

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 260-1998
September 3, 1998**

**INQUIRY RE: An applicant's request for records concerning his complaints and claims
made to 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 May 7, 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 of the Law Society of British Columbia (Law Society) to deny the applicant access to records relating to his claims and complaints made to the Law Society and its decision to deny the applicant's request for a fee waiver for services related to his access request.

2. Documentation of the inquiry process

On July 30, 1997 the applicant made a request to the Law Society under the Freedom of Information and Protection of Privacy Act (the Act) for Special Compensation Fund records concerning the applicant's claims; professional misconduct or discipline records; all accounting records and excess insurance records for specific Law Society members and records related to a Surrey, B.C. property in which a specific individual was involved.

In responses dated August 12, September 5 and 12, 1997 the Law Society disclosed copies of 11 sets of minutes concerning the applicant's Special Compensation Fund claims but withheld most information under sections 14 or 22 of the Act; gave a fee estimate for providing various services related to the records about professional misconduct of specific members and the Surrey, B.C. property, and then denied the applicant's August 26, 1997 request that the fees should be waived because of his inability to pay the fees, or that the records related to a matter in the public interest; and refused to confirm or deny, under section 8(2) of the Act, the existence of specific accounting records (Form 47s) or records concerning excess insurance coverage for specific members.

On September 10, 1997 the applicant submitted a request for review to this Office since he did not agree with the Law Society's various decisions about his request, "particularly when their object and duty is stated in section 3 of the Legal Profession Act and Canadian jurisprudence. It is also stated in section 25(1)(b) of F.O.I. legislation."

During the mediation process, the Law Society lowered its fee estimate for the professional misconduct / discipline records to \$403.93, disclosed five accounting records other than Form 47 records, and confirmed that the fee estimate for the Surrey, B.C. property records was \$34.78.

With the consent of the parties, the inquiry deadline was extended several times to April 23, 1998. On March 17, 1998 the applicant confirmed that he wished to proceed to a formal inquiry. On March 26, 1998, the parties agreed that the issue of the adequacy of the Law Society's search for all accounting records other than Form 47 records would be considered by the Commissioner in the formal inquiry.

At the request of the Law Society, I granted a final extension of the inquiry deadline to May 7, 1998. The applicant objected to this extension.

Prior to the inquiry deadline, the Law Society withdrew its application of section 22 to the 11 sets of minutes of the Special Compensation Fund Committee and the Benchers.

3. Issues under review and the burden of proof

In this inquiry, there are several issues under review:

1. The Law Society's application of section 14 of the Act to the minutes of the Special Compensation Fund Committee and the Benchers concerning the applicant's claims to the Special Compensation Fund.
2. The Law Society's decision not to waive fees under section 75(5) because of the applicant's inability to pay the fees and his assertion that the records relate to a matter in the public interest. The Law Society has assessed fees for the following records: discipline files regarding specific Law Society members who were retained by the applicant to provide professional legal services; and records related to a Surrey, B.C. property in which a particular third party was involved.
3. The Law Society's decision under section 8(2)(b) of the Act to refuse to confirm or deny the existence of records of professional liability insurance (insurance claim files) and any special assessments (excess insurance) regarding specific Law Society members.
4. The Law Society's decision under section 8(2)(a) and 8(2)(b) of the Act to refuse to confirm or deny the existence of records of annual accounting reports (Form 47s).
5. The adequacy of the Law Society's search for all of the accounting records including trust ledger records, and cancelled trust cheques (related to the applicant's court cases) regarding specific members of the Law Society under section 6(1) of the Act.

6. The applicant's assertion that all of the records he requested should be disclosed under section 25 of the Act because they relate to a matter of public interest.

The relevant sections of the Act are:

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.

Contents of response

8(1) In a response under section 7, the head of the public body must tell the applicant

(a) whether or not the applicant is entitled to access to the record or to part of the record,

(b) if the applicant is entitled to access, where, when and how access will be given, and

(c) if access to the record or to part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 53 or 63.

(2) Despite subsection (1)(c)(i), the head of a public body may refuse in a response to confirm or deny the existence of

(a) a record containing information described in section 15 (information harmful to law enforcement), or

(b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

Legal advice

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

Information must be disclosed if in the public interest

- 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.
- (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
- (a) any third party to whom the information relates, and
 - (b) the commissioner.
- (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
- (a) to the last known address of the third party, and
 - (b) to the commissioner.

Fees

- 75(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:
- (a) locating, retrieving and producing the record;
 - (b) preparing the record for disclosure;
 - (c) shipping and handling the record;
 - (d) providing a copy of the record.
- (2) An applicant must not be required under subsection (1) to pay a fee for
- (a) the first 3 hours spent locating and retrieving a record, or
 - (b) time spent severing information from a record.

(3) Subsection (1) does not apply to a request for the applicant's own personal information.

(4) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

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 section 14, 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.

Section 57 of the Act is silent with respect to a request for review about the issue of adequate search. As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body.

Section 57 is also silent with respect to a request for review about section 8(2) of the Act. I find that the Law Society is in the best position to discharge the burden of proof under this section.

To the extent that the applicant relies on section 25 of the Act to say that the Law Society is required to disclose the information in the public interest, the burden of proof is on the applicant to demonstrate that section 25 applies to the information. (See Order No. 165-1997, May 21, 1997; Order No. 182-1997, August 13, 1997; Order No. 206-1997, December 18, 1997; and Order No. 251-1998, July 31, 1998).

Finally, section 57 does not address the burden with respect to a request for review of a decision concerning a fee waiver under section 75 of the Act. As I decided in Order No. 90-1996, March 8, 1996, the burden of proof is on the applicant.

4. Procedural objections

The applicant has objected to the extension of the inquiry deadline to May 7, 1998 without his consent.

5. The records in dispute

The only records for my review are the minutes of the Special Compensation Fund and the Benchers related to the applicant's claims against the Special Compensation Fund. The Law Society has applied section 14 of the Act to these records.

Concerning the other records requested by the applicant, I must first determine if the Law Society's decision to deny the request for a fee waiver is reasonable, and if it is appropriate for the Law Society to confirm or deny the existence of certain records.

6. The applicant's case

Some of the background to this application for access to records can be found in Order No. 156-1997, March 19, 1997, and Order No. 185-1997, August 18, 1997.

The applicant believes, among other things, that section 14 of the Act has no relevance to the records in dispute.

Although I have read all of the applicant's submissions in this inquiry, it is difficult to present them in summary form, because they largely do not discuss issues that I have jurisdiction over under the Act, including the merits, or lack thereof, of how various lawyers have allegedly treated him and his property claims over time.

7. The Law Society's case

I have discussed below the specific submissions of the Law Society with respect to the application of each section of the Act.

8. Discussion

Issue 1: Minutes of Special Compensation Fund Committee and Benchers reviews

The applicant made eight claims to the Special Compensation Fund in 1993 and five additional claims in 1994. A subsequent claim was filed in 1996. All of these claims have been denied. (Affidavits of Mary Ann Cummings and Kenneth Affleck)

The Law Society has withheld minutes of the Special Compensation Fund Committee meetings, at which outside and in-house legal counsel were present to provide legal advice to the committee with respect to the applicant's claims. In the present instance, the applicant was invited to attend to make an oral presentation but he did not do so.

The affidavit evidence filed by the Law Society established that outside counsel was retained to provide advice to the Special Compensation Fund Committee specifically in relation to the applicant's claims. A staff lawyer with the Law Society also had a limited role in providing legal advice to the Committee in respect of the applications.

I have made a series of orders, too numerous to enumerate, which uphold the appropriate application of solicitor-client privilege by the Law Society in the course of its duties under the Legal Profession Act and Rules. I accept that solicitor-client privilege extends to all communications between the Law Society and its legal counsel as reflected in the minutes of the Special Compensation Fund Committee, except where the minutes reflect that the applicant was also present. In those cases, the minutes have already been disclosed to the applicant.

The applicant contests the application of section 14 of the Act to the minutes of the Special Compensation Fund Committee on the basis that solicitor-client privilege does not apply where the communications are criminal in nature or were made with a view to obtaining legal advice to facilitate the commission of a crime. In this regard, the applicant contends that the property in Surrey was fraudulently subdivided by third parties with the assistance of members of the Law Society and that such activity falls within the ambit of the Criminal Code. I find there is no evidence to support the applicant's allegation concerning criminal activity, which would negate the application of section 14 of the Act.

I find that the Law Society has met its burden of proving that the information severed from the minutes of the Special Compensation Fund Committee and Benchers Committees concerning the applicant's claims is protected by solicitor-client privilege and excepted from disclosure under section 14 of the Act. (See Submission of the Law Society, paragraphs 11 - 31)

Issue 2: The Law Society's decision not to waive fees under section 75(5) of the Act

The applicant claims entitlement to a fee waiver on two grounds. First, the applicant states that he is impecunious and that his funds are tied up in lawyers' trust accounts by virtue of court orders. Second, he contends that the requested records relate to a matter of public interest and that the Law Society has a mandate to uphold and protect the public interest in the administration of justice.

The Law Society denied the applicant's request for a fee waiver, in the process giving the applicant a thorough explanation for its decision:

The head of the Law Society ... has determined that it would not be fair to waive the fees in this case because of the expansive request, the questionable relevance of the information and the fact that the applicant has already received, at no cost, a large number of records through another process - i.e. his Special Compensation Fund applications. (Submission of the Law Society, paragraph 43)

The Law Society submits that the applicant has not met his burden of proving that he cannot afford to pay fees. Although the applicant asserted that his funds are tied up in lawyers' trust accounts, the Law Society filed evidence indicating that this is not the case. The affidavit of Kenneth Affleck indicates that there is no money held in trust by any lawyer in this province in respect of the claims relating to the applicant.

I agree with the Law Society's submission that the applicant has not met his burden of proving that he cannot afford to pay fees. I also agree with the Law Society that there was no public interest at stake to justify waiver of the fees on the basis of section 75(5)(b) of the Act. The records in issue do not appear to relate to a matter of public interest as required under that subsection; instead, they relate to a private dispute that the applicant has with members of the Law Society.

I find that the Law Society acted appropriately in denying a fee waiver on the basis of section 75(5) of the Act.

Issue 3: The application of section 8(2)(b) to records of professional liability insurance (insurance claim files) and any special assessments (excess insurance) regarding specified members

The Law Society refuses to confirm or deny the existence of any records of professional liability or excess insurance on the basis of section 8(2)(b) on the basis that this would be an unreasonable invasion of the personal privacy of third parties:

The fact that the Law Society's insurance department has a claim file in respect of a particular member is in itself very sensitive information. Members of the Law Society are required to report in writing to the insurance department if they 'become aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious . . .' Thus members report many errors and circumstances which ultimately do not result in any loss to a client or any claim against a member. Of reports received from January 1, 1993, to April 21, 1998, 65% were reported as potential claims only, and over 50% were closed with no defense required or indemnity paid. (See Affidavit of Susan Forbes)

The Law Society goes on to point out that the fact that a report has been made is not necessarily evidence of negligence on the part of a lawyer and is not evidence of incompetence. Many capable lawyers report potential claims out of an abundance of caution. The difficulty stems from the fact that the reports of insurance claims are likely to be taken by the public as a negative reflection on a lawyer's competence.

The Law Society submits that similar concerns apply to information concerning excess insurance, of which the Law Society has only a limited amount of information. The mandatory insurance policy issued annually by the LSBC Captive Insurance Company Ltd. provides coverage up to \$1 million per error. Law firms which do not consider this to be sufficient coverage may purchase excess insurance from private insurers to obtain additional coverage. The Law Society argues that disclosure of information concerning excess insurance has the potential to alter the dynamics of the management and settlement of claims and expose the third party insurer - and ultimately the third party member, through higher premiums - to financial harm. If a claimant knows that excess insurance exists, the guarantee and potential of recovery may encourage demands for higher damages, and claims may take longer to settle. The Law Society submits that disclosure of the existence of information concerning excess insurance constitutes an unreasonable invasion of privacy based on a number of the considerations outlined in sections 22(2) and 22(3) of the Act.

I agree with the Law Society's submission that the factors enumerated in sections 22(2) and 22(3) inform the interpretation of what constitutes an unreasonable invasion of a third party's personal privacy for the purposes of section 8(2)(b) of the Act. The factors which are of particular relevance in this case are those enumerated in section 22(2)(e), (f), (g), and (h). The information relating to excess insurance also relates to employment or occupational history under section 22(3)(d). I have carefully reviewed the detailed submissions of the Law Society and the evidence filed in support of these submissions and find them fully persuasive. (Submission of the Law Society; Affidavit of Susan Forbes) I agree that confirmation or denial of the existence of these records would be sufficient to constitute an unreasonable invasion of the personal

privacy of third parties. I find that the Law Society properly exercised its discretion to refuse to confirm or deny the existence of these records under section 8(2)(b) of the Act.

Issue 4: The application of section 8(2)(a) and (b) to the annual Accountant's Reports (Form 47s) maintained by the Law Society (records C)

Lawyers and law firms are required to file an annual Accountant's Report (Form 47) under section 24(2)(q) of the *Legal Profession Act* and Rules 910 to 917 of the Law Society Rules. An Accountant's Report is the means by which the Law Society determines whether a member's law practice has an adequate system for recording all financial transactions in order to comply with Part 8 of the Rules, whether the system is working, and whether there have been any contraventions under Part 8. (See Affidavit of Maureen Taylor) The information contained in an Accountant's Report forms the basis for the Law Society's investigations of contraventions of the accounting rules.

The Law Society submits that an Accountant's Report and all accompanying schedules are records that "could" contain information described in section 15 of the Act, since Law Society investigations are "law enforcement" matters which could lead to disciplinary proceeding against the member. The Law Society further points out that section 8(2)(a) of the Act does not require that disclosure of the existence of a record containing section 15 information must harm a law enforcement matter. It simply requires that the record contain section 15 information.

While I agree that section 8(2)(a) does not require that disclosure of the existence of a record must harm a law enforcement matter, it clearly requires that the record contain information described in section 15 (information harmful to law enforcement). Section 8(2)(a) cannot be invoked, unless the public body demonstrates that the record in dispute contains such information. It is not enough to say the Accountant's Reports "could" contain information harmful to law enforcement matters to justify the blanket application of section 8(2)(a) to all Form 47s. Not all Form 47s contain information described in section 15.

The Law Society also submits that disclosure of the existence of Accountant's Reports would also constitute an unreasonable invasion of the third party's personal privacy under section 8(2)(b). While I agree that Form 47s contain third party personal information, disclosure of which may be prohibited under section 22 of the Act, I do not agree that the disclosure of the existence of these forms would be an unreasonable invasion of personal privacy. I am reinforced in this view by the fact that Accountant's Reports are required to be filed annually under the *Legal Profession Act* and the Law Society Rules, unless an exemption is granted. The only information imparted by the confirmation of the existence of the Form 47 record is that the lawyer handles trust funds and has complied with the annual filing requirement. The content of the form may be protected from disclosure under other sections of the Act.

I find that the Law Society has not performed its duty properly under section 8(2)(a) and (b) of the Act, in relation to the Accountant's Reports. I therefore require the Law Society to confirm or deny the existence of the Form 47s that fall within the scope of the applicant's request.

Issue 5: Whether the Law Society met its duty to assist the applicant under section 6 by conducting a reasonable search for accounting records other than Form 47 records

The applicant contends that the Law Society has failed to discharge its duty to assist under section 6 of the Act. The Law Society has provided me with a lengthy description of the accounting records that it searched that might possibly be responsive to the applicant's request. (Submission of the Law Society)

Based on my review of the affidavit evidence filed by the Law Society, I am satisfied that the Law Society has discharged its duty under section 6(1) of the Act by making every reasonable effort to search for records in response to the applicant's request.

Issue 6: Disclosure on the basis of section 25 of the Act

The applicant relies on section 25 of the Act to mandate disclosure of the records in dispute. I agree with the Law Society's submission that if the information does not relate to a matter of public interest in the application of section 75(5)(b), then it does not meet the standard required for disclosure under section 25. There is no evidence to establish that disclosure of the records (whether Form 47 records or all of the records in dispute) is "clearly in the public interest" within the meaning of section 25(1)(b).

I agree with the Law Society's submission that the interest in disclosure of the records in dispute is a private interest of the applicant and not information that is clearly in the public interest. (Reply Submission of the Law Society, paragraphs 1 - 17) The circumstances of this case do not mandate disclosure under section 25. I find that the applicant has failed to discharge his burden of establishing that the Law Society was required to disclose the records under section 25(1)(b) of the Act.

9. Order

Issue 1: Minutes of Special Compensation Fund Committee and Benchers reviews

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

Issue 2: The Law Society's decision not to waive fees under section 75(5) of the Act

I find that the Law Society of British Columbia complied with section 75 of the Act when it denied a fee waiver to the applicant. I also find that the Law Society of British Columbia properly exercised its discretion under section 75(5) not to excuse or reduce the fees to the applicant. Under section 58(3)(c), I confirm the decision of the Law Society not to waive the fees in this case.

Issue 3: The application of section 8(2)(b) to records of professional liability insurance (insurance claim files) and any special assessments (excess insurance) regarding specified members

I find that the Law Society of British Columbia was entitled under section 8(2)(b) of the Act neither to confirm nor deny the existence of records that fall within the scope of issue three.

Under section 58(3)(a) of the Act, I require the Law Society of British Columbia to perform its duty to respond to the applicant openly, accurately, and completely under sections 6(1) and 8 of the Act. However, since I have found that the Law Society's decision neither to confirm nor deny the existence of records was reasonable, I find that the Law Society has complied with this Order and discharged its duty under sections 6(1) and 8 of the Act in relation to the records which fall within the scope of issue three.

Issue 4: The application of section 8(2)(a) and (b) to the annual Accountant's Reports (Form 47s) maintained by the Law Society

I find that the Law Society of British Columbia was not entitled under section 8(2)(a) or 8(2)(b) of the Act neither to confirm nor deny the existence of records that fall within the scope of issue four. I therefore find that the Law Society did not perform its duty to respond to the applicant openly, accurately and completely under sections 6(1) and 8.

Under section 58(3)(a) of the Act, I require the Law Society of British Columbia to perform its duty under sections 6(1) and 8 of the Act. Under section 58(4) of the Act, I require the Law Society within fourteen days of this Order to provide the applicant with a written confirmation or denial of the existence of records that fall within the scope of issue 4.

Issue 5: Whether the Law Society met its duty to assist the applicant under section 6 by conducting a reasonable search for accounting records other than Form 47 records

I find that the search for records conducted by the Law Society of British Columbia in this case was a reasonable effort within the meaning of section 6(1) of the Act.

Under section 58(3)(a) of the Act, I require the Law Society of British Columbia to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search for records conducted was reasonable, I find that the Law Society has complied with this Order and discharged its duty under section 6(1) of the Act.

Issue 6: Disclosure on the basis of section 25 of the Act

I also find that the Law Society of British Columbia has acted properly in refusing to apply section 25 of the Act pursuant to the applicant's request. I make no order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the records is warranted under the Act.

September 3, 1998

David H. Flaherty
Commissioner