for that belief. I accept that the Law Society's conservative approach of "regularly consulting with third parties pursuant to section 23 of the Act prior to disclosing documents to an applicant does not contravene the *Act* and is prudent, given the confidential nature of the complaint process and the nature of some of the relationships between its members and complainants." (Submission of the Law Society, paragraph 13) See Order No. 208-1998, January 5, 1998, p. 7.

## **10. Order**

I find that the Law Society of British Columbia was authorized to refuse access to all or part of the records in dispute under section 14 of the Act. Under section 58(2)(b), I confirm the decision of the Law Society of British Columbia to refuse access to the records withheld on the basis of section 14.

I also find that the Law Society of British Columbia was required to refuse access to all or part of the records withheld under section 22(1) of the Act with the exception of records 31, 32, and 58. Under section 58(2)(c), I require the Law Society of British Columbia to refuse access to all or part of the records withheld on the basis of section 22(1) with the exception of records 31, 32, and 58 which were properly withheld under section 14 of the Act.

I also find that the Law Society of British Columbia was not authorized to refuse access to records 1, 2, and 57 under section 15(1)(l) of the Act; however, the Law Society of British Columbia is not required to give access to these records, as they were properly withheld on the basis of sections 14 and 22(1) of the Act.

---

David H. Flaherty  
Commissioner

April 30, 1998