



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

Order 04-16

LAW SOCIETY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
July 12, 2004

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Summary: The applicant requested information relating to two named lawyers with whom he had past dealings. The Law Society is authorized to refuse to confirm or deny the existence of certain information, is authorized to refuse access to information protected by solicitor-client privilege and is required to refuse access to third-party personal information.

Key Words: refuse to confirm or deny existence of record – solicitor client privilege – personal information – unreasonable invasion of personal privacy – employment or occupational history – public scrutiny – fair determination of rights – unfair exposure to harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(b), 14 and 22; *Legal Profession Act*, s. 88(2).

Authorities Considered: B.C.: Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-44, [2002] B.C.I.P.C.D. No. 44; Order No. 305-1999, [1999] B.C.I.P.C.D. No. 18.

Cases Considered: *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] F.C.J. No. 524 (T.D.); *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127 (F.C.A.).

1.0 INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (“Act”) to the Law Society of British Columbia (“Law Society”) for information about two lawyers. He requested the current status and summary of any disciplinary information regarding one of the lawyers and any information respecting the alleged incompetence or negligence of that lawyer and the second lawyer.

[2] The Law Society responded by providing the applicant with some publicly-available information regarding one lawyer, but would neither confirm nor deny the existence of any other requested information about that lawyer (“lawyer A”) or the second lawyer (“lawyer B”). The Law Society relies on s. 8(2)(b) of the Act in taking this position. It also withheld all or part of some records respecting lawyer B under ss. 13, 14 and 22 of the Act.

[3] The applicant requested a review of the Law Society’s decision by this office. During mediation, the Law Society disclosed one further record, record 12. It had applied s. 13(1) to this record and, in releasing it, continued to apply s. 22 to portions of it.

[4] Also during mediation, the applicant decided not to pursue his request for a review of the Law Society’s decisions regarding lawyer A, but continued to want information regarding lawyer B. The applicant specified that he was seeking further information related to the complaint he had made to the Law Society about lawyer B.

[5] Because the dispute did not fully settle through mediation, a written inquiry was held under Part 5 of the Act.

2.0 ISSUES

[6] The issues before me in this inquiry are as follows:

1. Does s. 8(2)(b) of the Act apply?
2. Does s. 13(1) of the Act authorize the Law Society to refuse to disclose information?
3. Does s. 14 of the Act authorize the Law Society to refuse to disclose information?
4. Does s. 22(1) of the Act require the Law Society to refuse to disclose third-party personal information?
5. Does s. 88(2) of the *Legal Profession Act* (“LPA”) apply to information the Law Society has refused to disclose?

[7] The Law Society must, under s. 57(1) of the Act, establish that s. 13(1) and 14 authorize it to refuse to disclose information. Section 57(2) of the Act places the burden on the applicant to establish that disclosure of personal information would not unreasonably invade third-party personal privacy.

3.0 DISCUSSION

[8] **3.1 Law Society’s Refusal to Confirm or Deny** – Section 8(2)(b) of the Act authorizes a public body to refuse to confirm or deny the existence of a “record

containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy." Only the Law Society's decision to refuse to confirm or deny the existence of any records respecting alleged incompetence or negligence by lawyer B is in issue.

[9] In Order 02-01, [2002] B.C.I.P.C.D. No. 1, I dealt with the Law Society's reliance on s. 8(2)(b) to refuse to confirm or deny the existence or non-existence of a lawyer's prior complaint history because to do so would reveal whether negative opinions were recorded about the professionalism or honesty of the lawyer in a context where there was significant likelihood of unfair damage to his/her reputation. I also found that s. 8(2)(b) did not apply to disclosing the existence of a complaint to the very person who had made it. (In this case, the Law Society's response to the applicant's access request properly acknowledged the existence of the applicant's own complaint against lawyer B.)

[10] The applicant's request for records respecting alleged negligence or incompetence by lawyer B is wider than a complaint history. For example, it could also include records relating to a practice review by the Law Society. The existence of records containing information respecting allegations of negligence or incompetence—whether in relation to a complaint or a practice review—is not a measure of the lawyer's competency or honesty, yet it is very likely to be unfairly construed as a negative indication in that respect. Other than the applicant's own complaint against lawyer B, of which the applicant is, of course, already aware, I find that s. 8(2)(b) authorizes the Law Society to refuse to confirm or deny the existence of records respecting alleged negligence or incompetence by lawyer B.

[11] **3.2 Advice or Recommendations** – Section 13(1) of the Act authorizes the Law Society to refuse to disclose "advice or recommendations developed by or for" the Law Society. The Law Society has applied s. 13(1) to portions of records 22, 92, 93, 98 and 103 that it has also claimed are protected by solicitor client privilege under s. 14 Act.

[12] In light of my finding below that s. 14 applies, I need not consider whether s. 13(1) also applies.

[13] **3.3 Solicitor-Client Privilege** – The Law Society says that s. 14, which protects information subject to solicitor-client privilege, authorizes it to withhold all or parts of records 22, 36, 53, 84, 85, 92, 93, 94, 96, 98, 100, 102 and 103. (In its initial submission, the Law Society said it no longer contends that s. 14 applies to record 1, "except where Section 88 of the *Legal Profession Act* applies" (para. 18). I will deal with this record later.)

[14] The principles to be applied under s. 14 have been discussed in a number of orders, including Order 02-01, and I will apply here the approach taken in Order 02-01.

[15] In the interests of brevity, I will not describe the records other than to say they consist of communications from an in-house Law Society lawyer to her employer, the Law Society (in some cases with attachments of various records discussed in and forming

part of the in-house lawyer's communications). Other records are communications between or on behalf of in-house Law Society lawyers, again for the purpose of providing legal advice to the Law Society. A number of these communications disclose legal advice, while others relate to the provision of legal advice, to the Law Society.

[16] I find that s. 14 authorizes the Law Society to refuse to disclose records 22, 36, 53, 84, 85, 92, 93, 94, 96, 98, 100, 102 and 103 in their entirety and on its own behalf because they are subject to legal professional privilege between the Law Society and its counsel.

[17] **3.4 Personal Privacy** – Section 22, which protects third-party personal information, has figured in many cases. I will apply the approach to s. 22 taken in Order 01-53, [2001] B.C.I.P.C.D. No. 56 and Order 02-01, without repetition here.

Presumed unreasonable invasions of personal privacy

[18] The Law Society has withheld all or part of records 1, 6, 22, 24, 26, 27, 29, 31, 44, 45, 49, 50, 51, 52, 53, 54, 57, 58, 60, 61, 65, 66, 67, 69, 70, 73, 74, 76, 77, 79, 82, 83, 84, 85, 86, 87, 92, 93, 94, 95, 97, 98, 100, 101 and 103 on that basis that disclosure would unreasonably invade third-party personal privacy under s. 22(3)(a), (b), (d) or (f) of the Act. I agree with the Law Society's assessment of the presumptions in s. 22(3) in relation to the information it has withheld under s. 22.

Relevant circumstances

[19] Before turning to circumstances that might be relevant, as contemplated by s. 22(2), I will say at once that the death of lawyer B, who passed away a few years ago, does not deprive him of privacy rights. As I noted in Order 02-44, [2002] B.C.I.P.C.D. No. 44, one's privacy does not end with death. See, also, Order No. 305-1999, [1999] B.C.I.P.C.D. No. 18.

[20] As for circumstances that might be relevant in determining whether this third-party personal information can be disclosed, the applicant contends that he already knows certain personal information about lawyer B from Law Society correspondence. He says lawyer B lied to him and was incompetent and that the Law Society is merely trying to protect one of its members. He says that his liberty interests are at stake here.

[21] Bearing in mind the nature of the information in dispute under s. 22, nothing in the applicant's submissions or the other material before me favours the conclusion that, despite the presumed unreasonable invasions of personal privacy, the information can be disclosed to the applicant.

[22] I find that s. 22(1) requires the Law Society to refuse to disclose the third-party personal information that it withheld from the above-noted records.

[23] **3.5 Section 88(2) of the *Legal Profession Act*** – At para. 28 of its initial submission, the Law Society says records 1, 22, 69, 92, 93, 98, 100 and 103 contain confidential and solicitor-client privileged information that the LPA requires it to withhold under s. 88(2). In the next paragraph, the Law Society says s. 88(2) removes any discretion it would otherwise have under s. 14 of the Act—s. 88(2) requires the Law Society to refuse to disclose any information that a lawyer would be required to protect due to client privilege or a duty of confidentiality. At para. 37 of its initial submission, the Law Society says this:

In the present case, all of the documents to which Section 88(2) has been applied are privileged and Section 14 has been applied to exempt them from production.

[24] Section 88(2) of the LPA reads as follows:

Non-disclosure of privileged and confidential information

88(2) 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 the disclosure of that information as the person from whom the information, files or records were obtained.

[25] In Order 02-01, I explained the effect of s. 88(2) of the LPA as follows:

[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).

[26] The Law Society is obliged to assert privilege over information, files or records that it acquires in the course of carrying out duties under the LPA and that are subject to solicitor client privilege to another’s benefit.

[27] Under the Act, the Commissioner, or delegate, conducts independent reviews of decisions made by public bodies under the Act, including decisions to refuse access on the ground of solicitor client privilege. Under s. 56(1), the Commissioner may decide all questions of fact and law arising in the course of an inquiry and s. 58 requires the Commissioner to resolve the right of access when the inquiry is into a decision to give or refuse access to all or part of a record. If the Commissioner concludes that a public body has not made a proper decision, an order for compliance is made under s. 58 and that can be challenged by an application for judicial review in the British Columbia Supreme Court. The function of actually giving or refusing access to requested records rests with the public body, not the Commissioner.

[28] The Commissioner does not simply record the Law Society’s decision to assert privilege. The applicant in this case is already aware of the Law Society’s decision to refuse access to all or part of requested records on various grounds, including s. 14 of the Act and s. 88(2) of the LPA. That is why he requested a review. It is the task of the Commissioner to resolve the right of access under the Act, including the applicability of s. 88(2) of the LPA, on the basis of evidence.

[29] Section 44 of the Act empowers the Commissioner to require the production of records and to examine information in them, including solicitor client privileged records or information, and it confirms that the force of solicitor client privilege is preserved despite disclosure to the Commissioner:

- 44(1) In conducting an investigation under section 42 or an inquiry under section 56, the commissioner has the powers given to the commissioner by sections 15 and 16 of the Inquiry Act.
- (2) The commissioner may require any record to be produced to the commissioner and may examine any information in a record, including personal information.
- (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1) or (2), the solicitor client privilege of the record is not affected by the disclosure.
- (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

[30] In all this, the Commissioner is obliged to maintain the sanctity of solicitor client privilege and may not disclose privileged records or information acquired in performing his duties, powers and functions under the Act. This applies to both records that are the object of an access request and other records or information the Commissioner acquires for the purpose of determining the right of access to the requested records.

[31] There is no equivalent of s. 44(2.1) of the Act in the federal *Access to Information Act* (“ATIA”), but s. 36(2) of the federal statute is similar to s. 44(3) of the Act and reads as follows:

36(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

[32] Section 36(2) of the ATIA was recently considered by the Federal Court of Canada in *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] F.C.J. No. 524 (T.D.), at paras. 351-363. Section 46 of the ATIA, which mirrors s. 36(2) with respect to judicial review proceedings in the Federal Court, was judicially considered in *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127 (F.C.A.).

[33] In these cases, the Federal Court rejected a restrictive interpretation of the authority of the Information Commissioner to require production and to examine records that are solicitor-client privileged or claimed to be so. The Court recognized that sensitive information was to be provided to the Commissioner and the Court so they could properly perform their review functions. The Commissioner and the Court had a duty to protect privileged information received during the course of a review or a judicial review. The “obstacle of privilege” was eliminated by s. 36(2) and s. 46 of the *Access to Information Act* (Canada).

[34] As I said in Order 02-01, s. 88(2) of the LPA is an override provision within the meaning of s. 79 of the Act. The override of s. 14 of the Act means that the Law Society’s obligation not to disclose solicitor client privileged information, files or records it has acquired under the LPA prevails over the discretion in s. 14 of the Act not to claim solicitor client privilege.

[35] Section 88(2) of the LPA does not, however, override other provisions in the Act, including s. 44. It explicitly refers only to s. 14 of the Act. It remains the duty of the Commissioner to review public body decisions under the Act. This role entails examining records and considering evidence for the purpose of resolving the right of access in any given case, including those involving solicitor client privilege and s. 88(2) of the LPA. Section 44(2.1) of the Act explicitly confirms that the Commissioner’s examination of a solicitor client privileged record does not affect the privilege.

[36] The Law Society has provided virtually no evidence in this inquiry respecting the applicability of s. 88(2) of the LPA. Sometimes the applicability of a statutory provision is apparent from the face of a record provided by the public body, but that is not true of s. 88(2) of the LPA and the material provided by the Law Society here. I am unable to confirm the applicability of s. 88(2) of the LPA. The information the Law Society says falls under s. 88(2) is subsumed, however, in records that I have found may in any case be withheld in their entirety under s. 14 to the benefit of the Law Society (records 22, 92, 93, 98, 100 and 103) or must be withheld in their entirety under s. 22(1) to protect third-party personal privacy (records 1 and 69).

4.0 CONCLUSION

[37] For the reasons given above, I make the following orders under s. 58 of the Act:

1. I confirm that the Law Society is authorized by s. 8(2)(b) to refuse to confirm or deny the existence of information;
2. I confirm that the Law Society is authorized to refuse to disclose information it has withheld under s. 14; and
3. I require the Law Society to refuse to disclose the personal information that it has withheld under s. 22(1).

July 12, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia