

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 314-1999
July 20, 1999**

INQUIRY RE: A third party's refusal for the Real Estate Council to disclose his response to a complaint

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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 June 25, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review made by a licensed real estate agent (the third party), who challenged the Real Estate Council's (the Council) decision to disclose his response to a complaint made by the applicant, a former client of the third party. The applicant had complained to the Council about the third party's involvement in a particular real estate transaction.

2. Documentation of the inquiry process

On February 15, 1999 the applicant made a request under the Act for production of the third party's replies to a complaint and any other documents on record with the Council.

On March 1, 1999 the Council notified the third party that, after considering his comments and other relevant factors, it had decided to disclose the two response letters, since none of the Act's exceptions to disclosure applied to the records.

The third party's request for review to this Office, received on March 15, 1999, sought a review of the Council's decision to grant the applicant access to the third party's two responses to the applicant's complaint.

During the mediation process, the Council agreed that a paragraph in the third party's September 28, 1998 letter should be withheld, because it contained the third party's personal information.

On May 31, 1999 the third party confirmed that he wished to proceed to a formal inquiry. The parties agreed to an extension of the inquiry deadline to June 25, 1999.

3. Issue under review and the burden of proof

The issue to be considered in this inquiry is whether, with particular reference to section 22 of the Act, the Council's decision to disclose all but one paragraph of the third party's replies to the complaint is in compliance with the Act.

The relevant sections of the Act are as follows:

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
- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
 - ...
 - (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,
 - (g) the personal information is likely to be inaccurate or unreliable, and
 - (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,
- (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
- ...
- (i) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations, or
-

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 the public body to give an applicant access to all or part of a record or part 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.

4. The records in dispute

The records in dispute are the third party's September 28, 1998 and December 9, 1998 letters to the Real Estate Council, which were written in response to a complaint made by the applicant.

5. The applicant's case

The applicant used the services of the third party, a realtor. After a dispute arose, the applicant complained about the third party to the Council, which did not hold a formal hearing. The applicant questions whether the third party's version of events "has been forthright and honest. Any attempt at this point to hide behind privacy provisions is a dereliction of his professional and ethical duty to me as his principal."

6. The Real Estate Council of British Columbia's case

After the applicant made the two complaints against the third party, the Council dealt with them and concluded the file. It subsequently decided to release the complaint information to the applicant under the Act, because there were no statutory exceptions to such disclosure (with the exception of a paragraph). It still wishes to do so.

The Council also argues that “[w]hile communications to Council are privileged, they may still be released in accordance with FOI. If released, however, no action could be brought against [the third party] with respect to these responses.” (Initial Submission of the Council, p. 2) This appears to be in accord with the wording of section 8 of the *Real Estate Act*, which reads as follows:

Communications privileged

8. All replies and communications to the superintendent or to a member or officer of the council with respect to an applicant for a licence or a licensee under this Act are absolutely privileged, and no action may be brought against any person in respect of them.

7. The Third Party’s submission

The third party’s view is that “Section 8 of the *Real Estate Act* clearly states that all replies to the Real Estate Council are absolutely privileged, and in my opinion should remain so. Absolutely means absolutely.” (Initial Submission of the Third Party)

8. Discussion

It appears to me that the essential purpose of privilege within the context of the *Real Estate Act* is not so much to prevent disclosure as to remove the threat of *consequences*, that is, legal liability, which would flow from disclosure of the privileged information. This also suggests that within this context, privilege does not equate with confidentiality, particularly where there is an individual - the applicant - engaged with the third party in what amounts to an adversarial procedure arbitrated by the Council. It is my opinion that the legislature did not intend to bar participants in such a process from having access to submissions made by the opposing party. This is a consideration based on natural justice, to be overridden only by an explicit statutory direction from the legislature.

Further, I agree with the Council’s submission that the *Freedom of Information and Protection of Privacy Act* has superseded section 8 of the *Real Estate Act*, and that the superseding legislation should govern. With that in mind, one must look to the *Freedom of Information and Protection of Privacy Act* to determine what, if any, exceptions should apply. The Council has done so and decided to release most of the information requested by the applicant.

9. Order

With the exception of one paragraph of personal information which I have identified, I find that the Real Estate Council of British Columbia is not authorized or required to withhold the records in dispute under any section of the Act. Under section 58(2)(a), I require the Real Estate Council of British Columbia to give the applicant access to the records.

With respect to the one identified paragraph of personal information, I find that the Real Estate Council of British Columbia is required to withhold that part of the letter of September 28, 1998, under section 22 of the Act. Under section 58(2)(c) of the Act, I order the Council to withhold that information.

David H. Flaherty
Commissioner

July 20, 1999