

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 166-1997
May 29, 1997**

INQUIRY RE: The Law Society of British Columbia's decision to disclose information to an applicant

**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 March 17, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by one of the third parties for a review of the Law Society of British Columbia's decision to disclose a paragraph of a letter to an applicant.

2. Documentation of the inquiry process

The applicant made a request on August 12, 1996 for "a copy of the support material for the report that was prepared regarding my complaint." The Law Society responded by providing access to some records and withholding other records or parts of records. On October 15, 1996 the applicant requested a review of the Law Society's decision.

Additional information was disclosed to the applicant during mediation and, ultimately, the Law Society decided to give the applicant access to all other information previously withheld. The Law Society then gave third-party notice, under section 23 of the Act, of its intention to give full access to the applicant. One of the third parties then asked for a review of the Law Society's decision to disclose to the applicant one paragraph of a letter dated February 16, 1996, and indicated that he wished to make submissions on the application of sections 14 and 21 of the Act to the information in that paragraph. The information in dispute was initially withheld by the Law Society under section 22.

3. Issue under review at the inquiry

The issue in this review is the applications of sections 14, 21, and 22 of the Act to the information in dispute.

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 business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, or
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

...

(3) Subsections (1) and (2) do not apply if

- (a) the third party consents to the disclosure, or

....

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
- ...
- (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,
-
- (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,
- ...
- (g.1) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,
-

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(3)(a), at an inquiry into a decision of a public body 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 information would not be an unreasonable invasion of the third party's personal privacy.

Under section 57(3)(b), at an inquiry into a decision of a public body to give an applicant access to all or part of a record containing non-personal information that relates to a third party, it is up to the third party to prove that the applicant has no right of access to the record or part thereof.

4. The record in dispute

The record in dispute is a single seven-line paragraph in a nine-page letter sent on February 16, 1996 by third party B to the Law Society's investigator (outside counsel) as an additional response to the applicant's complaints about third party A.

5. The applicant's case

The applicant essentially wants full access to any records used in making a determination on his complaint to the Law Society and is of the view that none of the sections of the Act relied on to limit disclosure are applicable. He fears that the subject letter contains information that is not supportable and perhaps false, that may have been used by the Law Society to make its decision.

6. The Law Society of British Columbia's case

The essence of the Law Society's submission is that it informed the third parties in this case "that it was the Law Society's position that the exceptions offered by the Act did not support the Law Society withholding the information. The Applicant was also informed of the Law Society's decision to disclose the Record."

7. The third party's case

Counsel for the third parties explained that the applicant made a complaint to the Law Society about matters arising out of legal services provided to him by third party A. The Law Society retained counsel to investigate and report on the complaint. Third party B corresponded with that investigator on behalf of third party A. The investigator subsequently concluded that the evidence did not support a finding of incompetence or the necessity of disciplinary proceedings. (Submission of the Third Parties, paragraphs 4-7)

The gist of the third parties' case is that Law Society investigations are always conducted on a confidential basis and that information should not be disclosed to a complainant without the consent of an affected party. The third parties emphasize that the Law Society encourages candour from its members when replying to complaints. Under Rule 106 of the *Law Society Rules*, the Secretary of the Law Society may only deliver a copy of a member's response to the complainant if the member does not object to disclosure. In this vein, the third parties argue that the disputed information should be withheld under section 21 of the Act: "If communications made in confidence to counsel for the Law Society during an investigative process are subject to disclosure to the complainant and others, members will become far more reticent to respond to the Law Society in as free and perfunctory a manner as possible." (Submission of the Third Parties, paragraph 16)

The third parties further submit that, notwithstanding section 14 of the Act, "when the Law Society, in the course of carrying out its duties under the *Legal Profession Act*,

becomes privy to information, files, or records that are confidential or are subject to solicitor client privilege, it has the same obligation respecting the disclosure of that information as the member from whom the information, files or records were obtained.” (Submission of the Third Parties, paragraph 19) The context for this submission is section 94 of the *Legal Profession Act*, which prohibits disclosure of information obtained during an investigation into a complaint in the same way that section 47 of the Act prohibits disclosure by the Commissioner and his staff. Neither section determines the issue of access under the Act to records in the custody of a public body. The third parties also claim that statements made by third party B in the disputed paragraph are third party B’s personal information. (Submission of the Third Parties, paragraphs 24-32)

8. Discussion

The essence of the inquiry is that third party B wrote a nine-page defense of third party A in a letter to the complaint investigator for the Law Society. This obviously detailed letter has been disclosed to the applicant except for the penultimate seven-line paragraph in which it can be said that third party B “vented” at least a little about the applicant and his allegations about third party A. There are several adjectives and nouns which, perhaps understandably in the context of the complaint investigation, are not complimentary to the applicant.

The Law Society did not attempt to use section 14 to withhold the information in dispute. Although the third parties lay heavy emphasis on the importance of solicitor-client privilege, the information in dispute is not in my view subject to the privilege.

The third parties refer to the *Legal Profession Act* and argue generally that the information in dispute should also be withheld under section 21 of the Act. Although section 21(1)(c)(ii) appears most relevant to their argument, I note that lawyers can be required by the *Law Society Rules* to provide information to the Law Society in response to a complaint. In any case, the information in dispute does not meet the first part of the three-part test set out in section 21. Since it is not “trade secrets, or commercial, financial, labour relations, scientific or technical information of a third party,” it cannot be withheld under section 21.

The third parties submit that the information in dispute is the third party B’s personal information. In my view, the information is mostly third party B’s opinions of the applicant and is therefore by definition the applicant’s personal information. (Schedule 1 of the Act) The third parties correctly note that section 22(2) of the Act requires consideration of all relevant circumstances in determining whether disclosure of personal information would be an unauthorized invasion of a third party’s personal privacy. The applicant submitted that section 22(2)(c) (“whether the personal information is relevant to a fair determination of the applicant’s rights”) is the most relevant circumstance.

The third parties submit that the information in dispute should be withheld under section 22(2)(e) since there is a potential exposure to harm, under section 22(2)(f) since they believe the personal information was supplied in confidence, or under section 22(3)(g.1) as disclosure would be an unreasonable invasion of third party B's personal privacy. In all the circumstances, I am not persuaded that any part of section 22 should be used to deny access. Preventing possible embarrassment to third party B is not an exception provided for under the Act.

Procedural objections

The applicant objected to having to bear the onus of proving that disclosure would not be an unreasonable invasion of a third party's personal privacy: "This is not fair, as I do not even know who the third party is. Restricting me from knowing whom this party is does not allow me to make a complete and informed submission. This is, I believe, unfair." Under my Office's procedures, names of parties are not included in inquiry documentation. In some situations, providing the name of a third party to an applicant would amount to a pre-inquiry decision that disclosure would not be an unreasonable invasion of the third party's personal privacy. In this matter the applicant knows the name of third party A and, for the purposes of the inquiry, need only know that third party B was a lawyer representing third party A.

The third parties objected to the (assumed) inclusion in the record of proceedings of a certain letter dated November 29, 1996 from the Law Society to one of the third parties. This letter was not included in the record, and I have not seen it.

9. Order

I find that the Law Society of British Columbia was not authorized under section 14 of the Act to refuse access to the part of the record in dispute and was not required under sections 21 or 22 of the Act to refuse access to the part of the record in dispute. Under section 58(2)(a) of the Act, I require the head of the Law Society of British Columbia to give the applicant access to the part of the record.

David H. Flaherty
Commissioner

May 29, 1997