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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 322-1999
July 30, 1999

****** This Order has been subject to Judicial Review ******

INQUIRY RE: Legal Services Society's refusal to release the names and amounts paid to the top five "billers" for 1998 for immigration matters and criminal cases

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 26, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Legal Services Society (the Society) to withhold records requested by Adrienne Tanner, a reporter for The Province (the applicant).

2. Documentation of the inquiry process

On January 12, 1999 the applicant submitted a request to the Society for information on billing statistics, including a list of 1998's top five billers for immigration matters and the top five billers for criminal matters by name and amount billed. On February 19, 1999, the Society denied access under sections 14 and 22 of the Act and responded that the release of this information in the form requested would be an unreasonable invasion of privacy for the third parties.

On February 24, 1999 the applicant requested that this Office review the Society's decision. The ninety-day period ended on May 25, 1999. The Office sent the Notice of Written Inquiry to the parties on April 22, 1999 setting the inquiry for May 26, 1999 (due to May 24, 1999 being a statutory holiday).

3. Issues under review and the burden of proof

The issues in this inquiry concern the Society's application of sections 14 and 22 of the Act to a list of the names of the top five billers in immigration cases and the top five billers in criminal cases. Section 14 of the Act reads as follows:

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

The relevant parts of section 22 are as follows:

> ***Disclosure harmful to personal privacy***
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> ...
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,
>
> (g) public access to the information is provided under the *Financial Information Act*,
>
> ….

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), if the public body refuses to grant access to all or part of a record it is up to the head of the public body, in this case the Society, to prove that the applicant has no right of access to the record or part. Under section 57(2), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. Procedural objections

The Canadian Bar Association, to which I granted intervenor status, raised an objection as to the refusal by my Office to provide copies of the parties' submissions to them. The Canadian Bar Association felt that this refusal was inconsistent with the rules of natural justice. However, the role of an intervenor is different from that of the parties in the context of this type of inquiry, where disclosure of submissions may raise privacy concerns.

The Canadian Bar Association also requested that, should I decide that the information should be released, I provide the Association with the opportunity to consider a judicial review of my decision prior to the actual release of the records. The head of a public body has 30 days to comply with an order for disclosure. If a judicial review application is filed before the expiration of 30 days, the order for disclosure is stayed, until a court otherwise orders by virtue of section 59(2) of the Act.

5. The records in dispute

The records in dispute are billing statistics, including a list of 1998's top five billers for immigration matters and the top five billers for criminal matters by name and amount billed. The only information now in dispute concerns the names of these ten persons.

6. The applicant's case

Since the applicant's initial submission is quite brief, I have quoted it almost verbatim:

> Lawyers, when they work for the Legal Services Society, are paid by tax dollars and as such, the payments should be a matter of public record. In some respects, they already are.
>
> The Legal Services Society publishes a yearly schedule of payments to suppliers of goods and services paid more than $10,000. Individual lawyers are named in this yearly account.
>
> I fail to see why the information I asked for should be treated differently. I have already been provided a list of the top five criminal and immigration billers with names excluded. Since this very information will eventually be published in the next yearly payment schedule, I don't see why the names shouldn't be provided now.
>
> I understand the lawyers' concerns that the billing numbers sometimes represent the work of more than one lawyer billing under one legal services number. In cases where this is the case, the society should note

> the number of lawyers billing under the number to make sure the gross number is not seen to be the work of one individual.
>
> The Legal Services Society is funded through tax dollars and the public has the right to know how that money is being spent. I can see no reason for withholding this information. (Submission of the Applicant, p. 1)

7. The Legal Services Society' case

After the applicant refined the original request, the Society contacted the third parties involved. (Submission of the Society, paragraphs 4 to 8) The Society decided to disclose the billing amounts for the top billers in criminal and immigration cases, itemized as fees, disbursements, and GST: "however, it declined to release the names of the lawyers based on concerns relating to solicitor-client privilege and confidentiality, and the protection of personal privacy." (Submission of the Society, paragraph 8)

I have discussed below the Society's submissions on the application of sections 14 and 22 of the Act in greater detail.

8. The third parties' cases

I reviewed three submissions from third parties, all of which were made on an *in camera* basis.

9. The Canadian Bar Association's case as an intervenor

The Canadian Bar Association submits that disclosure of the names of the highest billing lawyers would be a breach of solicitor-client privilege. (Submission of the Canadian Bar Association, p. 4)

The Canadian Bar Association's submission with respect to section 14 is neatly encapsulated in the following paragraph:

> Although specific billing records are not the subject matter of this application, the same principles regarding the nature of the solicitor-client privilege are applicable. The information which has been withheld by the Legal Services Society to this point would, if released, breach the privilege owed to the clients of the solicitors. As agent for those solicitors, the Society is bound not to make such a disclosure. Thus, the information the applicant requests must be withheld under the s. 14 exception. (Submission of the Canadian Bar Association, p. 2)

The Canadian Bar Association further submits that disclosure of the names of the lawyers in question would be an unwarranted invasion of their personal privacy on the basis of sections 22(3)(d) and (f) of the Act.

10. The Radio Television News Directors Association of Canada, British Columbia Region's case (the Association) as an intervenor

The Association supports the applicant's request for access to the information in dispute. It submits that public scrutiny of the spending of the Legal Services Society includes examining how it spends the large majority of its budget:

It points out that the top billers' fees comprised a large portion of the total fees paid out by the Legal Services Society. This means that effective public scrutiny requires examination of the top billers' fees, at least to the point of knowing the amounts and the area of law that they fell under.

The Association also emphasizes that the names and total billings of lawyers doing legal aid work are already public knowledge through published listings of such information.

The Association also addresses the public interest concern raised by this issue:

> It is rare for a day to go by without a concern about the deficit appearing in the media. Public opinion polls consistently put the deficit amongst the top two or three public concerns. This speaks volumes about the profound public interest in the expenditure of public funds, and in the importance of public scrutiny to ensure taxpayers get value for money from its public bodies. The only way to intelligently address that public interest is to ensure access to the information about where the money is going. Whether that scrutiny satisfies taxpayers, shocks them, or engages them in healthy public debate about priorities, it achieves a vital public goal.

The Association submits that lawyers' names are far from private, since they are readily available from many sources. Further, it is hardly a private matter that individual lawyers engage in legal aid work or work in immigration or criminal law. In addition, the annual amounts that such lawyers obtain from the Society are already public knowledge. The Association contends that the applicant simply wants the information when it is more newsworthy than when it is eventually published under the *Financial Information Act*.

11. Discussion

Section 14: Legal advice

The Society has emphasized the fact that all information disclosed by a client or an applicant for legal services is treated as if privileged by section 12(1) of the *Legal Services Society Act*, chapter 5 of the *Professional Conduct Handbook* of the Law Society of British Columbia, and the Society's own Client and Applicant Confidentiality Policy. (Submission of the Society, paragraphs 21 to 24)

The Society referred to the Supreme Court of British Columbia's consideration of the relationship between solicitor-client privilege and the Society's obligations under the Act in quashing my Order directing the Society to produce records of the total amounts billed by a defence lawyer in two high profile murder trials. Justice Lowry stated that:

> ... it is my view that the protection s. 14 affords extends to all information in the hands of the Society, not just to information on the face of a record requested.... The question to be asked must be whether granting access to a record requested will disclose *any* information, directly or indirectly, that is the subject of solicitor-client privilege, *Legal Services Society* v. *British Columbia (Information and Privacy Commissioner),* (1996) 140 D.L.R. 94th) 372 (B.C.S.C.)

The Society states the core of its case to be as follows:

> The *LSS* case states that the key question is whether granting access will disclose <u>any</u> information directly or <u>indirectly</u>, that is the subject of privilege. The Society submits that although the applicant's request in this case does not, on its face, seek information relating to a specific client or case, it targets communications made in the framework of a solicitor and client relationship. The records requested did not exist prior to the request. The aggregate figures derive from the individual statements of account submitted by lawyers. The case law is clear that these accounts are 'communications made within the framework of the solicitor-client relationship.'
>
> Moreover, the Society submits that the applicant's request for gross billing amounts, if successful, may result, now or in the future, in the indirect release of information that the *LSS* case identified as subject to privilege. By acceding to this or similar requests, the Society would increase the danger that confidential information about a client will be released without proper authority.
>
> The Society submits that releasing the requested records, in this instance or in the future, might enable someone to confirm the nature and terms of a lawyer's retainer agreement with a client. For example, if a lawyer represented a client in a lengthy trial, and an applicant requested details of that lawyer's total billings to the Society during that period, an applicant could confirm (a) the nature of the retainer (legal aid) and (b) the financial terms of the retainer. (Submission of the Society, paragraphs 35-37)
> ...
> The Society submits that the requested records are derived from statements of account submitted by private lawyers that are clearly subject to privilege. The Society, its employees, and agents are subject to a solicitor's duty of confidentiality. The Society, as agent to the solicitor-

> client relationship, is required to prevent disclosure, directly or indirectly, of all communications made within the framework of that relationship. The third parties submitted their accounts with the expectation that the Society would keep the information confidential. The solicitor-client context of the relationship, and the associated duty of confidentiality, distinguish the present request from that considered in *Order No. 24-1994*, in which the Commissioner ordered the disclosure of the financial details of severance packages paid to departing hospital employees. (Submission of the Society, paragraph 44)

The Society argues that any disclosure "enabling an applicant to refine the scope of such disclosure [under the *Financial Information Act*] by identifying an area of practice, or narrowing the time frame, increases the danger that privileged information will be disclosed, directly or indirectly." (Submission of the Society, paragraph 38) This concern can be addressed by other safeguards. If, for example, the billing information for a lawyer only relates to a small number of cases, there may be a basis for non-disclosure. However, I must make my determination on the basis of the specific information at issue in this inquiry.

I recognize that the Society must "adopt a cautious approach," but there is still an obligation to comply with the requirements of the *Freedom of Information and Protection of Privacy Act*. In my view, the names of the lawyers themselves are not privileged because they are not being considered for release in the context of a single client, as was the situation in the Order reviewed by Justice Lowry, referred to earlier. Section 14 does not restrict the publication of the names of lawyers who receive funding from the Society for purposes of delivering legal services, especially since these names are disclosed under the *Financial Information Act*. The purpose of section 14 is to protect the confidentiality on behalf of clients, not lawyers.

The Canadian Bar Association raised a concern regarding the increasing accessibility of information about the names of clients and counsel on a particular matter in the courts of the province:

> As a result, a person possessing the names of the top billing lawyers, knowing that legal aid matters would certainly comprise the majority, if not the entirety, of their trial work, could determine which clients had used the resources of the Legal Services Society to fund their litigation. (Submission of the Canadian Bar Association, p. 4)

The Canadian Bar Association submits that such a result flies in the face of the results of the judicial review of my Order No. 74-1995, December 22, 1995, referred to above. Such risks exist with the disclosure of any information under the Act and may become a more serious risk for the Legal Services Society as court records are automated.

I recognize that the Legal Services Society must exercise caution in releasing the names of leading billers for services in order to ensure that identification of one or two

clients of that particular lawyer is not possible. The Legal Services Society knows how many clients a lawyer billed for in a particular time period. If, for example, all of the services of a particular leading biller were for a very small number of clients, there may be a proper basis for the Society to refuse to disclose that total billing amount, because it might facilitate the identification of specific clients.

Unless this is the case, I find that the information in dispute is not subject to solicitor-client privilege and that disclosure would not reveal information that is subject to privilege.

Section 22: Disclosure harmful to the personal privacy of third parties

The Society's key submission under this section of the Act is as follows:

> The Society submits that by releasing the gross billing amounts of the "top billers", while severing the names, the Society struck an appropriate balance between the competing values raised in this case. The partial release of information concerning "top billers" in criminal and immigration law does enable the public to scrutinize the Society's expenditures. However, the Society submits that while releasing the names would lead to a negligible increase in public scrutiny, it would substantially increase the risk of disclosure of privileged or confidential information, and invade unreasonably the personal privacy of the third parties. The Society submits that the onus remains on the applicant to demonstrate with "clear and compelling evidence" that the release of the names would increase public scrutiny to a degree that warrants the attendant risks to confidentiality and intrusions upon personal privacy. (Submission of the Society, paragraph 44)

The Society and the Canadian Bar Association submit that the personal information in dispute must be withheld on the basis of sections 22(3)(d) and (f) of the Act. In my view, the amount a specific lawyer bills the Legal Services Society is not part of his or her employment, occupational, or educational history. The Society argues that the requested information "falls squarely within subsection 22(3)(f) as it relates directly to the third parties' finances, income, financial history or activities, and creditworthiness." (Submission of the Society, paragraph 42) While the billing information may relate to the third parties' financial activities, it must be considered in light of section 22(4)(f).

The Bar Association makes the following argument in relation to section 22(3)(f):

> ...we submit that there is a real danger in releasing the personal information attached to the billed amounts. Assuming that the lawyers who bill the Legal Services Society the most have a practice which focuses on legal aid work, revealing their names would reveal their financial situation and income to members of the public. Lawyers in

> private practice are not obligated to reveal the amounts they bill on any given file, or the total amounts they bill to any given client. It is our submission that it would unfairly discriminate against those lawyers that provide legal aid to release their names and the amounts they received from the Legal Services Society to the public. (Submission of the Canadian Bar Association, p. 8)

However, this submission also flies in the face of section 22(4)(f).

Section 22(4)(f): A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if…the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

The Society concedes that the information reveals financial details of contracts for legal services to a public body:

> The Society contracts with the third parties to provide legal services to clients, so that the requested information would disclose financial details of contracts for services with the Society. However, it is the unique nature of those contracts as retainer agreements between private bar lawyers, clients, and the Society as agent to the solicitor-client relationship that raises concerns about privilege and confidentiality. For this reason, the Society submits that the Commissioner ought to attach less weight to subsection 22(4)(f) in the present circumstances. (Submission of the Society, paragraph 43)

However, section 22(4)(f) provides that disclosures that reveal financial and other details of a contract to deliver services to the Society is not an unreasonable invasion of the privacy of third parties. On this point, the Act is quite clearcut: section 22(4)(f) overrides the presumptions set out in section 22(3) of the Act.

22(4)(g) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if…public access to the information is provided under the Financial Information Act,

The Society must annually publish a "Schedule of Payments to Suppliers of Goods and Services" (the Schedule) for those contractors, including private bar lawyers, whom the Society pays more than $10,000 in a fiscal year. The Schedule lists suppliers alphabetically by name and amounts billed, but does not include other identifying information. (Submission of the Society, paragraph 3) The information in dispute has therefore been, or will be, published, except for one "top biller" whose billings were under $10,000.

The Society attempts to distinguish the personal information in this inquiry from the information which must be disclosed under the *Financial Information Act* (*FIA*):

> The Society submits that the present request differs from the disclosure authorized by the *FIA* in at least five ways: (i) it addresses only lawyers, not all service providers; (ii) it identifies lawyers with specific areas of practice; (iii) it seeks a relative ranking of the lawyers within each practice area; (iv) it seeks only the top five in each category, not the whole range of billings; and (v) it covers a time period that is different, and indeed shorter, than that specified in the *FIA*. Accordingly, as the requested information is materially different from that disclosed under the *FIA*, the Society submits that the public does not in fact have access to the requested information under its provisions. Moreover, as the requested billing amounts derive from accounts submitted within the framework of the solicitor-client relationship, the *FIA* disclosure requirement is an exception to the general rule of confidentiality, and must be narrowly construed: *Descoteaux*.

With respect, I find some of the listed distinctions unpersuasive regarding the application of section 22. The refinements in this request are quite typical of those that applicants routinely make to other public bodies in the course of making access requests. If the Society can provide such information (as it obviously can), then it may have to disclose it under the Act.

It seems to me that this subsection is directly relevant to the decision that I have to make in this inquiry, since the *Financial Information Act* does authorize the disclosure of the names of individual billers. Hence, in my view, this subsection undermines the Society's reliance on subsection 22(3) to argue against disclosure on the grounds of unreasonable invasion of the privacy of these third parties.

Consent to disclosure

The issue of consent by lawyers is only relevant to the application of section 22 of the Act. Seven of the ten lawyers contacted as third parties objected to the disclosure of their billing records. However,

> The Society declined to release the names of the third parties who gave full or qualified consent to disclosure, based on concerns that the third parties' responses had materially altered the nature of the disclosure, and might thereby affect their consent. Furthermore, the Society understood consent to be relevant solely to the question of personal privacy, not to concerns about solicitor-client privilege and confidentiality. (Submission of the Society paragraph 9; see also paragraph 43)

The Society subsequently added that one of the third parties who originally gave a qualified consent to the release of information revoked that consent.

As I have concluded that disclosure would reveal financial information relating to contracts to supply services to a public body and information to which there is public

access under the *Financial Information Act* under sections 22(4)(f) and (g) of the Act, the failure of eight of the lawyers to provide consent is not determinative.

10. Order

I find that the Legal Services Society is not authorized to refuse access to the records in dispute under section 14 of the Act or required to refuse access under section 22 of the Act. Under section 58(2)(a), I require the head of the Legal Services Society to give the applicant access to the records.

_____

David H. Flaherty
Commissioner

July 30, 1998