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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 252-1998
August 4, 1998**

INQUIRY RE: A decision of the Law Society of British Columbia to refuse access to a legal opinion

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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 May 20, 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 of a decision by the Law Society of British Columbia (the Law Society) to refuse access to an opinion provided by a staff lawyer.

2. Documentation of the inquiry process

On December 9, 1997 the applicant made a formal request under the Act to the Law Society for “a copy of an opinion written by [a named staff lawyer] to the Law Society in this matter [a complaint].”

On December 15, 1997 the Law Society responded to the applicant’s request by denying access to the record in its entirety under section 14 of the Act. In addition, the Law Society excepted some information in the record under section 22 of the Act.

On January 13, 1998 the applicant wrote to my Office to request a review of the Law Society’s response: “While privilege may have attached to [the named staff lawyer’s] opinion when the Law Society kept the communication between itself and its solicitor, [the named staff lawyer], I would submit that this privilege was certainly lost once the Law Society passed the opinion on to the person who is now charged with conducting my Conduct Review.” The Office opened a file on January 13, 1998 with the ninety-day review period due to expire on April 13, 1998.

Towards the end of February 1998, the parties agreed to a sixty-day extension of the ninety-day review period for this case to June 12, 1998. On April 14, 1998, the applicant informed the Office that he wished to proceed to an inquiry before the Information and Privacy Commissioner to resolve the issues in dispute in this matter. On April 20, 1998 the Law Society informed the Office that it was dropping its application of section 22 to the record in dispute but maintaining the use of section 14.

On April 21, 1998, the Office issued a Notice of Written Inquiry to take place on May 13, 1998. I subsequently approved a request from the Law Society for an extension to the inquiry timelines, and the inquiry took place on May 20, 1998.

3. Issue under review and the burden of proof

The issue under review is the Law Society's application of section 14 of the Act to refuse access to the opinion requested by the applicant, specifically, whether or not it waived solicitor-client privilege over this record. Section 14 reads as follows:

Legal advice

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

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of the record, it is up the head of the public body to prove that the applicant has no right of access to the record or part thereof. In this case, the Law Society has the burden of proving that it has not waived privilege and that it may withhold the record under section 14.

4. The record in dispute

The record in dispute is an opinion drafted by a staff lawyer with the Law Society. However, as the issue in this case is whether or not the Law Society waived privilege over this record, I determined that I did not need to view it in order to decide the issues in this case.

5. The applicant's case

The applicant submits that the Law Society abandoned its claim of solicitor-client privilege for the record in dispute, prepared by its staff lawyer, when it disclosed the legal opinion to the Bencher charged with his conduct review. It is the applicant's opinion that the latter is a disciplinary process and that he should have access to the full case made against him. See Order No. 208-1998, January 5, 1998, p. 6.

6. The Law Society's case

The Law Society's position is that it has not waived solicitor-client privilege with respect to the legal opinion prepared by its staff lawyer and conveyed to the Bencher holding the conduct review, who is a member of the subcommittee of the Discipline Committee of the Law Society. I have reviewed below, in greater detail, the submissions of the Law society on this issue.

7. Discussion

The applicant has misconstrued Order No. 208-1998 in the sense that he submits that he has a current right to access to the legal opinion of the staff lawyer for purposes of his conduct review. Such a decision on disclosure does not depend upon the Act but the procedures for conduct reviews under the *Legal Profession Act*. Even then, it may well be that the Law Society will choose to protect the legal opinion of its own staff lawyer from disclosure to the applicant, since the record in dispute in this inquiry is in fact an internal working paper of the Law Society, whether it is held by the staff lawyer, an administrator, or the Bencher conducting the conduct review on behalf of the Law Society. The disclosure practices of the Law Society's disciplinary proceedings are well beyond the scope of my jurisdiction under the Act. My role in this inquiry is limited to determining whether the Law Society has properly applied section 14 of the Act to the record in dispute.

The Law Society has provided me with a detailed submission concerning the purpose, functions, and structure of the Law Society. The Law Society Rules outline the role of conduct reviews in the Law Society's complaint process. The conduct review subcommittee does not perform an adjudicative role; instead, the subcommittee functions as an informal administrative body which performs an investigative function. The subcommittee has no authority to make a decision or to impose disciplinary action on the applicant. It is only authorized to prepare a written report of its findings of fact, conclusion and any recommendations and to file a report with the Discipline Committee. It is clear that "the subcommittee in question is simply a part of or a group within the Law Society." (Submission of the Law Society, pp. 2 - 5) As the Law Society indicates, this subcommittee is an integral part of the Law Society and does not constitute a separate entity.

The applicant contends that any privilege which may have attached to the legal opinion was waived once the Law Society forwarded the opinion to the conduct review subcommittee. Since the subcommittee forms an integral part of the Law Society, I am satisfied that the delivery of the opinion to the subcommittee did not constitute waiver of solicitor-client privilege under section 14 of the Act. See Hanson v. Law Society of British Columbia and McCallum (1981), 32 B.C.L.R. 181 (C.A.) at pp. 183-4.

The applicant further contends that he is entitled to know the case against him as a matter of procedural fairness. The Law Society points out that the requirement of

procedural fairness applies if the complaint proceeds to a disciplinary hearing. The applicant's complaint has not yet progressed that far. I agree with the Law Society's submission that issues of procedural fairness arising in the context of this disciplinary matter are irrelevant to this inquiry.

8. Order

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

David H. Flaherty
Commissioner

August 4, 1998