



OFFICE OF THE
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Order F18-29

LAW SOCIETY OF BRITISH COLUMBIA

Erika Syrotuck
Adjudicator

July 23, 2018

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Summary: The applicant requested records relating to a complaint that he made about a lawyer employed by the Law Society. The Law Society withheld some information under ss. 14 (solicitor client privilege) and 22 (harm to third party personal privacy). The adjudicator confirmed that the Law Society is authorized to refuse to disclose the information in dispute under s. 14 and required, in part, to refuse to disclose the information in dispute under s. 22.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), (22)(2)(f), 22(3)(d), 22(4)(e).

INTRODUCTION

[1] The applicant requested that the Law Society of British Columbia (Law Society) provide him with a complete copy of files relating to a complaint he made about one of its lawyers. The Law Society provided records to him but withheld some information under ss. 14 (solicitor client privilege) and 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Law Society's decision to withhold the information. Mediation did not resolve the issues and the matter proceeded to inquiry.

ISSUES

[2] The issues in this inquiry are:

1. Is the Law Society authorized to refuse to disclose information under s. 14?
2. Is the Law Society required to refuse to disclose information under s. 22(1)?

[3] Under s. 57(1), the burden of proof is on the Law Society to establish that the applicant has no right of access to all or part of the records in dispute under s. 14. In accordance with s. 57(2), the applicant has the burden of proving that disclosing the information in dispute would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).

DISCUSSION

Background

[4] The applicant complained to the Law Society about a lawyer employed by the Law Society (Lawyer). The Law Society hired an external lawyer to review the applicant's complaint (External Lawyer). The applicant made a request for all records related to his complaint to the Law Society.

Records in Dispute

[5] The Law Society withheld four records in their entirety under s. 14:

- A statement of account from the External Lawyer (Statement of Account);
- A retainer letter to the External Lawyer (Retainer Letter); and
- Two sets of emails between the External Lawyer and the Law Society's Manager of Intake and Early Resolution (Emails).

[6] The Law Society withheld information in an additional seven records under s. 22(1). Four of the records are about the applicant's complaint (Complaint Records) and the Law Society withheld a small amount of information from each. The remaining three records are printed reports about the Lawyer that are generated from a computer system (Reports). The Law Society withheld the Reports in their entirety.

Section 14

Legal Advice Privilege

[7] Section 14 permits a public body to refuse to disclose information that is subject to solicitor client privilege, including legal advice privilege. Previous OIPC orders¹ have applied the following test for legal advice privilege:

[T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;
2. the communication must be of a confidential character;
3. the communication must be between a client (or his agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.²

[8] I will apply the same test here.

Records not provided

[9] The Law Society did not provide me with the records in dispute under s. 14. Instead, it provided an index of the records with a brief description of each record including the parties involved in the records.

[10] The Law Society also provided affidavit evidence from the lawyer who was the Manager of Intake and Early Resolution (Manager) at the time the records were created.³ The Manager's evidence is that she was responsible for retaining, instructing and responding to the External Lawyer's communications.⁴

[11] Based on the Law Society's submissions, index and affidavit evidence from a lawyer who was personally involved in the communications, I determined

¹ Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10.

² R. v. B., 1995 CanLII 2007 (BC SC) at para. 22.

³ The Manager is now the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society of BC.

⁴ Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at para. 13.

that I had enough information to make a decision regarding solicitor-client privilege and did not need to review the records.

Parties' evidence and submissions

[12] The Law Society submits that the records in dispute are communications between the Law Society and the External Lawyer, who is a practicing lawyer in BC.⁵ The Manager says that the relationship between it and the External Lawyer was at all times intended to be a solicitor client relationship.⁶ The Law Society's Information and Privacy Officer says that the retainer agreement expressly provides that the External Lawyer was being retained as the Law Society's "counsel."⁷

[13] The Manager says that the External Lawyer was retained to investigate the complaint against the Lawyer and provide the Law Society with legal advice about whether the complaint disclosed facts that could amount to a discipline violation and if so, to provide advice and recommendations on its disposition and related matters.⁸ The Manager further states that the records were prepared for the purposes of seeking and receiving legal advice and include privileged communications as well as information from which privileged information may be inferred.⁹

[14] The Law Society submits that it expressly instructed the External Lawyer to keep all matters strictly confidential and the Law Society treated the communications as confidential.¹⁰ The Manager says that the External Lawyer was instructed to keep all records related to her retainer confidential.¹¹ The Manager says that the content of the records in dispute have been maintained in confidence, and that the Law Society has not disclosed the content of the communications to third parties or otherwise waived privilege.¹²

⁵ Law Society Initial Submissions at para. 46.

⁶ Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at para. 13.

⁷ Affidavit of the Information and Privacy Officer, at para. 8(c)(i).

⁸ Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at paras. 5 and 13.

⁹ Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at para. 12.

¹⁰ Law Society Initial Submissions at para. 47.

¹¹ Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at para. 11.

¹² Affidavit of the Manager of the Investigations, Monitoring and Enforcement Group of the Law Society, at para. 13.

[15] The applicant's submissions did not address whether the records in dispute are subject to legal advice privilege.¹³

Retainer Letter and Emails

[16] In *College of Physicians and Surgeons*, the BC Court of Appeal commented on how legal advice privilege applies in the context of a lawyer who is conducting an investigation:

Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client...¹⁴

[17] In my view, the Law Society's evidence establishes that the Retainer Letter and Emails are protected by solicitor client privilege. I am satisfied that there was a solicitor-client relationship between the Law Society and the External Lawyer, and that any investigating done by the External Lawyer was for the purposes of giving legal advice to the Law Society. I am further satisfied that the Retainer Letter¹⁵ and Emails contain confidential communications related to seeking, formulating or giving legal advice.

Statement of Account

[18] The Law Society is claiming privilege over the Statement of Account. The Supreme Court of Canada has established that there is a presumption of privilege regarding billing information contained in lawyer's statement of accounts or other documents.¹⁶ In *School District 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, the BC Supreme Court confirmed that the correct approach to determining whether the presumption has been rebutted is to ask two questions:

¹³ In his submissions, the applicant asks for legal representation in order to allow him to actively participate. Prior to the start of the inquiry, the OIPC advised the applicant that it does not provide legal representation and that he may want to retain his own lawyer.

¹⁴ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665 at para. 32.

¹⁵ This is consistent with previous OIPC orders and case law, which have also found that the terms of a solicitor client relationship contained in a retainer letter meet the requirements of solicitor client privilege. See *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203, at para. 13, upheld on appeal, Order F13-15, 2013 BCIPC 18, at para. 16; Order F15-15, 2015 BCIPC 16 at para. 17.

¹⁶ *Maranda v Richer*, 2003 SCC 67 at para. 33.

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and;
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?¹⁷

[19] The Law Society states that the Statement of Account includes detailed descriptions of the professional services provided by the External Lawyer, including the dates on which the services were provided, the hours spent providing services on each date, and the total amount of fees, taxes and disbursements charged for the services.¹⁸

[20] Based on the evidence before me, I accept that the information in the Statement of Account is billing information and as such, that it is presumptively privileged. Neither the Law Society nor the applicant address whether the billing information could reveal any communication protected by privilege.

[21] Having reviewed the evidence before me and being aware of the nature and context of the records,¹⁹ I am not satisfied that the presumption has been rebutted. In my view, it is clear that the descriptions of professional services could reveal privileged communications. I am also satisfied that there is a reasonable possibility that disclosure of the billing information including the hours spent providing services on each date and the total amount of fees, taxes and disbursements would allow inferences to be made about privileged communications. This is because the External Lawyer was retained for the purpose of responding to his complaint, so the applicant is aware of background information. For example, he knows how many letters he received from the External Lawyer and on which dates. There is a reasonable possibility that disclosure of this information could allow inferences to be made about privileged communications, such as how much time the Lawyer was instructed to spend responding to the applicant's complaint. The presumption attached to the billing information in the Statement of Account has not been rebutted.

[22] In summary, I find that the Law Society has established that the Retainer Letter, Emails and Statement of Account are all protected by solicitor client privilege and may be withheld under s. 14.

¹⁷ *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)* [Central Coast], 2012 BCSC 427 at para. 104.

¹⁸ Affidavit of the Information and Privacy Officer of the Law Society of British Columbia, at para. 8.

¹⁹ In *Central Coast*, the applicant did not put forth evidence to rebut the presumption and the BC Supreme Court found that the Commissioner could take the nature and context of the information into account in determining if a claim of privilege should be upheld. See *Central Coast*, paras. 107-115.

Section 22

[23] The Law Society withheld a small amount of information in the Complaint Records and all of the information in the Reports under s. 22. The withheld information pertains to the Lawyer.

[24] Section 22 requires that a public body withhold personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. The portions of s.22 pertaining to this inquiry state:

(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(f) the personal information has been supplied in confidence,

...

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

...

Personal Information

[25] The first step in a section 22 analysis is to determine whether the information is personal information.

[26] FIPPA defines personal information as “recorded information about an identifiable individual other than contact information.” FIPPA defines contact information as “information to enable an individual at a place of business to be

contacted and includes the name, position or title, business telephone number, business address, business email or business fax number of the individual.”²⁰ Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.²¹

[27] There is a header at the top of the first page of each of the Complaint Records containing information about the Lawyer. The Law Society disclosed his name, gender, call date and practicing status, but withheld two identification numbers, his insurance status and his year of birth. I find the withheld information is about an identifiable individual. Therefore, it is “personal information” as defined by FIPPA.

[28] The Reports contain extensive information about the Lawyer’s history as member of the Law Society. The Reports contain many headings. For example, some of these headings relate to former employers, discipline history, information about professional development and fees paid to the Law Society. Where the headings contain entries, the information in the entries is the Lawyer’s personal information because it is clearly about him. The text of each heading, on its own, does not contain the Lawyer’s personal information. However, due to the spacing under each heading, disclosing the headings would allow a reader to identify which ones contain entries and which do not. For this reason, I find that disclosing the headings would reveal information about the Lawyer. Therefore, in this context, the headings are also the Lawyer’s personal information.

[29] The remaining information in the records, such as page numbers is not personal information.

Section 22(4)

[30] The next step in the analysis is to identify which, if any, circumstances listed under s. 22(4) apply to the personal information in dispute. Section 22(4) describes circumstances where disclosure of personal information is not an unreasonable invasion of personal privacy.

[31] Section 22(4)(e) provides that information about a third party’s position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister’s staff is not an unreasonable invasion of third party personal privacy.

[32] The Law Society submits that s. 22(4)(e) does not apply because the personal information in this case does not relate to the Lawyer’s employment

²⁰ *Freedom of Information and Protection of Privacy Act*, Schedule 1.

²¹ See for example, Order F16-38, 2016 BCIPC 42 (CanLII) at para. 112; Order F13-04, 2013 BCIPC 4 (CanLII) at para. 23.; Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.

functions or his position or remuneration as an employee of the Law Society. It says that it is information held by the Law Society as a professional regulatory body about the Lawyer as a member of the legal profession.²²

[33] In my view, the Reports exist as a result of the Lawyer's membership in the Law Society as a practicing lawyer rather than as a result of his employment with the Law Society. I find that s. 22(4)(e) does not apply to any of the information in dispute.

Section 22(3)

[34] The next step is to consider whether the personal information in dispute is presumed to be an unreasonable invasion of a third party's personal privacy under s. 22(3). The Law Society submits that s. 22(3)(d) is applicable because the personal information relates to the Lawyer's employment, occupational and educational history. It says that the personal information includes a summary of significant details pertinent to the Lawyer's professional history and prior employment.²³

[35] The Reports describe the Lawyer's professional history as it relates to his membership in the Law Society. This information clearly relates to the Lawyer's employment, occupational and educational history. Similarly, the information in dispute in the Complaint Records relates to the complaint the applicant made about the Lawyer in his professional capacity, and therefore relates to the Lawyer's occupational history.²⁴ I find that s. 22(3)(d) applies to all of the personal information in dispute.

Section 22(2) circumstances

[36] The next step is to consider all relevant circumstances, including the circumstances listed under s. 22(2) to determine if the disclosure of the personal information is an unreasonable invasion of third party personal privacy. It is at this stage that any presumptions under s. 22(3) can be rebutted.

[37] The Law Society submits that s. 22(2)(f) applies and favours withholding the personal information in dispute. It says that the personal information is confidential and not made available to third parties outside of the Law Society.²⁵

²² Law Society Initial Submissions at para. 28.

²³ Law Society Initial Submissions at para. 30.

²⁴ This finding is consistent with previous orders interpreting "occupational history". For example, in Order 02-01, 2002 CanLII 42426 (BC IPC) at para. 121, former Commissioner Loukidelis found 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.

²⁵ Affidavit of the Information and Privacy Officer of the Law Society of British Columbia, at para. 8.

[38] In order for s. 22(2)(f) to apply, the personal information must have been supplied in confidence. In my view, some of the information appears to have been generated by the Law Society rather than “supplied.” The Law Society did not address whether the information was “supplied” in its submissions. However, in my view, the personal information in dispute is the type of information that is sensitive and confidential, which weighs in favour of withholding the information in dispute.

[39] The header on the Reports contains the same personal information as the header on the Complaint Records. The Law Society has already disclosed the Lawyer’s name, gender, call date and practicing status in the header of the Complaint Records. The Law Society did not provide an explanation about why it made the decision to sever this personal information inconsistently. The information is not particularly sensitive. The fact that the Law Society has already disclosed some information is a circumstance that weighs in favour of disclosure of the same information elsewhere in the records.

Conclusion on Section 22

[40] I find that all of the information is the Lawyer’s personal information and that disclosure is presumed to be an unreasonable invasion of his personal privacy because it relates to his employment, occupational or educational history. The confidential and sensitive nature of the information in the Reports and the Complaint Records weighs in favour of refusing access. Except for a small portion of the information in dispute, there are no circumstances that rebut the presumption that disclosure would be an unreasonable invasion of the Lawyer’s personal privacy.

[41] I find that the presumption is rebutted for the information in the header of the Reports. The Law Society has already disclosed it to the applicant in the Complaint Records and the information is not sensitive. Disclosing this information again would not be an unreasonable invasion of the Lawyer’s personal privacy.

CONCLUSION

[42] Under s. 58(2) of FIPPA and in accordance with the reasons above:

1. I confirm that the Law Society is authorized to refuse to disclose the information it withheld on the basis of s.14.
2. I require the Law Society refuse to disclose the information it withheld on the basis of s. 22 except for the information in the header of the Reports. I have highlighted this information in a copy of the records being sent to the Law Society along with this order.

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3. I require the Law Society to give the applicant access to the highlighted information by September 5, 2018. The Law Society must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

July 23, 2018

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F17-69710