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Order F17-29

## LAW SOCIETY OF BRITISH COLUMBIA

Celia Francis  
Adjudicator

May 11, 2017

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**Summary:** An applicant requested access to records about the preparation of affidavits for a court action. The Law Society of British Columbia (LSBC) refused, under s. 8(2)(b) of FIPPA, to either confirm or deny the existence of the records on the grounds that disclosure of their existence would be an unreasonable invasion of third-party personal privacy. The adjudicator confirmed that the LSBC was authorized to rely on s. 8(2)(b).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 8(2)(b), 22(3)(d), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(g) (22(2)(h)).

**Authorities Considered: B.C.:** Order F16-37, 2016 BCIPC 41 (Can LII); Order F15-01, 2015 BCIPC 1 (CanLII); Order 02-35, 2002 CanLII 42469 (BC IPC); Order F14-48, 2014 BCIPC 52 (CanLII); Order No. 260-1998, [1998] B.C.I.P.C.D. No. 55 (QL); Order 04-16, 2004 CanLII 7058 (BC IPC); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F15-54, 2015 BCIPC 57 (CanLII); Order 02-01, 2002 CanLII 42426 (BC IPC).

## INTRODUCTION

[1] This case flows from an applicant's request to the Law Society of British Columbia (LSBC) under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for records related to the preparation of two affidavits for a court action. Under s. 8(2)(b) of FIPPA, the LSBC refused to confirm or deny the existence of the requested records on the grounds that disclosure of their existence would be an unreasonable invasion of third-party personal privacy.

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the LSBC's decision. The LSBC then asked that the Commissioner exercise her discretion under s. 56 of FIPPA not to hold an inquiry, arguing that it was plain and obvious that s. 8(2)(b) applies in this case. In Order F16-37, the adjudicator dismissed the LSBC's application.<sup>1</sup> The OIPC then proceeded with this inquiry.

## ISSUE

[3] The issue in this inquiry is whether the LSBC is authorized, under s. 8(2)(b) of FIPPA, to refuse to confirm or deny the existence of records containing personal information of a third party. Section 57 of FIPPA sets out the burden of proof in inquiries but is silent respecting who has the burden regarding s. 8(2)(b). Past orders on s. 8(2) have placed the burden on the public body<sup>2</sup> or have said nothing about the burden.<sup>3</sup>

[4] The LSBC suggested that the applicant should have the burden of proof in this case, given the connection between s. 8(2)(b) and the principles set out in s. 22. The LSBC also argued that it has no evidentiary advantage in this case.<sup>4</sup> However, I agree with the adjudicator in Order F15-01, who expressed this view:

... [The public body] is in the best position to explain why it has refused to confirm or deny the existence of a record requested by the applicant. This is particularly the case when s. 8(2) is at issue, since public bodies often submit and rely on *in camera* evidence and argument that the applicant does not have access to (thus is not able to fully respond to) when this provision is at issue.<sup>5</sup>

## DISCUSSION

### ***Background***

[5] Order F16-37 summarized the background to this case as follows:

The applicant's spouse is the executrix of her mother's estate. The spouse's mother's estate was involved in litigation (the "Action") challenging the validity of the spouse's grandmother's Will. In the Action, the lawyer (the "Lawyer") who drafted the Will deposed an affidavit concerning its creation. He also testified at trial about the creation of the Will.

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<sup>1</sup> Order F16-37, 2016 BCIPC 41 (CanLII).

<sup>2</sup> For example, Order No. 260-1998, [1998] B.C.I.P.C.D. No. 55 (QL); Order 02-35, 2002 CanLII 42469 (BC IPC).

<sup>3</sup> For example, Order 02-01, 2002 CanLII 42426 (BC IPC).

<sup>4</sup> LSBC's initial submission, paras 17-18.

<sup>5</sup> Order F15-01, 2015 BCIPC 1 (CanLII), at para. 8.

The outcome of the trial was that the British Columbia Supreme Court determined that the spouse's grandmother's Will was valid and subsisting, and had been proven in solemn form. The British Columbia Court of Appeal dismissed an appeal and leave to the Supreme Court of Canada was denied.

The applicant believes that the Law Society retained a law firm (the "Firm") to draft affidavits for the Lawyer and his assistant in its role as the Lawyer's professional liability insurer. The applicant also believes that the Lawyer's evidence in the Action was false and contributed to the Will being upheld by the Court. In an effort to establish this, he requested all records in the custody or control of the Law Society in relation to the preparation of these affidavits, as well as all invoices and communications from or to the Firm regarding this work. [footnote omitted]<sup>6</sup>

### ***Preliminary issues***

#### *Scope of this inquiry*

[6] The LSBC's response to the applicant's request stated that, in addition to s. 8(2)(b), it was relying on s. 22 (disclosure harmful to third-party personal privacy) and s. 14 (information subject to solicitor-client privilege). During mediation of the request for review, the applicant raised the applicability of s. 25 of FIPPA (public interest override). The original notice for this inquiry thus stated that the issues would be ss. 8(2)(b), 14, 22 and 25. The OIPC then told the parties that it had determined that the most practical course to follow would be to decide the s. 8(2)(b) issue before the other issues. Accordingly, the OIPC issued an amended Notice of Inquiry inviting submissions only on s. 8(2)(b).

[7] The applicant objected to the amendment. The OIPC responded that s. 25 presupposes that records exist. The OIPC said that, in its view, the appropriate course of action was to consider the s. 8(2)(b) issue first and that, if necessary, it would promptly schedule a hearing for the ss. 14, 22 and 25 issues.<sup>7</sup>

#### *Applicant's allegations*

[8] The applicant made a number of allegations in his submission that I have not considered, as they are not relevant to the issue before me. For example, he alleged that the LSBC has no authority to retain a lawyer to represent it in this inquiry and that the LSBC interfered with the Lawyer's evidence in the Action.<sup>8</sup>

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<sup>6</sup> Order F16-37, at paras, 2-4. For ease of reading, I have also used the terms Lawyer, Action and Will in this order.

<sup>7</sup> The adjudicator made a similar determination in Order F16-37.

<sup>8</sup> Applicant's response submission, pp. 2 & 9.

**Principles for applying s. 8(2)(b)**

Section 8(2)(b) of FIPPA reads as follows:

- 8(2) ... the head of a public body may refuse in a response to confirm or deny the existence of
- ...
- (b) 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.

[9] For s. 8(2)(b) to apply, “a public body must first establish that disclosure of the mere existence or non-existence of the requested records would convey third-party personal information. It must then establish that disclosure of the existence or non-existence of that information would itself be an unreasonable invasion of that third party's personal privacy.”<sup>9</sup> Order F15-01 added that “... s. 22 of FIPPA is relevant in determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b).”<sup>10</sup> I have applied these principles in determining whether, under s. 8(2)(b), the LSBC is authorized to neither confirm nor deny the existence of the requested records.

**Professional liability insurance**

[10] The LSBC is responsible for addressing professional misconduct and discipline and for providing a program of professional liability insurance (PLI) to its members. Its Rules, developed under the *Legal Profession Act*, require lawyers to maintain professional liability and trust protection insurance. The LSBC offers professional liability insurance under the terms of the BC Lawyers' Compulsory Liability Insurance Policy (CLI Policy). The CLI Policy is intended to protect lawyers if they commit errors or omissions in the course of professional practice and are liable or potentially liable for negligence. It is mandatory for members to make early reports to the LSBC of actual or potential claims, “however unmeritorious”. The LSBC has a practice of keeping PLI information confidential, including not disclosing whether or not a lawyer has made a PLI report or claim.<sup>11</sup>

<sup>9</sup> Order F15-01, with reference to Order 02-35.

<sup>10</sup> Order F15-01, again with reference to Order 02-35. See also Order F14-48, 2014 BCIPC 52 CanLII), for a discussion of these principles.

<sup>11</sup> LSBC's initial submission, paras. 20-25; Affidavit of LSBC claims Manager, paras. 2-14.

***Would disclosure of the existence or non-existence of the requested records convey third-party personal information?***

[11] “Personal information” is defined as “recorded information about an identifiable individual other than contact information”.<sup>12</sup>

[12] The LSBC said that it considers information about PLI claim files, including whether such a file exists or does not exist, to be “sensitive and confidential personal information about a lawyer”. In the LSBC’s view, disclosing whether or not a PLI file exists in this case would disclose the Lawyer’s personal information, including the following: whether or not the Lawyer made a PLI report concerning professional negligence; his insurance coverage status; and whether or not he received legal services from the Firm or LSBC lawyers.<sup>13</sup>

[13] The applicant countered that the Lawyer had incorporated his law practice and that, if he did notify the LSBC of the Action, he did so as a director of that law practice. In the applicant’s view, therefore, the requested records, if they exist, would not contain the Lawyer’s personal information but rather “corporate, commercial information”.<sup>14</sup>

[14] I do not find the applicant’s argument persuasive. The issue of whether or not a lawyer has incorporated her or his practice is not, in my view, relevant, to the question of whether the information is personal information. I consider that information about the existence of a lawyer’s complaint history or a PLI claim is information that relates to the lawyer’s occupational or employment activities and is thus personal information.<sup>15</sup>

[15] Information about any PLI claim the Lawyer may have made, if it exists, would, in my view, be about the Lawyer as an identifiable individual. I therefore find that disclosing the existence or non-existence of the requested records would convey personal information of the Lawyer.

***Would disclosure of the existence or non-existence of the requested records be an unreasonable invasion of third-party privacy?***

[16] Determining whether disclosure of the existence or non-existence of the requested records would be an unreasonable invasion of third-party privacy entails a consideration of s. 22 of FIPPA.<sup>16</sup> The principles for applying s. 22 have long been established.<sup>17</sup> After determining if information is “personal information” (as I did above), it is necessary to consider if s. 22(4) applies. Section 22(4) lists

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<sup>13</sup> LSBC’s initial submission, paras. 7-9, 34-36.

<sup>14</sup> Applicant’s response submission, for example, at paras. 9 & 26-28.

<sup>15</sup> See also Order 02-01; Order No. 260-1998; Order 04-16, 2004 CanLII 7058 (BC IPC).

<sup>16</sup> Order 02-35, at para. 39.

<sup>17</sup> See, for example, Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

a number of types of personal information the disclosure of which is not an unreasonable invasion of third-party personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy, a presumption which can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[17] The LSBC provided submissions on s. 22 as set out below.<sup>18</sup> The applicant did not address the specific elements of s. 22 except to say that it does not apply.<sup>19</sup>

*Section 22(4)*

[18] The LSBC said that none of the circumstances in s. 22(4) is applicable in this case.<sup>20</sup>

[19] I agree with the LSBC. There is no basis in the material before me to indicate that s. 22(4) applies in this case. For example, confirming or denying the existence of the requested records would not reveal information about a public body employee's position or functions under s. 22(4)(e). I find that s. 22(4) does not apply.

*Section 22(3)(d) – employment or occupational history*

[20] The LSBC argued that information about a lawyer's professional liability coverage relates to that individual's employment or occupational history and thus falls under s. 22(3)(d).<sup>21</sup>

[21] I consider that confirming or denying the existence of information about whether the Lawyer made a PLI claim would reveal information about his action (or inaction) in relation to how he conducts his work. I therefore find that disclosure of the existence or non-existence of such information would reveal information about the Lawyer's employment or occupational history for the purposes of s. 22(3)(d). Disclosure of the existence or non-existence of the requested records is therefore presumed to be an unreasonable invasion of the Lawyer's personal privacy. I find support for this conclusion in previous orders.<sup>22</sup>

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<sup>18</sup> Some of the LSBC's submission was received *in camera*. I am therefore unable to discuss it. I have however considered it carefully in arriving at my conclusions in this case.

<sup>19</sup> Applicant's response submission, p. 12.

<sup>20</sup> LSBC's initial submission, para. 44.

<sup>21</sup> LSBC's initial submission, paras. 45-47.

<sup>22</sup> Order 02-01; Order No. 260-1998.

*Section 22(2) – relevant circumstances*

[22] The LSBC raised the following relevant circumstances:

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

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

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, ...

[23] Public scrutiny of public body - s. 22(2)(a) – As noted in Order F15-01, “In the context of s. 8(2)(b), the question is whether disclosing the personal information that would be conveyed by disclosing the existence or non-existence of records is desirable for subjecting the activities of a public body to public scrutiny.”<sup>23</sup>

[24] The LSBC said that disclosure of the existence or non-existence of the requested records would subject the Lawyer to public scrutiny, not the LSBC, which is not the purpose of s. 22(2)(a). The LSBC argued that disclosure in this case would be contrary to the public interest which, it said, is “best served by ensuring that lawyers have professional liability insurance in place” and that they make timely reports to the LSBC on potential claims. A risk of disclosure of their insurance claims history would discourage lawyers from making early reports, the LSBC continued, and would, among other things, undermine the LSBC’s ability to rectify a lawyer’s errors or omissions.<sup>24</sup>

<sup>23</sup> Order F15-01, at para. 36, with reference to Order 02-35, at para. 39.

<sup>24</sup> LSBC’s initial submission, para. 49.

[25] I acknowledge the LSBC's point that disclosure of the existence or non-existence of the requested records might subject the Lawyer to public scrutiny, rather than the LSBC. Disclosure might also have a negative effect on the LSBC's ability to manage PLI claims, for the reasons it argued. I therefore find that disclosure of the existence or non-existence of the requested records in this case is not desirable for the purposes of s. 22(2)(a).

[26] Fair determination of applicant's rights - s. 22(2)(c) – Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds.
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed.
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question.
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.<sup>25</sup>

[27] In the LSBC's view, this provision does not apply in this case as the applicant was not a party to the Action and has no standing to reopen the Action. In any case, the LSBC argued, the Action and its appeals have been exhausted and, even if the applicant did have standing, "it is also increasingly likely that any legal remedies available to the parties in the Action would be barred by the passage of time."<sup>26</sup>

[28] I agree with the Law Society in this case. I recognize that the applicant's spouse was a party to the Action. It is also possible that the requested records, if they exist, would have a bearing on or be necessary for the Action. However, as the applicant himself has admitted, the Action and its related appeals are over.<sup>27</sup> He has not explained how s. 22(2)(c) might otherwise apply here and I see no basis for its application in this case.

[29] Unfair exposure to harm; unfair damage to reputation - ss. 22(2)(e) and (h) – The LSBC acknowledged that "While it may be clear to members of the legal profession that a report to the [LSBC] is required by the [CLI] Policy and is

<sup>25</sup> See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F15-54, 2015 BCIPC 57 (CanLII).

<sup>26</sup> LSBC's initial submission, paras. 52-53.

<sup>27</sup> For example, his letter of October 4, 2011 at p. 5, Tab 8 of his response submission.



therefore not indicative of negligence, dishonesty, or other wrongdoing, the potential, indeed likelihood, that it would be construed or interpreted in this fashion by some members of the public is apparent.” The LSBC argued that several types of harm under ss. 22(2)(e) and (h) could flow from disclosure of the existence or non-existence of the requested records: damage to the Lawyer’s reputation; loss of business and the attendant financial harm; personal embarrassment; damaging assumptions about the lawyer’s competence, conduct or honesty; reduced client confidence in the Lawyer and thus “commencement of unmeritorious legal claims” against the Lawyer.<sup>28</sup>

[30] The LSBC acknowledged that the Lawyer gave evidence at trial in the Action about the steps he took in drafting the Will. It said, however, that the issues in that Action were not related to professional negligence on the part of the Lawyer nor to the propriety of his conduct. The LSBC argued that the fact that “a legal dispute receives public notoriety through court proceedings exacerbates rather than diminishes the prospect of risk and the extent of the harm to which a lawyer would be exposed if the existence or non-existence of a PLI claims file were to be confirmed.” The LSBC added that the court’s comments on his actions “do not, in more than a fleeting way, comment negatively or positively on the legal services provided by the Lawyer”. It also noted that the court’s reasons give no indication of whether or not a PLI claim was made.<sup>29</sup>

[31] I agree with the LSBC’s argument that disclosure of whether or not the requested records exist could give rise to “unfair and erroneous speculation” on the part of the public about the Lawyer’s competence, such as: the Lawyer accepted that he may have made an error or omission or believed himself to have been negligent; how the LSBC lawyers evaluated the PLI claim; and whether the Lawyer made a timely claim.<sup>30</sup> I accept that this has the potential to unfairly damage the Lawyer’s reputation and expose him to other harms such as loss of client confidence and consequent loss of business. I am therefore satisfied that confirming the existence of a PLI claim or file could result in the type of harm to the Lawyer listed in ss. 22(2)(e) and (h).

[32] Previous orders have arrived at similar conclusions.<sup>31</sup> In Order No. 260-1998, for example, former Commissioner Flaherty referred, with approval, to the following argument by the LSBC:

... the fact that a [PLI] report has been made is not necessarily evidence of negligence on the part of a lawyer and is not evidence of incompetence. Many capable lawyers report potential claims out of an abundance of caution. The difficulty stems from the fact

<sup>28</sup> LSBC’s initial submission, paras. 24-25, 54-56, 59-60.

<sup>29</sup> LSBC’s initial submission, paras. 29, 40-41.

<sup>30</sup> LSBC’s initial submission, paras. 35, 41.

<sup>31</sup> For example, Order 02-35, at para. 49, with reference to Order 02-01.

that the reports of insurance claims are likely to be taken by the public as a negative reflection on a lawyer's competence.<sup>32</sup>

[33] Similarly, in Order 04-16, former Commissioner Loukidelis said this:

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.<sup>33</sup>

[34] Supply in confidence - s. 22(2)(f) – The LSBC's evidence is that PLI claims are made in confidence. It added that its Rules, enacted under the authority of the *Legal Profession Act*, require that the LSBC strictly maintain the confidentiality of PLI claims. It said that it also provides assurances to its members that it keeps their PLI information confidential, including by refusing to disclose whether or not a member has made a PLI report or claim. It added that, if lawyers fear that information about their PLI claims will be subject to disclosure, this would have an impact on their willingness to make early reports. This could in turn, the LSBC argued, prevent it from intervening to repair or mitigate the effect of any error on a lawyer's part.<sup>34</sup>

[35] I accept the LSBC's evidence that it accepts and treats PLI reports and claims information confidentially and that it does not disclose such information except in accordance with the CLI Policy. I also accept the LSBC's reasons as to why it is important to receive and keep PLI information confidential. I therefore find that s. 22(2)(f) applies.

[36] Inaccurate or unreliable information - s. 22(2)(g) – The LSBC said it considered that disclosure of the existence of the requested records might lead to the drawing of inaccurate or unreliable inferences about the Lawyer's conduct, competence or professional activities, for the purposes of s. 22(2)(g).<sup>35</sup>

[37] Section 22(2)(g) states that public bodies must consider whether “the personal information is likely to be inaccurate or unreliable”. It is not about whether or not some people may draw inaccurate or unreliable inferences about what the information means. Rather, it seems to me, whether or not a PLI claim file exists is a fact and there is no evidence to suggest that there is any issue as

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<sup>32</sup> Order No. 260-1998 at p. 8.

<sup>33</sup> Order 04-16, at para. 10. See also Order 02-01, at para. 55, which found that revealing the existence or non-existence of LSBC complaint files, including allegations of incompetence and negligence, would indirectly reveal whether negative opinions had been recorded about the professionalism or honesty of a lawyer.

<sup>34</sup> LSBC's initial submission, paras. 24-25, 57-58; Affidavit of the LSBC's Claims Manager, paras. 8-12 and Exhibits A and B to this Affidavit (copies of relevant extracts from the LSBC's policies on the confidentiality of PLI reports and claims).

<sup>35</sup> Affidavit of LSBC's Manager, Policy & Legal Services, para. 12.e.

to the accuracy or unreliability of the personal information in this case. The LSBC's argument on this point appears to be directed more at the harms set out in ss. 22(2)(e) and (h).

[38] Other factors – The LSBC argued that it is also relevant to consider whether, even if the existence or non-existence of the requested records is confirmed, the applicant is likely to receive any of the information. The LSBC argued that, even if a PLI claim file does exist, the information about the claim would be subject to solicitor-client privilege.<sup>36</sup>

[39] I do not consider this to be a relevant factor. The applicability of any exceptions to the requested records, if they exist, is a separate issue from confirming whether or not they exist.

#### *Conclusion on s. 22*

[40] I found above that s. 22(4) does not apply here but that s. 22(3)(d) does. I also found that several circumstances, which the LSBC raises, are not relevant: ss. 22(2)(a), (c) and (g); and whether any exceptions to disclosure under FIPPA would apply to the information if it exists.

[41] However, I also found that ss. 22(2)(e), (f) and (h) apply. These factors favour withholding information about whether or not the requested records exist and I give them considerable weight.

[42] While the applicant does not have the burden of proof in this case, his arguments did not address the elements of s. 22 and did not otherwise, in my view, adequately counter the s. 22(3)(d) presumption. I find that confirming whether or not the requested records exist would be an unreasonable invasion of the Lawyer's personal privacy.

#### *Exercise of discretion*

[43] The LSBC argued that it had exercised its discretion properly in relying on s. 8(2)(b). It said it had considered a number of factors, including these: the effect that disclosure might have on the Lawyer's reputation and professional practice; the impact of disclosure on the confidence of the profession in the confidentiality of the PLI claim process and on lawyers' willingness to make early PLI reports; whether the existence or non-existence of the requested records might already have been made known (e.g., through the Action); the LSBC's own Rules which state that no one may disclose information associated with a PLI claim; and the factors listed in s. 22.<sup>37</sup>

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<sup>36</sup> LSBC's initial submission, para. 61.

<sup>37</sup> LSBC's initial submission, para. 63; Affidavit of the LSBC's Manager, Policy & Legal Services, paras. 12-18.

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[44] I agree that these are all appropriate factors to consider and I find that the LSBC exercised its discretion properly in this case.

**CONCLUSION**

[45] For reasons given above, I find that the LSBC is authorized by s. 8(2)(b) of FIPPA to neither confirm nor deny the existence of the requested records. In light of this finding, no order is necessary.

May 11, 2017

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

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