OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-01

LAW SOCIETY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
January 21, 2002

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Summary: The applicant made three access requests for records relating to a number of members and former members of the Law Society. The Law Society properly extended the time to respond to the applicant's third request. The Law Society also properly refused to waive, on the basis the applicant could not afford to pay or that it was otherwise fair to do so, the fee it estimated for the applicant's second request. The Law Society correctly: decided that draft decisions of its Special Compensation Fund Committee are excluded from the Act's scope by s. 3(1)(b); determined that records related to an Ombudsman's investigation are excluded from the Act's scope by s. 3(1)(c); withheld information under s. 19(1)(a); refused to confirm or deny the existence of personal information under s. 8(2)(b); refused to disclose information under s. 14; and determined that it was required by s. 22(1) to refuse to disclose third-party personal information. The Law Society is not required by s. 22(1) to refuse to disclose a small amount of business-related information in one record. The Law Society is not required by s. 25 to disclose information without delay. There is no need to consider the Law Society's reliance on ss. 13(1), 15 or 17.

Key Words: scope of the Act – a record that is created by or for an officer of the Legislature – person acting in a quasi-judicial capacity – draft decision or communication – refuse to confirm or deny existence of record – time extension – solicitor client privilege – personal information – unreasonable invasion of personal privacy – employment or occupational history – submitted in confidence – personal privacy – employment history – public scrutiny – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation – public interest – significant harm – disclose without delay – fee waiver – inability to afford the fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(b), 10(1), 14, 19(1)(a), 22, 25(1), 75(5); *Legal Profession Act*, s. 88(2).

Authorities Considered: B.C.: Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; Order No. 81-1996, [1996] B.C.I.P.C.D. No. 7; Order No. 156-1997, [1997] B.C.I.P.C.D. No. 14; Order 169-1997 [1997] B.C.I.P.C.D. No. 28; Order No. 185-1997, [1997] B.C.I.P.C.D. No. 46; Order 201-1997, [1997] B.C.I.P.C.D. No. 62; Order 221-1997, [1997] B.C.I.P.C.D. No. 14; Order 226-1998, [1998] B.C.I.P.C.D. No. 19; Order No. 260-1998, [1998] B.C.I.P.C.D. No. 55; Order No. 270-1998, [1998] B.C.I.P.C.D. No. 65; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 00-13, [2000] B.C.I.P.C.D. No. 16 Order 00-16, [2000] B.C.I.P.C.D. No. 16; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-26, [2001] B.C.I.P.C.D. No. 27; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order 00-44, [2000] B.C.I.P.C.D. No. 48; Order 01-51, [2001] B.C.I.P.C.D. No. 54; Order 01-53, [2001] B.C.I.P.C.D. No. 56.

Cases Considered: *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2001), 90 B.C.L.R. (3^d) 299, [2001] B.C.J. No. 1030 (S.C.).

1.0 INTRODUCTION

[1] This decision arises out of three access to information requests made, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Law Society of British Columbia ("Law Society") in 1999 and 2000. A 54-page table produced by the Law Society, and attached as Exhibit "A" to the affidavit of Jason Eamer-Goult, lists the records in issue in this inquiry and, in each case, the exception relied on and the reason for its application. The material withheld amounts to all or part of some 290 records. In some cases, the same record appears, and has been withheld, more than once in the table of records. Although the three requests, and the related review and inquiry process under Part 5 of the Act, have generated prodigious quantities of correspondence, submissions, affidavits and other material, most of the issues that actually must be addressed are not complex.

[2] The applicant's access requests relate to complaints and applications he made to the Law Society in connection with the alleged conduct of various lawyers governed by the Law Society regarding a Surrey property in which the applicant and others were involved. In the past the applicant has made, and pursued to inquiries, related or similar access requests under the Act arising from his experiences with this property. These have involved the City of Surrey (Order No. 156-1997, [1997] B.C.I.P.C.D. No. 14, and No. 185-1997, [1997] B.C.I.P.C.D. No. 46) and the Law Society (Order No. 260-1998, [1998] B.C.I.P.C.D. No. 55). In Order No. 156-1997, an order concerning the City of Surrey's refusal to waive a fee, my predecessor observed as follows, at p. 2:

> The applicant is apparently embroiled in a situation where he believes that his property in Surrey has been fraudulently rezoned and subdivided. It is not clear to me whether litigation over the matter is currently in progress. However, the applicant's submission does discuss a tangled web of land sales and litigation in which he has been involved in recent years.

[3] My predecessor also observed as follows, at p. 2 of Order 185-1997, an order concerning the adequacy of the City of Surrey's search for records requested by the applicant:

> The applicant is involved in a dispute over the rezoning of real property in Surrey. The record in dispute is a memorandum that a City official wrote to the City Solicitor and the response, or the lack of a response and follow-up, thereto.

[4] In Order No. 260-1998, at p. 6, he said the following:

> 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.

[5] This is a fair description of many of the applicant's submissions in this inquiry. I have, of course, considered those submissions, including his reply submissions, to the extent they actually address the issues before me under the Act, although this is frequently done in an obscure way in the submissions. I have tried here to reach both a just and legally correct result within the confines of the Act's requirements. I do not, however, propose to discretely summarize in this order the applicant's various relevant and irrelevant arguments.

[6] Some of the issues in Order No. 260-1998 are also similar to issues in this inquiry: the application of ss. 14, 17 and 22 to records arising out of complaints made by the applicant to the Law Society about lawyers who were alleged to have been involved, in one way or another, with the Surrey property; the Law Society's reliance on s. 8(2) to neither admit nor deny the existence of some requested records; the applicant's argument that the records requested are required to be disclosed by s. 25; and the Law Society's decision not to waive fees associated with one of the applicant's access requests.

[7] Last, it is useful for the purposes of this inquiry to quote the following passage from p. 7 of Order No. 260-1998, because it summarizes some of the history of the applicant's involvement with the Law Society and illustrates why the applicant believes the Law Society – or for that matter its members or their clients – should not have the protection ordinarily associated with solicitor client privilege:

> 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).

2.0 ISSUES

[8] It is convenient in this case to combine descriptions of three access requests with statements of the issues raised in relation to each request.

First Access Request

[9] The applicant's first access request, dated July 26, 1999 ("First Request"), was for all of the Law Society's records of its investigations of the applicant's complaints about several named lawyers or law firms. The Law Society acknowledged the request on September 22, 1999, while apologizing for having overlooked it. It asked the applicant to clarify what he was requesting and indicated that the 30-day response period under the Act would run from September 17, 1999. The applicant consented to this new response time and clarified his request in a letter dated September 28, 1999. On October 8, 1999, the Law Society told the applicant it was consulting with third parties and was therefore extending the response time under ss. 10(1).

[10] The Law Society responded to the First Request in three phases. It also later disclosed more information as a result of mediation by this office. The phased responses

took time, as did the mediation. The applicant requested a review under Part 5 of the Act of each of the Law Society's phased responses and of the Law Society's refusal to disclose other information or records following mediation. He also objected to various extensions of time under the Act taken by the Law Society or granted by this office. Those objections were subsequently withdrawn before the inquiry was held.

[11] The Law Society's October 18, 1999 partial response to the First Request outlined its understanding of the request and indicated the Law Society could not locate certain responsive records. In the case of other records, the Law Society said it was withholding information and records under ss. 3(1)(c), 14, 22(1), 22(2)(e), (f) and (h), 22(3)(d) and (f) of the Act, as well as s. 88 of the *Legal Profession Act*. It provided a general description of the exceptions it was applying and attached a table of particulars. It also told the applicant that, under s. 8(2)(b) of the Act, it was neither confirming nor denying the existence of other records.

[12] On November 25, 1999, the Law Society provided the applicant with the second phase of its response to the First Request. It told the applicant that it was applying ss. 14, 15(1)(c), 15(2)(b), 19(1)(a), 22(1), 22(2)(e), (f) and (h) and 22(3) of the Act to some information and records.

[13] The third phase of the Law Society's response was made on December 17, 1999. It told the applicant it was also applying ss. 15(1)(a) and (c), 15(2)(b), 19(1)(a), 22(2)(e), (f) and (h) and 22(3)(d) to some information and one record.

[14] Following mediation by this Office, the Law Society disclosed further records to the applicant on August 10, 2000 and, on August 21, 2000, it applied added exceptions to some of the records it had withheld.

[15] At issue in this inquiry is the Law Society's application of ss. 3(1)(b) and (c), 8(2)(b), 13(1), 14, 15(1)(a) and (c), 15(2)(b), 17(1), 17(1)(b), (d) and (e), 19(1)(a), 21(1)(a)(i) and (ii), 21(1)(b), 21(1)(c)(i) to (iii), 22(1), 22(2)(e), (f) and (h) and 22(3)(d) and (f) to records and information covered by the First Request (except any home addresses and members' numbers, which the applicant is not pursuing). Also at issue is the question of whether the Law Society is required by s. 88(2) of the *Legal Profession Act* to withhold certain information under the First Request.

Second Request

[16] On February 2, 2000, the applicant made a second access request ("Second Request") to the Law Society, for audit reports held by the Law Society in relation to four named lawyers and for specified periods. In its February 10, 2000 response, the Law Society said that it had decided to charge fees of $238.61 and asked for a deposit of $120.00 as a condition of granting access. The applicant requested a review of the fee estimate.

[17] During mediation by this office, the Law Society agreed to waive search fees for the Second Request and, in a letter dated March 21, 2000, provided the applicant with a

revised fee estimate of $67.41. The Law Society at that time asked for a deposit of $33.00 on account of the new fee. Although the applicant accepted the new fee estimate, he asked the Law Society to waive the fee on the ground that he could not afford to pay it. The Law Society denied that request and the applicant asked for a review of that decision. The matter did not settle in mediation by this Office, so the fee waiver denial in relation to the Second Request is in issue in this inquiry.

Third Request

[18] The applicant's third request ("Third Request") was made in a letter dated February 16, 2000. He requested access to certain Law Society files, by file number, that had been mentioned in records disclosed in response to the First Request. The applicant indicated that he understood those files related to two of the members whose conduct he had complained about and who had been the focus of his First Request. The Law Society again provided responses and further disclosure following mediation by this Office, and the applicant again requested a review under Part 5 of the Act of each decision of the Law Society to disclose or withhold information or records. The applicant also requested a review of the extension of time taken by the Law Society to consult with a third party and asserted that disclosure of records responsive to the Third Request was required by s. 25 of the Act.

[19] After the Law Society had clarified the Third Request with the applicant, it took a time extension under s. 10(1)(c) in order to consult with a third party. Pending that third-party consultation, on March 17, 2000 it disclosed some records to the applicant. It informed the applicant that it was severing some information and was withholding some entire records under ss. 3(1)(c), 14, 17(1), 17(1)(d) and 22(1), 22(2)(e), (f) and (h), and 22(3)(d) and (f) of the Act.

[20] On April 12, 2000, the Law Society provided the applicant with the second phase of its response to the Third Request. It told the applicant that it would grant partial access to the records that had been the subject of consultation with the third party, but it withheld some information under s. 19(1)(a) of the Act. It also told the applicant that it was applying s. 19(1)(a) to another record that it had withheld as part of the first phase of its response to the Third Request. The Law Society's partial access decision in this respect was confirmed on May 3, 2000, since the third party had not by then requested a review of that decision. The Law Society also told the applicant it was adding s. 17(1), including s. 17(1)(d), to two other records covered by the Third Request.

[21] Following mediation by this Office, the Law Society disclosed further information and records to the applicant on June 27 and August 10, 2000.

[22] At issue in this inquiry is the Law Society's application of ss. 3(1)(c), 14, 17(1), 17(1)(d), 19(1)(a), 22(1), 22(2)(e), (f) and (h) and 22(3)(d) and (f) to records and information covered by the Third Request (except any home addresses and members' numbers, which the applicant is not pursuing). The applicant is also pursuing his request for a review of the Law Society's decision to extend time under s. 10(1)(c) in order to

consult with a third party and a review of his argument that s. 25 of the Act requires disclosure.

Notice to Ombudsman & Further Records Disclosures

[23] I will note here that this Office gave a copy of the Notice of Written Inquiry to the Ombudsman because certain records in the custody of the Law Society appeared to relate to an investigation under the *Ombudsman Act*. The Ombudsman made submissions in the inquiry on the application of s. 3(1)(c) to those records.

[24] I will also note here that, on September 26, 2000, and again on July 19, 2001, the Law Society disclosed further records and also withdrew its reliance on some exceptions in relation to records and information that it had previously withheld from the applicant. As a result, First Request records 14, 31, 84, 85, 248 and 353 and Third Request records 15, 16, 18, 24, 110, 118, 129, 247, 272 and 299 are no longer in issue in this inquiry.

3.0 DISCUSSION

[25] **3.1 The Parties' Evidence** – The evidence before me includes a September 27, 2000 affidavit sworn by the applicant and a number of affidavits in support of the Law Society's case. The affidavits relied on by the Law Society were sworn by the following individuals, whose positions or roles are indicated below:

- Affidavit of Jeffrey G. Hoskins sworn September 28, 2000. He is the Law Society's general counsel, as well as its head for purposes of the Act.

- Affidavit of Jason Eamer-Goult sworn September 27, 2000. He is the Law Society's freedom of information analyst and, as such, he had the conduct of the fee assessments and search and disclosure of records in relation to the access requests covered by this inquiry.

- Affidavit of Jean Whittow sworn September 28, 2000. She is the Law Society's Deputy Executive Director and is responsible for its regulatory operations, which includes disciplinary and special compensation matters.

- Affidavit of Mary Ann Cummings sworn September 28, 2000. She is the staff lawyer for the Law Society's Special Compensation Fund and custodianships of lawyers' practices.

- Affidavit of Susan Forbes sworn September 27, 2000. She is the Law Society's Director of Insurance.

- Affidavit of Kenneth N. Affleck sworn September 28, 2000. He, along with Murray Wolf, has been counsel to the Law Society's Special Compensation Fund respecting a series of applications made by the applicant against the Special Compensation Fund.

- Affidavits of Tim Holmes sworn September 29, 2000 and July 18, 2001. He is the Manager of the Professional Conduct Department at the Law Society and is responsible for day-to-day operations relating, in particular, to receiving, classifying, investigating and assessing complaints against lawyers which are delivered to the Law Society's executive director.

- Two affidavits of "X", sworn December 7, 1999 and September 25, 2000.

[26] The affidavits sworn by "X" were submitted entirely *in camera* on the basis that they contain sensitive personal information as well as information that is, or would be, excepted from disclosure under s. 19(1)(a) of the Act. These affidavits have been appropriately tendered on an *in camera* basis.

[27] Paragraphs 14 to 19 of Susan Forbes' affidavit were also submitted *in camera*, on the basis that they disclose either personal information about third parties or privileged documents, they disclose the contents of some of the disputed records and they disclose details of the Law Society's insurance coverage which the Law Society says is protected from disclosure under s. 17(1)(d) of the Act. The applicant objects to this evidence having been submitted *in camera*. Although I accept that these paragraphs of Susan Forbes' affidavit were appropriately submitted *in camera*, the contents of this affidavit have not been a factor in my decision.

[28] **3.2 Description of the Disputed Records** – The Law Society has put the disputed records into categories for the purposes of this inquiry. I have reproduced its list of categories below because it gives a useful sense of the types of records that are in issue. A couple of observations must, however, be made about the list.

[29] First, the Law Society has described several of the categories in terms that are conclusive of whether exceptions under the Act apply to records in the category. For this reason, I have not simply adopted those descriptions, but in each case have considered the relevant evidence and arguments, as well as the relevant record or information, in making my findings.

[30] Second, as I noted above, the applicant's access requests focus on (a) "complaints" made by the applicant to the Law Society about specific members or law firms and (b) Law Society files mentioned in records disclosed by the Law Society that the applicant understands are about two of the lawyers against whom he has made complaints. This focus suggests a search for information about Law Society disciplinary investigations and related processes. In fact, while some of the disputed records are about Law Society disciplinary complaints and investigations – instigated by applicant or others – most of the disputed records connect in one way or other to claims made by the applicant to the Law Society's Special Compensation Fund Committee ("SCFC") and many of them directly concern the SCFC's consideration of, and decision-making processes regarding, the applicant's compensation claims.

[31] As was noted by my predecessor in Order No. 260-1998, the applicant made 14 claims to the Special Compensation Fund from 1993 to 1996, all of which were denied.

The records now in dispute mostly concern, in one way or another, the applicant's compensation applications to that fund. This observation and my observations about the history of the applicant's interactions with the Law Society are also reinforced by para. 2 of Eamer-Goult's affidavit, where he says, about the access requests giving rise to this inquiry:

> The Requests follow a previous request for records of the Applicant dated July 30, 1997 and both the July 30, 1997 request and the Requests relate to issues concerning the Applicant's applications to the Society's Special Compensation Fund.

[32] Of course, this inquiry is about records and information the Law Society has withheld from the applicant, not material to which it has given him access. The table attached to Eamer-Goult's affidavit lists some 290 records that are in dispute in this inquiry because they have been withheld, in whole or in part. This does not mean the Law Society has not made significant disclosures of records in response to the applicant's access requests. The submissions and evidence in this inquiry have not made me aware of all the details of what the Law Society did disclose, but it is clear that it has disclosed significant amounts of material.

[33] The Law Society's categories for the disputed records areas follow:

A. Member History Printout sheets, records relating to the existence or non-existence of complaints, closing memo for complaints files, file-closing checklists.

B. Material relating to SCFC meetings, supplementary notes, reports and draft reports, and communications between the SCFC and legal counsel.

C. Communications between the Law Society and its general, in-house counsel over which solicitor client privilege is claimed.

D. Communications between the Law Society and its external legal counsel over which solicitor client privilege is claimed.

E. Materials, notes and memoranda forming the working brief of legal counsel for the Law Society, including communications between in-house and external legal counsel and third parties, staff and counsel's agents.

F. Personal notes, communications or draft decisions of persons working in a judicial or quasi-judicial capacity.

G. Various records held by the Law Society, some of which relate to third parties, containing personal information withheld under ss. 15, 17, 19, 22.

H. Communications and records created by or for the Ombudsman relating to the exercise of the Ombudsman's statutory functions.

[34] The Law Society has provided me with a table showing the exceptions – or other provisions such as s. 3 – that it claims apply to each of the disputed records. For many records, the Law Society claims that several exceptions apply. The Law Society has not specifically cross-referenced each of the disputed records according to the above classifications, but it has indicated in written submissions in this inquiry that it has applied s. 14 (solicitor client privilege) over the records in classes A to E. It has also applied s. 3(1)(b) to the records in class B and s. 13(1) to some records in classes C, D and E. It has applied s. 15(1)(c) to records in classes A and G. It has applied s. 88(2) of the *Legal Profession Act* to some records in class A. It appears that the Law Society has also applied s. 3(1)(b) to records that it considers fall into class F, s. 3(1)(c) to records it believes fall into class H and ss. 8(2)(b), 15(1)(b), 17(1) and 19(1) to a variety of records across all of the classes. I will note here, in closing on this point, that the classes of records described by the Law Society are such that it is claiming that many of the disputed records fall into more than one class and some of the classes clearly overlap considerably (*i.e.*, class B and class F).

[35] As is evident from the discussion below, I have not found it necessary to decide the application of each exception claimed for each disputed record. For the most part, where a record clearly is subject to a claimed disclosure exception – or is clearly excluded from the scope of the Act – I have rested my order on that finding without considering all other alternative exceptions that might also apply to the record, in whole or in part.

[36] The discussion below begins with the simpler of the issues before me and proceeds to the more involved of the questions to be addressed.

[37] **3.3 Extension of Response Time** – In relation to the Third Request, the applicant has requested a review of the Law Society's decision to extend the response time under s. 10(1)(c) of the Act in order to consult with a third party. Eamer-Goult's affidavit succinctly describes the circumstances of, and reasons for, that time extension. The Third Request was dated February 16, 2000 and the Law Society counted the statutory 30-day response period from that date. Between February 16 and March 13, Eamer-Goult processed the Third Request and on March 13 met to discuss issues with Hoskins, the Law Society's general counsel and its head for purposes of the Act. After that meeting, Eamer-Goult sent an e-mail message to Hoskins confirming that the Law Society would take an extension of time to consult with a third party. On the same day, Eamer-Goult wrote to the applicant to notify him of the third-party consultation and time extension and also wrote to and spoke with the third party. On March 17, 2000 – within the 30-day response period for the Third Request – the Law Society sent its response to the applicant for records not included in the third party consultation. On March 30, the third party responded to the Law Society. Eamer-Goult was away on vacation then. When he returned on April 3, he communicated with the third party and the next day met with Hoskins to discuss the third party's response. On April 10 and 11, he again communicated with the third party. On April 12, within the 30-day time extension taken under s. 10(1)(c), the Law Society issued its response regarding records that had been the subject of the third-party consultation.

[38] It may be that, had the Law Society started consulting the third party shortly after February 16, 2000 (when the Third Request was received) instead of after March 13 (when Eamer-Goult met with Hoskins) it might have been possible to conduct the third-party consultation under s. 23 of the Act and issue a complete response to the Third Request without taking the time extension under s. 10(1)(c) of the Act. I do not, however, think a standard of perfection is required here and I am satisfied that the Law Society's handling of the Third Request was reasonable. The Law Society's judgement, in all the circumstances, that more time was needed to consult the third party was warranted, as was the resulting time extension taken under s. 10(1)(c) and the Law Society's progress from there with the third-party consultation and its response within the extended time in relation to records that were the subject of the third party consultation.

[39] I find no fault with the Law Society for taking the extension under s. 10(1)(c) for the Third Request.

[40] **3.4 Fee Waiver Refusal** – In the Second Request, the applicant asked the Law Society to provide him with Annual Trust Audit Reports ("Form 47s") for specified lawyers and time periods. After receiving the requests the Law Society gave the applicant an initial fee estimate of $238.61. After mediation by this Office, the Law Society waived search fees associated with the Second Request and gave the applicant a revised fee estimate of $67.41, for copying and preparation of the Form 47s. It asked for a deposit of $33.00. On April 3, 2000, the applicant asked the Law Society to waive those estimated fees on the basis that he could not afford to pay and on the ground that the records related to a matter of public interest.

[41] In his affidavit, Hoskins deposed that the Law Society carefully considered, but denied, the applicant's request for a fee waiver, because the fee was reasonable and the Form 47s would require considerable and time-consuming severing (that would render the records uninformative) in order to protect the personal information of third parties.

[42] The Law Society argues here that the applicant has provided no evidence of his inability to pay the fee, nor reasons that would make it fair for the Law Society to excuse payment. In the circumstances, according to the Law Society, it was not unfair to require the applicant to pay a modest fee and he has not discharged the burden of establishing that the Law Society erred in refusing a fee waiver under s. 75 of the Act. The Law Society says the applicant's various requests have resulted in significant costs for it, including because many staff hours have been required to process them. While the Law Society accepts that the applicant need not pay fees when requesting his own personal information, it says he is not entitled to have access to all records for free. Alternatively, even if the applicant did establish an inability to pay the fee in question, the Law Society says, this would not require it to waive the fee. Further, it says, the Form 47s do not relate to a matter of public interest – the applicant seeks the Form 47s for private reasons relating to his applications to the Special Compensation Fund.

[43] I agree with the Law Society that, even if the applicant established that he is unable to pay the $67.41 fee in question, this does not mean that the Law Society must waive it under s. 75(5)(a) of the Act. The Law Society still has a residual discretion to

waive or not waive the fee. I also agree that the Form 47s requested by the applicant do not relate to a matter of public interest under s. 75(5)(b). None of the public interest factors that I outlined in, for example, Order No. 332-1999, [1999] B.C.I.P.D. No. 45, Order 01-24, [2001] B.C.I.P.D. No. 25, or Order 01-51, [2001] B.C.I.P.C.D. No. 54, are present here.

[44] The Law Society has justified its decision not to waive the fee, in part, because of the effort that would be required to sever third party personal information from the Form 47s. Section 75(2) prohibits a fee being charged for the time spent severing a record. Since the time required to sever the requested records cannot be a component of the fee, there may be an issue about the degree to which this same factor can justify a decision not to waive the fee. I need not consider this question here, however, since I have decided that the Law Society's decision not to waive the fee is reasonable despite the severing issue.

[45] The Law Society is not required to waive the fee, even if the applicant cannot afford to pay all or part of it. The applicant has not, in all the circumstances, established any reason – inability to pay or otherwise – for the Law Society to waive this fee out of fairness to him. The history of these three access requests suggests, in fact, that the Law Society has treated the applicant with an abundance of fairness and is, in relation to this request, already not seeking to recover fees for items it is entitled to charge under the Act (*i.e.*, the search fees beyond the first three hours of searching). In my view, the Law Society is entitled at this stage to say to the applicant that he cannot expect to have the Second Request processed for free and it is not unfair to the applicant or otherwise wrong for the Law Society to take this position and deny the fee waiver.

[46] **3.5 Public Interest Disclosure** – The Notice of Written Inquiry and Portfolio Officer's Fact Report issued by this Office indicate that the applicant claims that the records covered by the Third Request must be released by the Law Society under s. 25 of the Act. This provision requires the disclosure, without delay, of 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.

[47] I have had some difficulty identifying where in the materials before me the applicant has raised or addressed s. 25 of the Act, or has otherwise addressed public interest disclosure, in any clear or coherent way. It is even more difficult to discern any reference to s. 25, or to disclosure required in the public interest, in the applicant's submissions in the inquiry. It may be that the applicant's statement in his request for review dated August 21, 2000, that he does not believe the Law Society "is acting in the public interest in the administration of justice", has been interpreted as a claim that disclosure is required by s. 25 of the Act. I have no hesitation in concluding that the applicant has not satisfied the burden of establishing that s. 25 requires disclosure of the disputed records in the Third Request. There is nothing in the nature of, or in, those records that suggests that disclosure without delay under s. 25 might be required in the public interest.

[48] **3.6 Ombudsman Investigation Records** – The Law Society has withheld First Request records 5, 30, 32, 33, 120 and 125 and Third Request records 28, 30, 32, 61, 62 and 64 on the basis that they are excluded from the scope of the Act by s. 3(1)(c). The relevant portions of s. 3(1) read as follows:

> **Scope of this Act**
>
> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (c) a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[49] The evidence establishes that these records were created by Ombudsman staff, or by Law Society staff, in relation to an Ombudsman investigation of the Law Society under the *Ombudsman Act*. The Law Society has correctly determined that under s. 3(1)(c) these records are outside the scope of the Act, as they relate to the exercise of the Ombudsman's functions under the *Ombudsman Act*. The scope of s. 3(1)(c) in relation to Ombudsman investigations is established in, among others, Order 01-43, [2001] B.C.I.P.C.D. No. 45.

[50] **3.7 Disclosure Harmful to Mental or Physical Health or Safety** – Section 19(1)(a) of the Act authorizes a public body to refuse to disclose information, including personal information about an applicant, if its disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health. In this case, the Law Society has withheld some information from First Request records 15 and 16 (these are copies of the same document) and Third Request records 60 and 63, on the basis that disclosure of that information could reasonably be expected to threaten a third party's physical or mental health. A record was also withheld which was attached, and related to, First Request record 15.

[51] The Law Society consulted with the third party. That third party also participated in this inquiry through two *in camera* affidavits and the Law Society has provided an *in camera* submission relating to those affidavits and in support of the application of s. 19(1)(a) to the withheld information. Again, I am satisfied that the affidavits of "X" and the Law Society's s. 19(1)(a) submission were properly submitted *in camera*. I am also satisfied that the evidence before me in the *in camera* affidavits, considered against the all of the disputed records and other evidence adduced by the Law Society and the third party, establish a reasonable expectation of harm to the physical or mental safety of the third party if the withheld information is disclosed. In passing, I commend the Law Society for facilitating, in its consultations with the third party, the release to the applicant of as much information as was reasonably possible from these records.

[52] **3.8 Refusal to Admit or Deny Existence of Third Party Personal Information** – Section 8(1)(c)(i) requires a public body to provide reasons for refusing to grant access to a record or part of a record and the provision of the Act on which the refusal is based. Section 8(2)(b) creates an exception to this requirement. It provides that the public body may refuse to confirm or deny the existence of a record containing third-party personal information if the disclosure of the existence of the information would be an unreasonable invasion of third-party personal privacy.

[53] The Law Society submits that disclosing the existence or non-existence of a member's prior complaint history would be an unreasonable invasion of that lawyer's personal privacy. This is said to be reflected in Rule 3-3, made under the *Legal Profession Act*, which places a duty of confidentiality on the Law Society and only permits disclosure where the lawyer consents as part of the process of inquiries made for the purposes of a potential judicial appointment or if the complaint is already generally known to the public.

[54] The Law Society's reasons for refusing to confirm the existence or non-existence of a complaint is that it would be unfair to the lawyer and the complainant. Disclosure can, the Law Society says, unjustly damage the lawyer's reputation, as well as his or her professional stature among peers and the broader community. Only when the Law Society has issued a formal citation following an investigation does it make the existence of a complaint publicly known. For the same reason, discipline matters or proceedings which have not resulted in a citation are not publicly disclosed. According to the Law Society, it is only at the point of citation that the lawyer's or another third party's personal privacy is outweighed by the public's interest in knowing about the complaint. The Law Society's reason for refusing to deny the existence of a complaint is that, if a complaint has been made, it would be inaccurate and misleading to deny its existence. It is also obvious, of course, that a practice of acknowledging when a complaint does not exist would by inference disclose when a complaint actually does exist.

[55] I will discuss below the Law Society's disclosure practices in relation to complaints against its members or former members in connection with the "Member History" printouts that the Law Society has withheld in their entirety from the applicant. It is sufficient at this point to say that the Law Society has properly applied s. 8(2)(b) in this case. In my view, disclosure of the mere existence or non-existence of complaint information would indirectly reveal whether negative opinions have been recorded about the professionalism or honesty of Law Society members or former members in a context where there is a significant likelihood of unfair damage to their reputations. As I discuss further below, I consider that information about the existence of a complaint against a lawyer is personal information that relates to the employment or occupational history of the lawyer within the meaning of s. 22(3)(d) of the Act. Section 22(3)(d) provides that disclosure of such information is presumed to unreasonably invade the personal privacy of the individual whose personal information it is. Even though such information is not, properly understood, an indication of any actual wrongdoing, it is nonetheless likely that negative conclusions will be drawn about the member or former member from the mere existence of such information. I consider that disclosure of this information would be an

unreasonable invasion of the personal privacy of the Law Society members or former members involved here.

[56] Consistent with Order No. 270-1998, [1998] B.C.I.P.C.D. No. 65, the Law Society has not invoked s. 8(2)(b) where the complaint involved was made by the applicant himself. This is because he is, of course, already aware of the existence of his own complaint against a member. This approach is also consistent with the one I took to s. 22(3)(d) in Order 00-44, [2000] B.C.I.P.C.D. No. 48, and in Order 01-53, [2001] B.C.I.P.C.D. No. 56, where I held that personal information relating to employment history did not have to be withheld from an applicant when that information consists of the very allegations the applicant has made, and knows he or she has made, against the third party.

[57] **3.9 Records of Disciplinary Complaints and Investigations** – I will now deal with the more involved of the issues before me by categories of records that raise these issues. The first category of records is that relating to disciplinary complaints and investigations involving lawyer-members of the Law Society.

Records Subject to Solicitor Client Privilege

[58] Third Request records 62, 64, 69, 78, 79 and 113 all concern Law Society disciplinary complaints and investigations – the existence or non-existence of some of which the Law Society has neither admitted nor denied – that were instigated by the applicant and others against various Law Society members or former members. These records have been withheld in their entirety under s. 14 of the Act.

[59] Section 14 authorizes a public body to refuse to disclose information that is "subject to solicitor client privilege". In previous cases, I have described and discussed in detail the two branches of solicitor client privilege incorporated under s. 14. These are legal professional privilege (the privilege protecting confidential solicitor client communications between a client or his or her agent and a legal adviser that are directly related to the seeking or giving of legal advice) and litigation privilege. (See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8, and Order 01-10, [2001] B.C.I.P.C.D. No. 11.) The Law Society claims that both kinds of privilege apply to the entirety of the above-listed records. It is not necessary for me to deal with the claim of litigation privilege, however, because I have decided that the first kind of privilege, legal professional privilege, applies to these records. The reasons for this conclusion follow.

[60] As I have said in previous orders, not everything a lawyer says or does is privileged. The fact that one party to a communication is a lawyer will not suffice to establish privilege where the communication is not related to the seeking or giving of legal advice. On the other hand, the solicitor-client relationship is no less protected where the legal advice the lawyer is called on to give draws on both strict legal expertise and investigatory and regulatory judgement associated with legal issues on which advice has been sought or given.

[61] In Order 00-08, I dealt with letters or written reports from medical experts to the College of Physicians and Surgeons of British Columbia (through its in-house legal counsel) and memos (prepared by its in-house legal counsel) of interviews with the medical experts – all in connection with the investigation of a complaint that a physician had, among other things, improperly employed a medical procedure. I found that, with the exception of some readily severable legal analysis in one of the memos, the disputed records were not protected by legal professional privilege. As regards the letters and reports from medical experts, I observed that legal professional privilege does not protect communications between a third party and a lawyer, except where the third party is acting as an agent of the client for the purpose of seeking, receiving or implementing legal advice. I found that the communications from the medical experts to the College (through its in-house counsel) did not fall under that third-party exception because they were not integral to the solicitor client relationship. The experts were an external source of information rather than a conduit between the College and its counsel. I found that the function of conduit, to the extent it existed, lay not with the experts but with the College's in-house counsel, who was a channel of communications between the experts and the College. In this respect, I said the following at p. 14:

> Indeed, although I have every respect for the importance of the statutory role which the College fulfills in processing and acting on complaints against its members, in my view the concerns against which Doherty J.A. warns [in *General Accident Assurance Co.* v. *Chrusz* (1999), 180 D.L.R. (4th) 241] apply here. It would not be a proper use of the confidential solicitor client relationship, and the privilege associated with it, for the College to be able to shield these third party communications by the artifice of funnelling them through counsel for the College.
>
> In *General Accident*, the court found that the insurance investigator's function was to educate the lawyer concerning the claim, so that the insurance company could receive the benefit of the lawyer's informed advice and instruct him accordingly. This function was not integral to the solicitor client relationship and the communications between the investigator and the solicitor were accordingly not privileged. Similarly, the experts here were retained to inform the College's lawyer on medical issues respecting a complaint against a member; their written reports to the College assisted the lawyer to understand the circumstances surrounding the complaint and give legal advice to the SMRC as to its disposition. The experts' opinions may have been important, even critical, to the investigation and processing of the complaint, but they were not integral to the confidential solicitor client relationship between the College and its lawyer.

[62] With respect to the memos prepared by the College's in-house counsel of her interviews with two of the medical experts, I found that – with the exception of severed legal analysis by in-house counsel found in one of the memos – the interview memos recorded communications of third-party medical experts which were not integral to the solicitor client relationship and were not protected by legal professional privilege. I reflected as follows, at p. 16-17, on the College's use of legal counsel to conduct investigations that it was statutorily mandated to undertake:

> … The College has a statutory obligation under the MPA [*Medical Practitioners Act*] to investigate complaints made against its members. The memos to file are the

> primary records of the expert opinions gathered as part of that investigation process. The College has the right to obtain legal advice in connection with an investigation; this may be very desirable, and confidential communications between solicitor and client in that relation should be protected from disclosure. In this case, however, the College has chosen to have its lawyer actually conduct part of the SMRC's [Sexual Misconduct Review Committee's] investigation of a complaint. This circumstance does not change, in my view, the substance of the work involved from work in relation to a statutorily mandated investigation to work in relation to, and integral to, a confidential solicitor client relationship.
>
> …
>
> The effect of the College's argument here is that, by having its lawyer conduct the investigation, the investigative process is subsumed under the solicitor client relationship between the College and its lawyer. This loses sight of the function involved in a statutory complaint investigation process under the MPA and of the fact that the expert opinions were gathered as an integral part of that investigation process. The College's solicitor client relationship with its lawyer serves to enable the College to discharge its duties and functions; the investigation process under the MPA does not exist to serve a solicitor client relationship between the College and its lawyer.
>
> I therefore conclude that the first memo and the second memo record third party communications from medical experts which were gathered as part of the College's investigation of the applicant's complaint, as well as some legal analysis by the lawyer. They are not communications from solicitor to client (though copies of the memos may, I infer, have been provided to the College through the sending of copies to the SMRC). Nor are they confidential communications in relation to a solicitor client relationship. To the extent that the first memo contains text that reflects the lawyer's legal analysis or advice to the SMRC, the disclosure of that information would reveal, and is in relation to, confidential solicitor client communications. Because that information is privileged, it may be withheld by the College. This information consists of that part of the first memo found after the visual break ">><<"on page four. The memos themselves, as opposed to the information just described, are not privileged as being in relation to a confidential solicitor client relationship.

[63] Owen-Flood J. upheld Order 00-08 in the British Columbia Supreme Court, in *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2001), 90 B.C.L.R. (3d) 299, [2001] B.C.J. No. 1030. Although the judgement of Owen-Flood J., which is under appeal, did not track my reasoning in Order 00-08 on all points, it did not express any significant disagreement with my reasoning regarding legal professional privilege.

[64] In Order 01-10, I considered a claim of legal professional privilege by the University of Victoria with respect to a variety of records relating to the work of in-house and external legal counsel to the University and several of its staff. Although the University of Victoria does not have the same functions or duties as the Law Society, the affairs and operations of a university present complications of their own. Order 01-10 is an example of how the common law principles of solicitor privilege must be applied by

examining each record with an awareness of the particular relationships and obligations involved. I took a similar approach to that analysis in relation to the College in Order 00-08 and I propose to do the same here with respect to the Law Society.

[65] Paragraphs 2 and 3 and 12 to 15 of Jean Whittow's affidavit describe the role of the Law Society's legal counsel, both in-house and external, with respect to complaint investigations:

> 2. Where allegations are made that a lawyer has committed a discipline violation, in most cases the Society conducts an investigation into those allegations.
>
> 3. Investigations made on behalf of the Society are conducted by either in-house legal counsel, or legal counsel retained under private retainers by the Society. Counsel may employ the assistance of agents, such as investigators.
>
> …
>
> 12. The Society employs in-house legal counsel. Those individuals provide legal advice to the Society, sometimes including specific committees such as the Special Compensation Fund Committee and the Discipline Committee.
>
> 13. It is the practice of the Society to maintain separate files about complaints against lawyers, under the name of the complainant making the allegation.
>
> 14. All documents pertaining to a particular allegation are usually contained in the complaint file and these documents can often relate to counsel's provision of legal advice to the Society, including but not limited to legal opinions, communications with other Law Society counsel, legal analysis, working notes, and notes pertaining to communications with opposing counsel, witnesses and third parties.
>
> 15. I am informed by Jason Eamer-Goult, Freedom of Information Analyst, and do verily believe, that documents in the complaint files maintained by the Society that are not subject to solicitor-client privilege, whose disclosure would not be an unreasonable invasion of third parties' personal privacy, or the subject of other applicable exceptions within the *Freedom of Information and Protection of Privacy Act*, are disclosed to complainants on request. I am also informed by Mr. Eamer-Goult, and do verily believe, that documents from the Applicant's complaint files requested by him which were not governed by solicitor-client privilege or these other concerns have been disclosed to the Applicant

[66] Although the Law Society retains legal counsel to conduct investigations into disciplinary complaints against members, it has not taken the position that all records pertaining to disciplinary complaints are protected by solicitor client privilege. This is significant. Legal professional privilege does not revolve around the features of a statutory complaint investigation process – nor could the features of such a process be artificially imposed on the common law requirements for legal professional privilege by having lawyers exclusively conduct all the Law Society's statutorily mandated complaint intake, investigation and processing functions.

[67] Having said that, in assessing a claim of solicitor client privilege by the Law Society in relation to its regulatory work, it is necessary to be aware of the unique role the Law Society fulfills among all self-governing professional bodies. As the governing body over lawyers, the Law Society deals with complaints about the conduct of lawyers. Those complaints will involve questions of whether lawyers have conducted themselves competently and properly in practicing law according to professional practice standards. The Law Society's handling of such complaints will often involve privileged information of third parties coming into the hands of those investigating on its behalf. This will not invariably be so, of course. For example, when one lawyer complains that another lawyer has behaved in a manner unbecoming to the profession, third-party privileged information may not be involved and the question of whether the conduct alleged was unbecoming may be largely factual judgement.

[68] I will now examine specific disputed records that relate to disciplinary complaints and investigations. Third Request record 62 is a memo from in-house counsel for the Law Society to the Law Society's Professional Standards Committee. It consists largely of legal analysis of issues relating to a complaint against a member. In my view, the Law Society was authorized by s. 14 to withhold this record on the ground that it is covered by legal professional privilege. Third Request record 64 is a copy of record 62, so the same conclusion applies to it.

[69] Three records were attached to record 64. The first two are records that have been disclosed separately to the applicant, in severed form. The third is a memo from an external member, and official of, the Law Society, giving advice to its in-house counsel about the complaint. That communication is legal advice or, at the least, in relation to the giving or seeking of legal advice. I find that this record, which is a communication between two lawyers within the Law Society chain of command and is specific to legal advice concerning complaints made by the applicant, is protected by legal professional privilege.

[70] Third Request record 69 is one page of handwritten notes of Law Society in-house counsel relating to complaints by the applicant against various members. Records 78 and 79 are of the same character. I find these three records relate directly to counsel's provision of legal advice to the Law Society. They are protected by legal professional privilege.

[71] Third Request record 113 is another memo from in-house counsel at the Law Society to a superior at the Law Society, concerning the applicant's complaints. Again, I find that the Law Society is authorized by s. 14 to withhold this record on the ground that it is covered by legal professional privilege.

[72] I will also address First Request record 26 at this stage. This is a one-page 1993 document titled "Closing memo For Complaint Files". It relates to a complaint made by the applicant against a member of the Law Society. The author of the memo is not indicated, but the Law Society says in its table of disputed records that it "is counsel's closing brief on the file and subject to solicitor client privilege". The Law Society has also claimed a variety of other exceptions with respect to this record. I would have some difficulty with the general proposition that, just because a closing memo to a Law Society

complaint file is authored by one of its counsel, it must be subject to legal professional privilege. I can certainly see that such a record might contain third-party privileged information, or legal advice to the Law Society concerning the merits and disposition of a complaint, but I fail to see how the Law Society's institutional record of the disposition of a complaint – as opposed to legal advice about that disposition – is integral to the solicitor client relationship between the Law Society and its counsel. A complaint disposition is a decision by the Law Society that may be made on the basis of privileged legal advice, but the disposition itself is not privileged.

[73] As I have already noted, First Request record 26 is a 1993 document. It is the only document among the disputed records that is described as a "Closing Memo For Complaint Files". It may be that this kind of document is no longer used by the Law Society. This is in fact suggested at para. 4 of the Law Society's further reply submission, where it is said (with emphasis added), that "Closing memos, as generated by in-house counsel *at that time*, included counsel's opinions and advice to the Law Society." In any event, I have concluded, admittedly with some hesitation, that it was open to the Law Society to refuse to disclose this particular record on the basis of legal professional privilege because its contents – although they also refer to the disposition of the complaint involved – are counsel's notes integral to the legal advice counsel gave concerning this particular complaint.

Disclosure Harmful to Personal Privacy

[74] I will now deal with two records – Third Request records 73 and 75 – that relate to disciplinary complaints against lawyers, which the Law Society withheld in part under s. 22(1) of the Act on the ground that disclosure would be an unreasonable invasion of third-party personal privacy. In the case of Third Request record 75, the Law Society has also claimed privilege under s. 14 of the Act over the same part of this record, but because I find that s. 22 requires the Law Society to refuse disclosure, I need not decide whether s. 14 applies.

[75] Third Request record 73 is a note by the Law Society's in-house counsel of a telephone conversation with a lawyer with whom the applicant had some involvement. The Law Society has withheld some information on the ground that its disclosure would unreasonably invade third-party personal privacy because the information relates to third-party employment or occupational history, could expose the third party to financial or other harm and could unfairly damage the reputation of individuals referred to in the record. This record contains information that relates to the occupational history of a third party (this issue is discussed at some length below in relation to member history printouts and that discussion is relevant to my finding here). This record contains information, views or opinions expressed by others about the third party. Those views or opinions arose in the context of the Law Society's investigation of a complaint that the applicant had made against the third party. Because this information is subject to the presumed unreasonable invasion of personal privacy created by s. 22(3)(d), the information must be withheld from the applicant unless he establishes that its disclosure would not unreasonably invade third party personal privacy. Nothing in the applicant's submissions, or in the material otherwise before me, persuades me that disclosure of this information is permitted and I am satisfied that the Law Society is required by s. 22(1) to

refuse to disclose that information to the applicant. In arriving at this conclusion, I have decided that, as the Law Society argues, the circumstance set out in s. 22(2)(h) of the Act is relevant and favours the determination that disclosure would constitute an unreasonable invasion of the third party's personal privacy.

[76] Third Request record 75 is a memorandum to file from the Law Society's in-house counsel relating to a telephone conversation with a member involved with complaints made by the applicant. Some information has been withheld from this record on the basis that disclosure would be a unreasonable invasion of third-party personal privacy because it relates to third-party employment, occupational and financial history, could expose a third party to financial or other harm and could unfairly damage the reputation of individuals referred to in the record. This record essentially sets out, in somewhat expanded form, the contents of Third Request record 73, which I have already addressed. For the reasons given above, I am satisfied that the portions of this memorandum withheld by the Law Society under s. 22 were also appropriately withheld from the applicant.

[77] **3.10 Certain SCFC Records** – The next category of records relates to the SCFC's consideration of claims on the Special Compensation Fund and its decisions on such claims.

Role and Functions of the SCFC

[78] As I have already said, most of the disputed records connect in one way or other to claims made by the applicant to the SCFC and many directly concern the SCFC's processing of, and its decisions about, the applicant's compensation claims. The SCFC is clearly not a disciplinary committee. Its function is to assess applications for compensation for money or other property that was misappropriated or wrongfully taken by a lawyer. Section 31 of the *Legal Profession Act* provides for the Law Society's benchers – who are the elected and appointed directors of the Law Society – to treat the Special Compensation Fund as the Law Society's property and to make payments from it only if satisfied that (a) money or other property was received in a lawyer's capacity as a lawyer, (b) it was misappropriated or wrongfully taken by the lawyer and (c) there was a resulting pecuniary loss to the compensation applicant.

[79] Section 31 also contains some specific restrictions on when the benchers may authorize the payment of a claim and confers authority (a) to make rules establishing and enabling the SCFC, (b) for bencher reviews of SCFC decisions, (c) for conditions of, and qualifications for, payment of claims, (d) for the administration of the fund, (e) for procedures for investigation and consideration of claims, including hearings and (f) for placing general limitations on the amounts that may be paid out of the Special Compensation Fund. Section 31 also gives the Law Society the power to recover payments made from the fund from the lawyer on whose account they were made.

[80] The workings of the SCFC, generally and in relation to the applicant's claims specifically, are described in the affidavit of Mary Ann Cummings, the staff lawyer for

the SCFC and for Law Society custodianships. Because her evidence is important for the purposes of the discussion below, I reproduce here paras. 3 to 19 of her affidavit:

> 3. Until November 1, 1993, the Benchers made all decisions on whether to pay claims against the Fund after receiving a Report and Recommendation from the Committee. As of November 1, 1993, the Benchers delegated to the Committee the authority to decide claims for $25,000.00, or less, but an applicant could ask for a Bencher review. No reasons for the request were necessary. Effective February 7, 1997, the Benchers delegated to the Committee, the authority and discretion to decide all claims and decided there would be no Bencher review, with respect to claims received by the Secretary of the Law Society, after that date.
>
> 4. The Committee process begins when an application is delivered to the Secretary, along with an accompanying statutory declaration. The general practice has been that, where possible, the member, or former member in respect of whom an application is made, is given a copy of the application and provided with the opportunity to respond. Where a member, or former member, responds in writing, a copy is provided to the applicant. The process of written submissions or responses may continue and, in each instance, the general practice is that these documents are disclosed to both the member, or former member and the applicant.
>
> 5. When all documents and written submissions have been received, the usual practice of the Committee is for it to consider and review the application, relevant documents and written submissions in the absence of the applicant and, also in the absence of the member, or former member of the Law Society, in respect of whom the application is made. The Committee's meetings are usually conducted with the assistance of either myself as in-house counsel, to give advice, or with the advice of outside counsel who has been retained in respect of a particular matter. The Committee may order an oral hearing, either before the Committee, or a sub-committee, but in practice, most claims are decided without an oral hearing.
>
> 6. The Applicant made claims to the Fund by way of statutory declarations, declared:
>
> (a) December 22, 1993, in respect of [… eight specified members or former members of the Law Society];
>
> (b) February 16, 1994, in respect of [… two specified members or former members of the Law Society];
>
> (c) December 30, 1994, in respect of [… three specified members or former members of the Law Society];
>
> (d) August 1, 1996, in respect of [… one specified member or former member of the Law Society].

The Applicant requested a Bencher review of all the Committee's decisions. The Bencher review regarding his claim in respect of [… the member or former member in para. (d), above], is still outstanding.

7. The applicant made an additional claim to the Fund by way of Statutory Declaration declared November 1, 1999, regarding another member. This claim has not yet been decided by the Committee.

8. On occasion, the Law Society appoints outside counsel to act as counsel to the Committee. Kenneth N. Affleck, of the firm of Macaulay McColl, was appointed to act as legal counsel to the Committee, with respect to all of the Applicant's applications, outlined in para. 6.

9. Notwithstanding Mr. Affleck's role, I continued to have a limited involvement in giving legal advice to the Committee, in respect of the Applicant's applications. I did not give advice on the substantive issues, but on points of procedure only.

10. As in-house counsel, one of my duties is to assist the Committee by providing them with a factual and legal analysis for their review in determining whether or not the criteria set out by s. 31(4) of the *Legal Profession Act* has been met, and whether payment is prohibited by s. 31(5) or s. 31(10). If the Committee determines that the claim meets the criteria set out in s. 31(4), and payment is not prohibited by s. 31(5) or s. 31(10) they may then go on to exercise their discretion under s. 31(6) as to whether to a payment from the Fund should be made, and if so, the amount.

11. If outside counsel has been retained, they will generally provide to the Committee the same assistance and legal advice.

12. Generally legal counsel provides assistance to the Committee in finalizing the Committee's written decision.

13. In the normal course, one of the Committee members will, following the consideration and decision in respect of a claim, create a first draft of a written decision. This decision is then given to legal counsel for review. Counsel reviews the draft decision, to ensure that the draft correctly reflects the Committee's decision and does not contain obvious typographical or grammatical errors. Counsel would point out any such errors to the Committee member responsible for drafting the decision. The Committee member responsible for the first draft is ultimately responsible for correcting those errors, although counsel's secretary may assist with the actual typing.

14. The revised draft is then faxed by legal counsel to other members of the Committee who participated in the consideration and decision respecting the claim for their review.

15. If no changes are requested by other members of the Committee, then legal counsel will circulate the decision in a final form for signature by the Committee members. If further minor changes of a grammatical or

> typographical nature are identified these are usually referred to the drafting Committee member, but may be referred to the Chair.
>
> 16. If on the other hand, substantive revisions are suggested by Committee members then legal counsel will refer those suggestions to the Chair of the Committee and the Chair of the Committee will finalize the written decision based on the input of the other Committee members.
>
> 17. Prior to February 7, 1997 the Committee prepared written reports and recommendations to the Benchers with respect to claims to the Fund as set out in paragraph 3 herein. In most instances, a report and recommendation was signed by the Chair or Acting Chair of the Committee. The usual practice was for counsel to the Committee to provide assistance, including legal advice, to the Committee regarding the preparation of the written report and recommendation to the Benchers.
>
> 18. When the Benchers delegated the authority to the Committee to make decisions regarding claims, under $25,000 as of November 1, 1993, and all claims as of February 7, 1997, the procedure outlined in paragraphs 13 to 16 herein was generally followed except that the final written Committee decisions were only signed by the Chair or Acting Chair of the Committee until January 2000.
>
> 19. Counsel's role is a combination of providing legal advice to the Committee on substantive issues, as well as some administrative assistance in finalizing the Committee's written decision.

[81] I will now consider, in light of this contextual evidence, the Law Society's application of ss. 3(1)(b), 14 and 22 to records in this category.

Draft SCFC Decisions

[82] The Law Society says that First Request records 302, 306.1, 307, 308, 309, 494, 570, 800, 801, 811, 823, 824, 826, 827, 828, 853, 855 (attachments) and 856 (attachments) are excluded from the scope of the Act by s. 3(1)(b). The relevant portions of s. 3(1) read as follows:

> **Scope of this Act**
>
> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;

[83] The above-noted records are draft decisions of the SCFC. In some cases, they are accompanied by covering communications that convey them from one person to another

and are integral to the drafts themselves. In other cases, the draft decisions are attached to records that have an independent function. In those cases, the Law Society argues that s. 3(1)(b) applies only to the attached drafts. In one case, the draft decision attaches a note from a third party to the SCFC's legal counsel. This particular communication is integral to the draft decision and I need not consider its disclosure on a severed or free-standing basis. It is part of the draft.

[84] The Law Society argues that members of the SCFC act in a judicial or quasi-judicial capacity for the purposes of s. 3(1)(b) and that "the documents and confidential information related to the Benchers' exercise of this function is [*sic*] outside the scope" of the Act. The criteria for identifying a quasi-judicial function laid down by the Supreme Court of Canada in *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.) support this conclusion. I applied those criteria in Order 00-16, [2000] B.C.I.P.C.D. No. 16, at p. 8. In the present case, consideration of the evidence before me, and the Law Society Rules governing the SCFC at the material times, lead me to the following conclusions in light of the *Coopers and Lybrand* criteria:

- The SCFC does not accept or reject an applicant's claim for compensation, because of a default by a lawyer, without hearing from the applicant who seeks compensation and from the affected lawyer. (The applicant is not necessarily heard in person. He or she may only make representations and documents and information in writing.)

- The SCFC decision on the compensation claim directly affects both the applicant's rights and the interests of the lawyer whose alleged default is at the heart of the compensation application.

- The compensation-applicant and the lawyer whose alleged default is involved are engaged in an adversarial process to the extent that both make representations to the SCFC, despite the fact that they are not pitted against each other directly in a 'one person must win, one must lose' sense.

- The SCFC is obliged to apply the Law Society Rules, made under the *Legal Profession Act*, to each compensation application, as opposed to the SCFC's implementing social or economic policy in a broad sense.

[85] In light of these considerations, I accept that the SCFC's members are, when deliberating on or deciding matters within the SCFC's authority, acting in a quasi-judicial capacity for the purposes of s. 3(1)(b).

[86] The Law Society goes too far, in my view, when it argues that "documents and confidential information related to the Benchers' exercise of this function" fall outside the scope of the Act. Section 3(1)(b) does not exclude from the Act's scope all "documents and confidential information" that can be characterized as in some way related to the exercise of the SCFC's functions. It clearly applies only to "a personal note, communication or draft decision" of someone who is acting in a judicial or quasi-judicial capacity. Despite the Law Society's overly broad view of the section, I am

satisfied that it has properly applied s. 3(1)(b) to draft decisions created by SCFC members and, therefore, the records listed above are not within the scope of the Act.

Legal Advice to the SCFC

[87] The Law Society argues that both branches of solicitor client privilege incorporated by s. 14 of the Act apply to a large number of records that concern the SCFC's processing of, and decision-making on, the applicant's various compensation claims. I have reviewed those records in detail in the context of the common law rules for solicitor client privilege, the SCFC's role and functions, and the Law Society's evidence, notably paras. 3 to 14 of the affidavit of Kenneth Affleck, which follow:

> 3. As counsel to the [Special Compensation Fund] Committee in respect of the Applicant's claims, I have attended meetings of that Committee to give it legal advice in respect of the Applicant's applications and I have treated those occasions as being confidential and privileged. Written reports were prepared by Mr. Wolf and me for the Committee, and at all times we considered those to be reports and recommendations from solicitor to client.
>
> 4. The Committee decided all of the Applicant's claims without an oral hearing. With respect to his claims against … [named lawyers], the Committee Chair had granted a request of the Applicant to attend the meeting to make oral submissions. However, the Applicant did not attend the meeting and instead forwarded additional documents to be considered.
>
> 5. As counsel for the Committee in respect of the Applicant's claims, I generated and maintained counsel's files which I understand formed a part of the Applicant's request dated July 26, 2000. I have considered and treated those files as being confidential and subject to solicitor-client privilege.
>
> 6. The Applicant's claims against the Special Compensation Fund arise out of a real estate transaction and the involvement of a number of lawyers who are members of The Law Society of British Columbia. The claims involve the following lawyers (or former lawyers): [… named lawyers].
>
> 7. By written decision dated May 17, 1997, the Committee denied the Applicant's claims in respect of [… named lawyers]. A copy of this decision was sent to the Applicant.
>
> 8. By written decision dated September 9, 1994, the Committee denied the Applicant's claims in respect of [… named lawyers]. A copy of this decision was sent to the Applicant.
>
> 9. By report and recommendation to the Benchers dated October 13, 1997, the Committee recommended that the Applicant's claims in respect of [… named lawyers] be denied. A copy of this report was sent to the Applicant.
>
> 10. By written decision dated May 8, 1995, the Committee denied the Applicant's claims in respect of [… named lawyers]. A copy of this decision was sent to the Applicant.

> 11. The Benchers, in their review of the Committee's decisions or recommendations that the Applicant's claims be denied in respect of [… named lawyers], dismissed the Applicant's applications by way of their reasons for decision dated September 6, 1996. A copy of these reasons was sent to the Applicant.
>
> 12. By written decision dated June 23, 1997, the Committee denied the Applicant's claims in respect of [… named lawyer]. A copy of this decision was sent to the Applicant.
>
> 13. There is no money held by any lawyer in British Columbia in respect of claims to the benefit of the Applicant. In respect of all of the claims referred to in this Affidavit, the Special Compensation Fund Committee has dismissed the applications of the Applicant against the Fund.
>
> 14. With regard to the decisions and reports of the Special Compensation Fund Committee, both Mr. Wolf and I considered our advice to be that of solicitor to client. As the Committee was drafting its reports or decisions, either Mr. Wolf or I were [*sic*] from time to time asked for advice in respect of details of the proposed reports or decisions, and advice was given either orally or in writing and in some instances by means of notations on draft reports or decisions.

[88] First Request record 191 is a report to the SCFC from its external counsel about compensation applications that the applicant had made. It included a one-page agenda for the SCFC meeting that summarized the recommendations made in counsel's report. First Request records 306, 375, 567, 802, 803 and 805 are the same type of reports. All of these records have been withheld in their entirety.

[89] First Request records 462, 463, 833, 856, 906, 907 are memos, correspondence or other communications between SCFC in-house or external counsel to the SCFC or its members regarding the applicant's compensation claims. All of these records have been withheld in their entirety.

[90] First Request record 251 is correspondence from the SCFC's in-house counsel to its external counsel with a variety of attachments, all relating to the applicant's compensation claims. First Request records 318, 324, 345, 376, 379, 382, 389, 392, 393, 399, 403, 404, 417, 423, 448, 452, 466, 474, 477, 479, 489, 506, 507, 509, 513, 516, 517, 518, 525, 531, 538, 544, 545, 550, 561, 568, 579, 581, 619, 628, 647, 648, 650, 653, 654, 660, 678, 682, 686, 693, 695, 698, 699, 700, 710, 711, 713, 723, 724, 728, 733, 736, 739, 741, 742, 791, 792, 850, 851, 866, 885, 892, 903, 909, 911, 918, 921, 926, 935, 939, 949, 967, 974, 975, 982, 983, 993, 995, 1000, 1002, 1033, 1034, 1039, 1040, 1053, 1057, 1064, 1068, 1074, 1075 and 1081 are also memos, correspondence or other communications between SCFC in-house counsel – or other Law Society or SCFC officials – and SCFC external counsel relating to the applicant's compensation claims. In some cases related documents are attached and in some cases the correspondence concerns and attaches bills for counsel's legal services to the SCFC. All of these records have been withheld in their entirety.

[91] First Request records 243, 325 to 340, 354, 357, 358, 366, 369, 372, 373, 381, 395, 396, 397, 398, 405, 408, 410, 411, 416, 419, 421, 422, 424, 440, 44, 445, 449, 451, 456, 460, 461, 464, 465, 478, 493, 515, 525, 536, 557, 558, 575, 576, 583, 584, 586, 587, 607, 631, 638, 642, 665, 673, 690, 692, 715, 743, 774, 781, 793, 794, 796, 804, 807, 808, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 825, 829, 837, 838, 839, 840, 842, 846, 847, 852, 855, 857, 858, 905, 915, 917, 940, 981, 984, 991, 998, 999, 1030, 1031 and 1078 are notes, memos and other documents or drafts from the files of SCFC counsel that relate to the applicant's compensation claims. They include notes of telephone calls and meetings, as well as memos between counsel or their agents. All of these records have been withheld in their entirety.

[92] First Request records 450 and 453 are memos between external counsel to the SCFC relating to telephone calls from the applicant. Most of these records have been released to the applicant. The information that has been withheld specifically discloses legal advice or reflections integral to the confidential solicitor client relationship between the SCFC and its counsel.

[93] First Request records 467 and 563 are each short (one-page or less) handwritten notes of telephone conversations between SCFC external counsel and the applicant. These records have been disclosed to the applicant, except for some information in each that relates to communications between SCFC external and in-house counsel about the applicant's claims.

[94] First Request record 589 is a one-page cover letter from SCFC in-house counsel to its external counsel enclosing a letter from the applicant. This letter and its enclosure have been disclosed to the applicant, except for part of a sentence in the cover letter which discloses counsel's reflections integral to the confidential solicitor client relationship between the SCFC and its counsel (in-house and external). First Request record 671 is similar to record 589 and comparable information in it has been withheld.

[95] First Request records 795, 996, 997, 1001 are correspondence with attached documentation between SCFC external counsel and an external counsel for the Law Society, relating to a matter arising from the applicant's compensation claims. All of these records have been withheld in their entirety.

[96] Having reviewed the above records and the evidence before me with care, I consider that the records or information withheld, as the case may be, disclose communications integral to the confidential solicitor client relationship between the SCFC and the Law Society, on the one hand, and their counsel (whether in-house and external) on the other. I am persuaded that these records, in whole or in part, as applicable, are protected by legal professional privilege and therefore that the Law Society is authorized by s. 14 of the Act to refuse their disclosure.

[97] In reaching this conclusion, I have applied the common law criteria for legal professional privilege. I have not applied a new or expanded understanding of those requirements or found it necessary to resort to the second branch of solicitor client privilege, litigation privilege. It should be understood that my finding is not an

endorsement of any proposition that everything said or done by counsel for the Law Society or the SCFC is confidential or privileged, or that engaging counsel to fulfill statutory or other functions automatically cloaks the discharge of those functions with solicitor client privilege. My finding here is specific to the evidence before me and to the disputed records, which I have examined record by record.

Unreasonable Invasion of Personal Privacy

[98] I will now deal with records responsive to the First Request that were withheld, in whole or in part, under s. 22(1) of the Act on the ground that disclosure would be an unreasonable invasion of third party personal privacy. In all but one instance, the Law Society also claims that the records are privileged under s. 14. Because I consider that s. 22 applies to these records, however, I need not resolve the s. 14 issue.

[99] First Request record 118 is a one-page letter sent by a lawyer to the Law Society. Only one sentence has been withheld under s. 22(1). It contains private legal and financial information about the affairs of a third party who was a client of the letter's author. I consider that this information falls under the presumed unreasonable invasion of personal privacy created by s. 22(3)(f) of the Act. In all of the circumstances, I find that the Law Society is required to withhold this sentence.

[100] First Request records 351 and 356 each consist of one page or less of handwritten notes of telephone conversations with the applicant. In each case, a small amount of information has been withheld on the ground, it appears, that it relates to as yet undetermined matters involving third parties and disclosure would unreasonably invade their personal privacy. Again, in all of the circumstances I find that the Law Society is required to withhold this information.

[101] First Request record 378 is an April 5, 1994 letter sent by a lawyer to external counsel to the SCFC. The direct business telephone number of the letter's author and three words that describe another lawyer's business relationship, at the time, with the writer's firm have been withheld under s. 22(1). This information, which is almost eight years old, can be disclosed to the applicant without unreasonably invading third-party personal privacy. As regards the lawyer who wrote the letter, the only withheld information that in any way relates to him is a direct-line business telephone number. My check of the Canadian Bar Association's 2002 directory of lawyers in British Columbia discloses no entry for the lawyer who wrote the letter. It also discloses that direct-line business telephone numbers for lawyers at the law firm on whose letterhead the letter was written are listed in the directory, which is publicly available. In all of the circumstances, I consider that disclosure of this information would not be an unreasonable invasion of the lawyer's personal privacy. The Law Society is not required by s. 22 to refuse to disclose this information.

[102] The information withheld from First Request record 378 that relates to another lawyer describes the business relationship that used to exist between that other lawyer and the law firm of the lawyer who wrote the letter. I do not consider it would be an unreasonable invasion of the other lawyer's personal privacy to disclose this information,

which describes the individual's business relationship with a law firm, as a practicing lawyer, some eight years ago. I have arrived at this conclusion because the Law Society has already disclosed the same information to the applicant by disclosing a statement of facts prepared by the other lawyer, a copy of which was enclosed with the April 5, 1994 letter. The Law Society is not required by s. 22 to refuse to disclose the same information where it appears in the letter itself.

[103] First Request records 1047 and 1061 are letters from the SCFC's external counsel to third parties regarding one of the applicant's compensation claims. The applicant has been given access to all of these records except identifying information of the third parties to whom counsel wrote, again on the ground that disclosure would be an unreasonable invasion of their personal privacy. The applicant says he no longer seeks third party addresses, but he still wishes to know the third party's identity. First Request record 1048 is a cover letter from SCFC in-house counsel to SCFC external counsel. It has been disclosed to the applicant except for a third party's name, which has been withheld for the same reasons as records 1047 and 1061.

[104] The Law Society relies solely on s. 22(1) in arguing that disclosure of the third party's name in these records would be an unreasonable invasion of personal privacy. Certainly, none of the presumed unreasonable invasions of personal privacy created by s. 22(3) applies to this information. Although I cannot discuss in any detail why I agree that s. 22(1) requires this information to be withheld from First Request records 1047, 1048 and 1061, I find that is the case. The circumstances in which the third party was contacted by the applicant in relation to one of his compensation applications to the SCFC, and the fact that the third party had no personal involvement in matters underlying that application, both support the view that s. 22(1) applies to this information. The applicant has not persuaded me that this information can be disclosed without unreasonably invading the third party's personal privacy. I find that the Law Society is required to refuse to disclose this personal information.

[105] **3.11 Member History Printouts** – First Request records 1, 33, 34, 35, 36, 65 and Third Request records 1, 227, 248 and 250 are Law Society "Member History" printouts. These records have been withheld in their entirety. Each is a standard-form computer printout for a given lawyer, with information entered under the following headings: complaints; hearings; trust audits; investigations; financial difficulties; special fund claims; and suspensions and disposals. A particular history printout may contain information under some, none or all of the headings.

[106] The Law Society relies on ss. 14 and 22 to withhold these records. It indicates that, if information about a complaint made by someone other than the applicant is contained under the 'complaint' heading of a printout – a circumstance that, under s. 8(2)(b), has been neither admitted nor denied – the Law Society also invokes s. 88(2) of the *Legal Profession Act* to preclude disclosure of any details of that information. Consistent with its position on s. 8(2)(b), the Law Society does not argue that s. 88(2) of the *Legal Profession Act* prevents disclosure to the applicant of the existence, or details, of any of his own complaints against members or former members.

[107] Section 88(2) of the *Legal Profession Act* contains the kind of express override of the Act contemplated by s. 79 of the Act. It reads as follows:

> Despite section 14 of the *Freedom of Information and Protection of Privacy Act*, a person who, in the course of carrying out duties under this Act, acquires information, files or records that are confidential or are subject to solicitor client privilege has the same obligation respecting disclosure of that information as the person from whom the information, files or records were obtained.

[108] Section 88(2) acknowledges the fact that the Law Society – as the governing body for lawyers in British Columbia – often must, in exercising its regulatory mandate, require its members to disclose to the Law Society information that is confidential and privileged between members and their clients. Section 88(2) recognizes that, when this happens, the Law Society has the same obligation as the member from whom the information was obtained respecting confidentiality and solicitor client privilege. As a result of the s. 88(2) override of s. 14 of the Act, the Act recognizes that the s. 14 discretion of the Law Society to waive solicitor client privilege is subject to its obligation not to disclose information, files or records it has acquired under the *Legal Profession Act* where such materials are covered by solicitor client privilege.

[109] In the context of this inquiry, s. 88(2) of the *Legal Profession Act* would only be relevant to information the existence of which I have already decided the Law Society is entitled to neither admit nor deny under s. 8(2)(b) and which it is, I have found, required to withhold under s. 22. To the extent that such information might include information covered by the s. 88(2) override of s. 14 of the Act, I agree that the Law Society would be correct, under the Act, in refusing to disclose that same information, if it was protected by solicitor client privilege, despite the otherwise discretionary nature of s. 14 of the Act.

[110] I will note here that s. 88(2) does not, in my view, extend solicitor client privilege to records or information that are not otherwise privileged. In Order No. 169-1997, [1997] B.C.I.P.C.D. No. 28, at p. 5, my predecessor said that s. 57(1) of the *Legal Profession Act*, the language of which is very close to s. 88(2), extended solicitor client privilege "to all records which are confidential, even if not subject to the privilege" for the purposes of the Act. That is not, in my view, the effect of s. 88(2).

[111] Returning to the member history printouts, the Law Society also argues, at para. 4 of its further reply submission, that the member history printouts are protected in their entirety by solicitor client privilege belonging to the Law Society because they are "documents generated for and used by in-house counsel in the complaints investigation process, and to provide legal advice to the Law Society." I have considerable difficulty with the proposition that these records are "generated for" use by counsel – exclusively, dominantly or indeed at all. I also have serious difficulty with the argument that, because they may be "used" by counsel, this must mean that they are integral to the confidential solicitor client relationship between counsel and the Law Society or are otherwise subject to solicitor client privilege.

[112] The Law Society is a self-governing professional body and these records appear to be key institutional records of the regulatory history of each member or former

member. No doubt a member history printout may contain information privileged to the Law Society's benefit (such as legal advice about a complaint) as well as third-party privileged information (such as details of legal work performed for, or advice given to, a client by a lawyer). Such information in a member history would be protected by solicitor client privilege. I do not accept, however, that the Law Society's regulatory mandate, and therefore this entire core record of the regulatory status of each of its members or former members is, by definition, entirely within the Law Society's own solicitor client relationship with its legal counsel. This is so even if, because the Law Society's statutory responsibility is to regulate the conduct of the legal profession, its complaint processing and investigation functions are, in whole or in part, carried out or overseen by lawyers. It follows that, to the extent it might be suggested that, in Order No. 201-1997, [1997] B.C.I.P.C.D. No. 62, my predecessor found that member history printouts are, in their entirety, protected by solicitor client privilege, I do not agree with that proposition regarding member history printouts.

[113] I will now deal with the question of whether s. 22 applies to the member history printouts. First, based on my review of the disputed printouts, I am satisfied that they contain third-party personal information, as is in fact suggested by the above-described information headings. Again, the applicant has the burden, under s. 57(2) of the Act, of establishing that disclosure of this third-party personal information would not unreasonably invade third-party personal privacy.

[114] The Law Society says, in its table of disputed records, that disclosure of the member history printouts would be an unreasonable invasion of third party personal privacy

> … because the information relates to the third party's employment or occupational history, and financial history. Considerations relevant to withholding this information are that it was collected in confidence, a third party could be exposed to financial or other harm, and disclosure could unfairly damage the reputation of any person referred to in the record.

[115] The Law Society therefore relies on s. 22(1) and ss. 22(2)(f), (e) and (h) and s. 22(3)(d) and (f) in arguing that s. 22 requires it to withhold these records.

[116] The main thrust of the Law Society's arguments on this point is found at pp. 24-27 of its initial submission. At para. 63, the Law Society says the following:

> 63. The Law Society submits that in the circumstances under review, it would be unfair to disclose the third parties' personal information. Members face considerable exposure to financial harm if their personal and confidential information is disclosed as it would undermine their professional reputation, which would negatively impact their income earning ability. Lawyers rely upon their professional reputations to attract clients and favourable employment opportunities, and disclosure would likely have a negative impact on their financial situation. It is unfair to subject the members to this kind of financial harm when they have not engaged in any blameworthy behaviour or conduct.

[117] At para. 65, the Law Society says the information was confidentially supplied or generated in connection with the Law Society's discharge of its regulatory and disciplinary functions. It also says, in the same paragraph, that

> … [g]iven the important function the Law Society plays in protecting the public and the legal profession, the public must have confidence that confidential information or reports will remain confidential.

[118] Further, the Law Society says, a number of previous orders have established that personal information relating to professional disciplinary matters falls under the presumed unreasonable invasion of personal privacy created by s. 22(3)(d). It cites Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35, Order No. 81-1996, [1996] B.C.I.P.C.D. No. 7, and Order 00-13, [2000] B.C.I.P.C.D. No. 16.

[119] The Whittow affidavit is relevant to the issue of whether the member history printouts can be disclosed to the applicant. Again, Jean Whittow is the Law Society's Deputy Executive Director and is responsible for the Law Society's regulatory operations, including disciplinary and special compensation matters. Paragraphs 2-11 of her affidavit read as follows:

> 2. Where allegations are made that a lawyer has committed a discipline violation, in most cases the Society conducts an investigation into those allegations.
>
> 3. Investigations made on behalf of the Society are conducted by either in-house legal counsel, or legal counsel retained under private retainers by the Society. Counsel may employ the assistance of agents, such as investigators.
>
> 4. In limited circumstances, the Society is empowered to decline to investigate an allegation under Rule 3-5(2) of the Law Society Rules. The basis upon which the Executive Director of the Society may decline to investigate a complaint are that the complaint:
>
> a) is outside the jurisdiction of the Society;
>
> b) is frivolous, vexatious or an abuse of process; or
>
> c) does not allege facts that, if proved, would constitute a discipline violation.
>
> 5. Further, under Rule 3-6, after investigating a complaint the Executive Director must take no further action if satisfied that the complaint is not valid, is unproveable, does not disclose conduct serious enough to warrant further action and has a discretion to take no further action if the matter has otherwise been resolved.
>
> 6. Serious allegations may give rise to a formal charge, called a citation. Such cases may result in an admission by the lawyer or findings of fact by a Hearing Panel, along with a verdict of professional misconduct or conduct unbecoming. Where a contrary verdict is made, a lawyer can face a number of consequences including a reprimand, a fine, suspension or

> disbarment. The powers of the Society in the context of discipline hearings are set out in s. 38 of the Legal Profession Act and the penalties are set out in s. 38(5) of the Act.
>
> 7. Under Rule 4-16, where a citation has been authorized to be issued and the Respondent has been so notified, the citation may be disclosed to the public.
>
> 8. However, the Rules do not generally permit disclosure of complaints:
>
> > 3-3(1) No one is permitted to disclose any information or records that form part of the Executive Director's investigation of a complaint or the Complainant's Review Committee's review of it, except for the purpose of complying with the objectives of the Act or these Rules.
>
> 9. Rule 3-3 does provide certain exceptions to the above sub-Rule where the lawyer consents to disclosure of information as part of the process of an inquiry made for the purposes of a potential judicial appointment or if the complaint is already generally know to the public.
>
> 10. The rationale for the Rule requiring confidentiality of complaints is principally the disclosure of the existence of a complaint – as distinct from a citation – is unfair to the lawyer and to the complainant. In particular, disclosure can unjustly damage the reputation of a lawyer and damage his or her professional stature, both within the legal procession and the community as a whole.
>
> 11. At the same time where a complaint has been made, it would be inaccurate for the Society to deny its existence. Accordingly, but for the exception set out above, the Society neither confirms nor denies the existence of a complaint.

[120] As Whittow's affidavit indicates, the Law Society's Rules provide that, if the Law Society issues a citation against a member as a result of its investigation of a complaint against the member, that citation may be made public. If the investigation does not lead to a citation, however, the Rules – which do not override the Act – generally speaking prohibit the disclosure of any information or records that form part of the investigation. The orders cited by the Law Society, to which I have referred above, establish that personal information arising from a disciplinary investigation involving a public body employee is information that relates to the individual's employment history. See, also, Order 01-53, [2001] B.C.I.P.C.D. No. 56, regarding employment investigations.

[121] I consider that personal information arising from a disciplinary investigation by a regulatory body involving an individual subject to that body's authority is information that relates to the individual's occupational history. Where an individual who is investigated by a self-regulating body such as the Law Society is also employed by someone else, the information may also relate to the individual's employment history.

[122] In arriving at this view, I have considered Order No. 221-1998, [1998] B.C.I.P.C.D. No. 14 where my predecessor expressly held, at p. 29, that information generated by the College of Physicians and Surgeons of British Columbia in the course of

its statutory conduct reviews of a physician's practice was not information related to the physician's employment or occupational history under s. 22(3)(d). He found, instead, that the information was, for the purposes of s. 22(1), "highly personal and sensitive information concerning the physician" (p. 29). However, in Order No. 226-1998, [1998] B.C.I.P.C.D. No. 19 – a case involving a review by the College of Physicians and Surgeons of the quality of a physician's treatment of a patient – he held that some of the physician's information was covered by s. 22(3)(d). I prefer the approach taken in Order No. 226-1998, which is consistent with the one I took in Order 00-11, [2000] B.C.I.P.C.D. No. 13. That case also involved a practice quality review by the College of Physicians and Surgeons. That College review, like the one involved in Order No. 226-1998, was undertaken in response to a complaint to the College and was in the discharge of the College's statutory regulatory role under the *Medical Practitioners Act*.

[123] For the reasons given above, I have found that disclosure of the mere existence or non-existence of complaint information would indirectly reveal whether negative opinions have been recorded about the professionalism or honesty of Law Society members or former members in a context where it is likely disclosure will lead to unfair damage to their reputations. I have found that it is likely that negative conclusions will be drawn, despite there being no real basis for doing so, about a member or former member of the Law Society based on the mere existence of such information. I have also found that disclosure of this information, which is covered by s. 22(3)(d), would be an unreasonable invasion of personal privacy.

[124] I will pause to note that this issue differs from that in Order 01-26, [2001] B.C.I.P.C.D. No. 27. In that case, I found that the public body had not proven that knowledge that a complaint of some unspecified nature had been made against a business could reasonably be expected to significantly harm the competitive position of the business. The significant harm test under s. 21 of the Act is, of course, different from the test under s. 22. The concept of unreasonable invasion of personal privacy cannot be collapsed into the requirement of significant harm – not just harm – under s. 21, even though one might advance consumer-oriented arguments in this case as in Order 01-26.

[125] My finding that disclosure of the existence or non-existence of complaints would be an unreasonable invasion of personal privacy applies to member history printouts because they contain a heading for complaints and a particular printout will or will not contain information under that heading. Severance of a complaint from a printout would reveal the fact that a complaint had been made and this would be a disclosure that would unreasonably invade the personal privacy of the member.

[126] If the Law Society were to adopt a practice of disclosing member history printouts, in whole or in part, in cases where no complaints are recorded, then its refusal to disclose any part of a printout where a complaint history is, in fact, recorded will by inference disclose that very fact. I alluded to this dilemma in the above discussion regarding s. 8(2)(b).

[127] This is not to suggest, of course, that all information in member history printouts is not available to the public. On the contrary, the need to withhold member history

printouts will not prevent the Law Society from, for example, disclosing citations (as described above) or responding to inquiries about whether a particular lawyer is suspended from practicing law or has been disbarred.

[128] Again, the Law Society has said it does not seek to apply s. 88(2) of the *Legal Profession Act* to information that would disclose to the applicant the existence of complaints he made against particular lawyers. Similarly, s. 22 does not require the Law Society to refuse to disclose information that would merely confirm to the applicant that he has made a complaint against any of the lawyers whose printouts are in issue here. The rest of those printouts, however, are in my view protected from disclosure by s. 22, as the applicant has not established that any part of them can be disclosed without unreasonably invading the personal privacy of the lawyer involved. None of the relevant circumstances, including those mentioned in s. 22(2), supports the conclusion that any part of the printouts can be disclosed to the applicant, even in severed form, without unreasonably invading the personal privacy of the lawyers involved. As an exception to this, the Law Society must disclose to the applicant information that would disclose to him the existence of complaints he has made against particular lawyers.

4.0 CONCLUSION

[129] For the reasons given above, I find that First Request records 5, 30, 32, 33, 120, 125, 302, 306.1, 307, 308, 309, 494, 570, 800, 801, 811, 823, 824, 826, 827, 828, 853, 855 (attachments) and 856 (attachments) and Third Request records 28, 30, 32, 61, 62, 64 are excluded from the scope of the Act by s. 3(1)(b) or (c), as the case may be. The Law Society was therefore correct to refuse to disclose all or part of these records in response to the applicant's access requests.

[130] With one very minor exception, which is addressed below, I also find that the Law Society was authorized or required by the Act to refuse to disclose all of the remaining information and records that it has withheld from the applicant. As the above reasons indicate, this finding is based on ss. 14, 19(1)(a) and 22, as appropriate. It has not been necessary for me to consider the Law Society's reliance on ss. 13, 15 or 17.

[131] Accordingly, under s. 58(2)(b) and (c) of the Act, I confirm the Law Society's decisions to refuse access, or require the Law Society to refuse access, to all or part of the disputed records, as applicable according to which exception I have found above applies in respect of each record or part of a record. Where I have found that the Law Society is authorized to refuse disclosure, I have found no ground on which to interfere with its exercise of discretion to refuse disclosure, including in relation to its discretion under s. 14.

[132] The very minor exception mentioned above relates to First Request record 378. As noted above, I have found that the Law Society is not required by s. 22 of the Act to refuse to disclose the information that it withheld from this record. Under s. 58(2)(a) of the Act, I require the Law Society to disclose to the applicant the information that it withheld from this record.

[133] I find that the Law Society conducted itself reasonably and properly in taking the extension of the time to respond under s. 10(1) that is challenged by the applicant in this inquiry. I confirm that extension of time under s. 58(3)(b) of the Act.

[134] I also find that the Law Society acted reasonably and properly under s. 75(5) of the Act in refusing to waive the fee challenged by the applicant in this inquiry. I confirm that fee under s. 58(3)(c) of the Act.

January 21, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia