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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 163-1997
May 14, 1997**

INQUIRY RE: A decision of the Law Society of British Columbia to withhold records relating to a complaint from an applicant

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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 April 8, 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 of a decision of the Law Society of British Columbia (the Law Society) to withhold certain documents from an applicant concerning a complaint he made to the Law Society about one of its members (the third party in this inquiry).

2. Documentation of the inquiry process

On June 27, 1996 the applicant requested from the Law Society a copy of the entire file to date on a complaint filed by the applicant against a Law Society member. It responded in part on July 5, 1996 by withholding documents that required third-party notice until the opinion of the third party could be sought. On August 6, 1996 the Law Society made a further release to the applicant but still withheld documents numbered 9 and 12.

The applicant requested a review of this decision on August 9, 1996. After an extended mediation/settlement period, the applicant, the Law Society, and the third party were given notice on February 3, 1997 that a written inquiry would take place on March 4, 1997. The parties independently either requested an extension of this time period or raised a procedural objection. On March 12, 1997 my Office issued an

amended Notice of Written Inquiry advising the parties that a written inquiry would take place on April 8, 1997.

3. Issue under review at the inquiry and the burden of proof

The issue under review at this inquiry is the Law Society's decision to apply sections 15(1)(a), 15(1)(c), 22(1), 22(2)(e), 22(2)(f), and 22(3)(b) of the Act to the records in dispute. These sections read as follows:

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,
 - ...
 - (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
 -

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
- ...
 - (e) the third party will be exposed unfairly to financial or other harm,
 - (f) the personal information has been supplied in confidence,
 -
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
 - (b) 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,

....

Under section 57(1), where access to the information in a record has been refused under section 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 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 the third party's personal privacy.

4. The records in dispute

The records in dispute are two letters relating to the applicant's complaint to the Law Society of British Columbia.

5. The applicant's case

The applicant did not make an initial submission in this matter. Under the current rules of procedure established by my Office, an applicant who fails to make an initial submission is not permitted to make a reply submission. However, under the rules of procedure then in force for written inquiries, I accepted the applicant's reply submission.

The reply submission from the applicant essentially argues that a particular third party should not be allowed to submit documents to the Law Society without confirmation of their validity or truthfulness by the applicant; the latter describes the practice as "a ploy in a sham to shoot the messenger."

The applicant further argues that the Law Society's withholding of the records in dispute violates his rights under the *Canadian Charter of Rights and Freedoms*. This is not a matter that I can address under the Act.

6. The Law Society of British Columbia's case

Portions of the Law Society's submission in this inquiry were made *in camera*. This has at least limited my ability to discuss in this Order some of the facts and arguments relevant to this matter. As I have stated previously, considerations of the privacy of individuals and the confidentiality of information often make it impossible for me to share details with the public that would clarify various situations. (Order No. 89-1996, March 4, 1996, p. 3)

The Law Society states that the applicant lodged a complaint against a lawyer who is a member of the Law Society; it proceeded to investigate and assess the complaint to determine whether there were sufficient grounds to institute proceedings against the lawyer (under the relevant provisions of the *Legal Profession Act* and the *Law Society Rules*). The Law Society indicated that it provided some records to the applicant and

delivered to him a summary of the member's response to the complaint. (Submissions of the Law Society, paragraphs 1, 7, 9)

I have presented below the essence of the Law Society's submission on the application of sections 15 and 22 of the Act in this inquiry.

7. The third party's case

The third party's submission was made entirely *in camera*. In it, the third party essentially objects to the disclosure to the applicant of the written response, required by the Law Society, to the substance of the applicant's complaint.

8. Discussion

Section 15: Harm a law enforcement matter

The Law Society has applied sections 15(1)(a) and 15(1)(c) of the Act to the records in dispute. Its goal is to prevent harm to a law enforcement matter and harm to the effectiveness of investigative techniques and procedures used in law enforcement. The essence of the submissions reads as follows:

It is submitted that the regulatory investigative activities of the Law Society fall within the definition of 'law enforcement' contained in Schedule 1 of the Act. The *Legal Profession Act* provides for investigations that lead or could lead to a penalty or sanction being imposed on the member, that being restriction or removal of his or her licence to practice or a fine. In the present circumstances, the complaint by the Applicant triggered the regulatory investigative provisions of the *Legal Profession Act* and *Rules* and put the Member in clear jeopardy of penalty.

The Applicant's complaint against the Member resulted in an investigation being initiated that it is submitted clearly falls within paragraph (b) of the 'law enforcement' definition in the Act and as such the records relating to that investigation are subject to nondisclosure in circumstances where the disclosure of the information would reasonably be expected to cause harm to the law enforcement matter or the investigative techniques and procedures used by the Law Society. (Submission of the Law Society, paragraphs 15, 17)

The Law Society's submissions on the application of the exceptions provided by section 15 of the Act were made partly in the initial submission and partly in the subsequent reply submission, most of which was submitted *in camera*. Although I am concerned about the use of *in camera* submissions for argument as distinct from facts, I

continue to be generally tolerant of the use of *in camera* submissions; but I also encourage all parties to use them sparingly.

The Law Society's submission as quoted above refers generally to the *Legal Profession Act* and the *Law Society Rules* in the context of the definition of law enforcement. It is useful to provide some detail about them. Under Schedule 1 of the *Freedom of Information and Protection of Privacy Act*, "law enforcement" means: policing, including criminal intelligence operations; investigations that lead or could lead to a penalty or sanction being imposed; or proceedings that lead or could lead to a sanction being imposed. The *Legal Profession Act* includes provisions for disciplinary proceedings, while section 94 governs other "proceedings" such as complaints or investigations. Under that section, a response of a member to the substance of a complaint is not admissible without the written consent of the member, just as a complaint is not admissible without the written consent of the complainant. Under Rule 106 of the *Law Society Rules*, the Secretary of the Law Society may provide to the complainant either the member's response to the complaint or a summary of the member's response, just as the Secretary may provide to the member complained about either a copy of the complaint or a summary of it. In other words, the Law Society has considerable discretion in deciding how to proceed with its own investigations. An investigation by the Law Society is clearly an investigation that could lead to a penalty or sanction being imposed.

I have discussed in previous Orders what I regard as an important principle inherent in any consideration of the right of access and the right of a public body to withhold information, which is that public bodies should be able to conduct complaint investigations and subsequent disciplinary proceedings within a zone of confidentiality, subject only to the obligation to provide an applicant with his or her own information. I have previously noted that public bodies which have the primary responsibility for processing complaints are entitled to a considerable amount of discretion and confidentiality. (See especially Order No. 144-1997, January 17, 1997; and Order No. 158-1997, April 10, 1997)

In Order No. 140-1996, December 19, 1996 I quoted and agreed with an applicant's submission that "Section 15(1)(a) aims at identifiable harm to a specific law enforcement matter, not the personal sensitivities or feelings of individuals charged with conducting an investigation." (p. 8) In that matter, I stated that I could find no grounds for withholding the disputed information on the basis of section 15(1)(a) of the Act. In the present inquiry, however, I am satisfied that the type of proceeding carried out by the Law Society, as described above, is law enforcement within the meaning of section 15 of the Act and that disclosure to the applicant could harm a specific law enforcement matter as contemplated by section 15(1)(a).

I reject, as I have before, the argument that section 15(1)(c) can be relied on to withhold the records currently in dispute, simply because a written response to a complaint is not in my view the kind of investigative technique and procedure

contemplated by the section. (See especially Order No. 50-1995, September 13, 1995, pp. 6, 7)

Section 22: Unreasonable invasions of a third party's personal privacy

The Law Society has relied on sections 22(1), 22(2)(e), 22(2)(f), and 22(3)(b) of the Act to prevent disclosure of the records in dispute. (Submission of the Law Society, paragraphs 20-23)

In its reply submission, the Law Society correctly noted that the applicant's submission did not advance either evidence or argument on the application of this section, which means that he has not met his burden of proof. The Law Society made an additional submission *in camera* about the interests it is seeking to protect by its reliance on section 22. In practice, this material made no difference to my decision on the application of section 22 in this inquiry, because of the applicant's failure to meet his burden of proof.

Review of the records in dispute

At the end of the day, I am persuaded that a public body should have full capacity to carry on a law enforcement investigation within a zone of confidentiality under section 15(1)(a), especially until an investigation is completed and a decision has been made on a particular matter. In contrast, my decision in Order No. 140-1996, pp. 7-8, concerning disciplinary proceedings of the Association of British Columbia Professional Foresters involved the disclosure of records after the completion of a prolonged investigation. In the circumstances of this particular inquiry, it makes no sense, under the Act, for the Law Society to be required to disclose to an applicant submissions from various parties in response to a complaint to the Law Society that somehow involves them.

Procedural objections

Both the applicant and the Law Society raised jurisdictional issues during the inquiry phase of this matter. The applicant stated: "For the record, I take exception to the Commission's handling of this matter as it violates my Charter rights to a fair hearing." I will simply say that under the Act, my Office is the only forum for a review under the Act.

9. Order

I find that the Law Society of British Columbia is authorized to refuse access under section 15 of the Act to the two records that are in dispute. Under section 58(2)(b), I confirm the decision of the head of the Law Society to refuse access to these records.

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

David H. Flaherty
Commissioner

May 14, 1997