2017 LSBC 10
Decision issued: April 10, 2017
Citation issued: May 5, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

LAWYER 17

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	September 12 and December 2, 2016
Panel:	Philip A. Riddell, Chair Don Amos, Public representative Shona A. Moore, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Richard Gibbs, QC

INTRODUCTION

[1] This hearing concerns whether the Respondent complied with an order to disclose information to the Law Society as part of its ongoing investigation of a complaint filed by two former clients.

[2] This is the second citation issued against the Respondent, both arising in the context of an ongoing investigation by the Law Society into a complaint filed in February 2014 by two former clients of the Respondent about the manner in which the Respondent handled certain aspects of their file referred to by the parties as the LC file.

[3] In March 2014, the Law Society opened a complaint file and commenced its investigation into the allegations made by the former clients. During the course of that investigation, the Law Society asked the Respondent to disclose certain documents, including emails. A citation was later issued on September 25, 2015 ("Citation No. 1") alleging that the Respondent failed to provide a full and substantive response to the Law Society's request for certain email correspondence.

[4] A hearing was conducted in 2016 ("Hearing No. 1"). A decision was issued ("Decision No. 1"). The Panel found that the Respondent had engaged in professional misconduct and made this order (the "2016 Order") at para. 154:

> … In this case we order the Respondent to produce all emails as requested in the letter dated May 13, 2015 from Mr. Wedel within two weeks of this order.

SUMMARY

[5] The present citation was issued on May 5, 2016 ("Citation No. 2") alleging that the Respondent committed professional misconduct when he failed to comply with the 2016 Order by failing to provide all the emails, as ordered.

[6] The Respondent admitted service of Citation No. 2, and a hearing was conducted on September 12 and December 2, 2016.

[7] After considering all of the evidence, including oral evidence of the Respondent, we have concluded that there is insufficient evidence to support a finding that the Respondent failed to disclose to the Law Society all of the emails as ordered.

BACKGROUND

[8] The Respondent represented the two former clients on the LC file as lead counsel to pursue a test case about who could be granted Canadian citizenship. During the course of his representation, AB, who at various times was a non-practising or inactive member of the Law Society, assisted the Respondent.

[9] The working relationship between the Respondent and AB evolved over time and is summarized in Decision No. 1 in the passages below:

> [13] For the period prior to 2011, AB and the Respondent shared office space at the Respondent's office.

> [14] Although he had been called to the bar of British Columbia in 1986, immediately prior to September 2012, AB was not a practising member of the Law Society. In September 2012, AB regained his status as a practising lawyer and commenced employment as a lawyer with the Respondent's law firm.
>
> ...
>
> [18] From the fall of 2011 to September 2012, AB assisted the Respondent with his work for the former clients as an unpaid volunteer doing administrative work. After he regained his active practising status in September 2012, AB assisted the Respondent as co-counsel for the former clients.

[10] When AB returned to the active practice of law, he worked with the Respondent under a Supervision Agreement mandated by the Law Society. In accordance with the Supervision Agreement, every email AB received from or sent to a client was copied to the Respondent. The evidence before us from AB and the Respondent was the same as is recorded in Decision No. 1 at paras. 19 and 20:

> As a condition of doing so, AB had to copy the Respondent with all email correspondence that he sent and received during the course of the former clients' retainer. To the best of his recollection, he did so.
>
> The Respondent's evidence was the same. He testified that, with some specific exceptions, he copied AB with all emails that he sent and received in respect of the former clients. Prior to September 2012, the Respondent copied and forwarded his emails to AB at his Gmail Account; after September 2012, he copied AB at the Rlit Email Address.

[11] The Supervision Agreement between AB and the Respondent was in place from August 2012 until July 2014 when it was terminated by the Law Society upon receipt of the complaint from the former clients. Thereafter, AB moved to non-practising status in July 2014. He continued to assist the Respondent with administrative procedures associated with the LC file in a role described as "akin to an assistant or a researcher or paralegal" but not as a lawyer until May 2015 when his employment with the Respondent was terminated.

[12] In February 2014, the two former clients made a complaint to the Law Society against both the Respondent and AB. The Law Society opened separate files for the complaints against the Respondent and the complaints against AB.

[13] The Citation before this Panel arises exclusively from the Society's investigation of the former clients' complaint against the Respondent.

CITATION NO. 1

[14] During the course of its investigation into the complaint, the Law Society made a request that the Respondent disclose certain records, including emails, relating to the complaint. A separate but similar request was made of AB.

[15] When the Respondent failed to promptly provide a full and substantive responsive response to the request, the Law Society issued Citation No. 1. A hearing of the citation was conducted in 2016 ("Hearing No. 1").

[16] During the period leading up to Hearing No. 1, the Respondent relied on AB to produce the emails requested by the Law Society. Before this Panel, the Respondent testified that he relied on AB because the Respondent believed that AB would have the most complete record of the emails in question, that is, all emails to and from the Respondent's and AB email accounts. In retrospect, that decision was a poor one.

[17] The Respondent's failed efforts to produce the emails is described in Decision No. 1 is set out in paras. 68 to 74:

> The Respondent testified that, because he had copied AB on all of his emails relating to the former clients, AB had the most complete set of emails relating to that matter. For that reason, he asked AB to produce all emails, including all emails from his Rlit Email Address, that had been generated in respect of the former clients.
>
> In the Respondent's view, AB's production of all the emails, including the emails from his Rlit Email Address, would ensure that a complete set of emails had been produced to fulfil the request that the Law Society had made of him.
>
> The Respondent testified that AB told him he had produced the emails from the Rlit Email Address.
>
> AB does not dispute the Respondent's evidence. He agreed that production of all of the emails from his Rlit Email Address, together with all of the email from his Gmail Account, would result in the most complete set of emails that had been generated in respect of the former clients.
>
> He also agreed that the Respondent had asked him to produce all of the emails from his Rlit Email Address and that he had told the Respondent throughout that he had done so.

> However, on cross-examination, AB conceded that the emails that he ultimately provided to the Law Society contained only those emails from his Gmail Account in compliance with the Law Society's specific request of him. He never directed his mind to the emails from the Rlit Email Address.
>
> Both AB and the Respondent testified that they only realized that AB did not produce the emails from the Rlit Email Address during the course of their preparation for this hearing.

[18] These findings are consistent with the uncontradicted evidence of the Respondent and AB before us.

[19] There was no dispute on the evidence before the panel on Hearing No. 1 that the Respondent had failed to provide "all email correspondence (to, from and within the firm, including the Respondent's email address)."

[20] At the conclusion of Hearing No. 1, the panel gave an oral decision that the Respondent had engaged in professional misconduct by failing to respond to the Law Society's request for information and documents. The Chair urged the Respondent to start producing the missing emails immediately, even though no formal order had yet been issued. The transcript from Hearing No. 1 includes this exchange:

> CHAIR: ... But, [Respondent], there's no order for you now to comply with the earlier demands but those earlier demands have been made. You should not wait for our reasons to start complying with that.
>
> RESPONDENT: I don't intend to.
>
> CHAIR: And so with respect to both those e-mail accounts, I think it will stand you in good stead to start producing them. And if you produce them before our reasons come out, that would be a good thing, not that we're going to be referring to them or to the length of time that you take to produce them in our -- because we won't know, we're not going to be told that either, but I just urge you to carry on, produce it as soon as you can. We will likewise reserve and issue our reasons as soon as we can for them.

[21] The Panel later issued an order in these terms set out in Decision No. 1:

> … In this case we order the Respondent to produce all emails as requested in the letter dated May 13, 2015 from Mr. Wedel within two weeks of this order.

CITATION NO. 2 – THE FACTS

[22] The Law Society put in its case by affidavit, including a lengthy affidavit from Mr. Wedel, but chose not to call him to give oral evidence at the hearing. The Respondent testified at the hearing and called evidence from AB.

[23] We turn now to the facts giving rise to the citation before this Panel.

[24] After Hearing No. 1, the Respondent set about the work of producing the emails that were later ordered to be produced on April 1, 2016.

[25] The Respondent and AB each gave evidence about:

(a) the email addresses each of them used;

(b) how certain email accounts were set up;

(c) as between the Respondent and AB, who controlled each email account;

(d) the Respondent's practice in saving emails and copying AB; and

(e) how the Respondent and AB separately dealt with email correspondence that came into accounts to which one or other had access in respect of the LC file, in general, or to and from the former clients.

The email accounts

[26] A number of email accounts contained emails related to the Law Society's investigation of the former clients' complaint.

[27] The first is REmail. The Respondent used this account to send and receive emails associated with his law practice and, in accordance with the Supervision Agreement, the Respondent also received copies of any emails sent or received by AB.

[28] AB had at least two email accounts, both of which were also gmail accounts, that is, accounts that had email addresses ending in "@gmail.com".

[29] Prior to joining the firm as a lawyer, AB had a gmail account ("ABgmail").

[30] When AB started working for the Respondent as a lawyer under the Supervision Agreement, AB opened a second gmail account ("ABLaw"). As part of the process of opening this account, AB selected a password that controlled access to this email account. AB intended to use the ABLaw for work on the LC file.

[31] At all material times, AB continued to use both email accounts.

[32] The Respondent testified that other employees at the firm created separate gmail accounts. Each employee selected email addresses with a common format. As each email account was created, the employee selected a password that controlled access to the gmail account. When a person left the firm, the departing employee gave the Respondent the employee's gmail account password.

[33] The exception to that practice was AB. The Respondent never knew the password AB assigned to his ABLaw email account, and AB declined to give it to the Respondent when later asked for it.

[34] The Respondent described his practice in managing work-related emails sent from or received into his email account. We accept his evidence that the Respondent opened and saved to the firm's server in his office any email he received or sent that was file-related correspondence.

[35] For example, his server contained a file "LC." The Respondent's practice and the practice "he drilled into numerous students and assistants" was that emails and documents in connection with a file would be opened and then saved to the LC file. The Respondent was forthright in his evidence that he did not save "chatty emails" from clients, such as "may I park my motorcycle behind your garage."

The events after Hearing No. 1

[36] Immediately after the conclusion of Hearing No. 1, the Respondent set to work to produce the emails that remained outstanding in response to Mr. Wedel's request by letter dated May 13, 2015.

[37] On February 3, 2016 the Respondent emailed Mr. Wedel to let him know that the Respondent had "gone over all of the emails in the LC box in [his] Gmail account and had printed them off in PDF with the most substantive of attachments." The Respondent also reported to Mr. Wedel that he had "gone back and checked [his] remaining 'unfiled emails' in [his] inbox for emails from both of his former clients

and would forward all of the emails to Mr. Wedel." The Respondent further reported to Mr. Wedel in the same email:

> As I said before the issue is [AB] has as close to 100% of the emails with [LC] as possible where I do not since I was not the primary point of contact from September 2012 forward and frequently deleted non-useful emails.

[38] In a later email, sent February 5 by the Respondent to Mr. Wedel, he described the extent of his disclosure of emails in this way:

> Just so you were absolutely clear what I am forwarding is all of the "[REmail]" emails I have in my inbox and on my Gmail account that relate to the [LC].
>
> I confirm again that I have no other notes or memorandums other than contained in the file or reflected in the eight emails.
>
> With a This [sic] series of emails you will receive over the weekend I confirm that I believe that I complied info [sic] with your May 2015 email request.
>
> If [AB] can get this other material done in regard to the emails he had with the client you will have 100% of the emails back-and-forth between the [LC] and the firm.

[39] The second email generated a quick response from Mr. Wedel, also on February 5, 2016, clearly emphasizing, "I think it is important to state that the emails available in the ABLaw account are captured by the May 13, 2015 request to you." Mr. Wedel urged the Respondent to review the May 13, 2015 request to ensure that the Respondent produced what had been requested.

[40] Late in the afternoon on February 5, 2016, the Respondent emailed Mr. Wedel referencing a number of emails sent to him earlier attaching pdf copies of emails and documents. The Respondent described the material sent to Mr. Wedel in this way:

> They include emails between [AB] and I as they were saved. Draft documents generally were put on the server in the "[LC]" file and documents amended with track changes done on the document.
>
> I noticed when I was producing the PDF versions there was minimal numbers of email with drafts attached. I believe that [CD] and [EF] saw drafts but those do not turn up in my email.

> I will be talking to [AB] over the weekend about getting those emails turned into PDFs.

[41] Mr. Wedel's view as communicated to the Respondent by email was, once again, that the May 13, 2015 request had not yet been satisfied because, in Mr. Wedel's view, AB's ABLaw account was captured by his May 13, 2015 request for production.

[42] The Respondent's view was, and remains at the hearing before us, that Mr. Wedel's May 13, 2015 request, and the 2016 Order that incorporates that letter, did not extend to AB's ABLaw account as it was not an account under the Respondent's control.

[43] The Respondent was clear in his evidence before this Panel, however, that in spite of his view of the scope of the 2016 Order, he continued to make every effort to extract and produce to the Law Society all of AB's emails from his ABLaw account so the Law Society would have 100 per cent of all correspondence from the former clients about the LC file.

[44] The Respondent testified that he emailed Mr. Wedel on February 9, 2016 to report truthfully that much of what AB would produce from his ABLaw account "will be copies of his or my emails sent by or copied to either" the Respondent's email address or AB's.

[45] Throughout the period from February to the date Citation No. 2 was issued on May 5, 2016, AB was suffering from a continuing medical condition that interfered with his ability to work and to concentrate on a task at hand.

[46] Even though the Respondent urged AB to review his ABLaw account and to produce the emails from that account to the Respondent so that they could be forwarded to the Law Society, we are satisfied after considering all of the evidence before us, including AB's evidence and that of the Respondent, that AB was simply unable to give the project the necessary attention. His poor health and its negative impact on his ability to take on the email review and production task was further complicated by AB's technical difficulties in managing emails, printing them, or reproducing them in some other fashion. He readily admitted that he was not a "technophile."

[47] By email dated February 9, 2016 the Respondent communicated with Mr. Grady, discipline counsel for the Law Society, to report that the Respondent had complied with the May 13, 2015 requirement. The Respondent was eager to have this

information brought to the Hearing Panel's attention before they decided on an appropriate penalty. The Respondent said, in part:

> By my reading of the correspondence I have complied with the May 13 requirement, but in the interests of getting this completely covered once and for all the [ABLaw] emails from and to [CD], [EF] etc are being produced … to insure that every email to and from the firm, including [ABGmail] email are produced.

[48] The Respondent continued:

> What I don't want to have happen is the panel believe I still have not complied when I have complied with the May 13 requirement and I am making sure that every source of the emails has been provided to counsel for the law society.

Further, the Respondent acknowledged that Mr. Wedel "has now required the additional email from ABLaw as per my recent email to him with the accompanying attachments of emails sent last week."

[49] The Respondent told Mr. Grady that the additional ABLaw emails would be provided as soon as possible.

[50] Mr. Grady responded to the Respondent to emphasize that no update would be given to Hearing Panel No. 1 and that whether or not the Respondent's disclosure amounted to full compliance with the requests was a matter for Mr. Wedel as they were his requests.

[51] Later in February, AB communicated directly with Mr. Wedel to report that his health was improving and that AB was preparing emails from his previous email account with respect to the LC and they would be provided to the Respondent for production to the Law Society.

[52] Throughout February, AB appeared confident that this work would be completed. It became apparent to the Respondent, though, that AB continued to have health challenges that delayed his work. Indeed, by the end of April there continued to be no real prospect of AB completing his review of his ABLaw account in a timely way.

[53] The Respondent emailed Mr. Wedel on April 29:

> Dear Sir

> Re [the Respondent] – [LC] emails
>
> Further to the previous directions of the discipline committee and my previous forwarding of the emails which I had in my possession on my personal email account, I have asked [AB] to finish making copies of all of his emails on his [ABLaw] account with members of the [LC] and forward same to you with a copy to me.
>
> This has gone on since the date of the hearing on a [sic] almost daily basis. From what he has advised me this is a massive task due to the number of unrelated emails between members of the [LC] he (and in some cases the writer) were copied on.
>
> He has recently advised me he is down to roughly "100 emails to go" before he has completed this task.
>
> I realize this is taking way longer than it should but [AB] has not been well.
>
> The alternative has been for me to get the password from [AB] and do this myself. The problem with this is you will not get complete record as I frankly don't understand how [AB] has run his email account.
>
> I recognize from my discussions with [AB] that many of these emails are of limited assistance to the law society reviewing this matter, however, it is in everyone's interest let this be as complete a record as is humanly possible.
>
> [AB] has assured me that this will be done by the end of the first week of May.
>
> If it is not done by the end of the first week of May I will get the password for [AB] and do the task myself to the best of my ability.

[54] By this time, although the Respondent had produced all of the emails he received or was copied on in connection with the LC file and although the Respondent was aware that his interpretation of the 2016 Order differed from that of Mr. Wedel, the Respondent's continued focus was to try to provide to the Law Society as complete a record as possible by extracting from AB the emails from AB's ABLaw account, even though that might result in a 100 per cent duplication of the LC-related emails already produced by the Respondent.

[55] The real logistic barrier facing the Respondent was that he had never had access to AB's ABLaw account and AB refused to give the Respondent the password. Indeed, AB readily confirmed in his evidence before this Panel that he had not and would not disclose the password to his ABLaw account because he felt it necessary to have exclusive control over that account as he, himself, had to separately respond to the Law Society.

[56] The Respondent's frank report to Mr. Wedel prompted a quick email response from Mr. Wedel:

> I can advise you that the matter of your apparent continuing non-compliance with the hearing panel order in relation to the emails in the [ABLaw] account has been referred to the Chair of the Discipline Committee.

[57] The Respondent was surprised by Mr. Wedel's apparent view that he was not in compliance with the Order. He followed up almost immediately by emailing Mr. Wedel to seek confirmation that he had received the emails in pdf format earlier in February.

[58] The Respondent a few moments later emailed Mr. Wedel, again, to state:

> ...
>
> 1/ the emails from [CD] or [EF] are most likely all in my production of February. There may be some "coming by tomorrow afternoon" type email missing from my production as those were often deleted
>
> 2/ [AB] has everything I have (he was copied on everything from September 2013 forward) plus materials from persons other than [EF] or [CD] that were either not sent to me or were deleted as unnecessary.
>
> 3/ those other emails from the [LC] group do not follow a general title of "[LC]" or "[EF] v. HMQ" when they came from third parties who were often looking at some particular sub issue and have email topic titles that may not be obvious "[LC]" emails on a search for that subject, or a search for [EF] or [CD] emails.
>
> 4/ [AB] has been trying to assemble everything on the [ABLaw] email account including the 3rd party emails. There are persons that did [LC] research and communicated with [AB] directly where I only received the documents(s) they found and did not communicate with them in the process of their research. You likely have seen some emails from me

> where I comment on the evidentiary value and relevance of some of these documents.
>
> ...
>
> The Respondent testified that each of his statements to Mr. Wedel was truthful, and we accept that evidence.

[59] The Respondent continued to do what he could to encourage and coax AB to produce emails from his ABLaw email account.

[60] By May 6, 2016 the Respondent wrote to Mr. Wedel providing, amongst other things, a CD containing AB's emails from his ABLaw account.

ANALYSIS AND DECISION

[61] The onus is on the Law Society to prove on a balance of probability that the Respondent failed to comply with the 2016 Order: *FH v. McDougall*, 2008 SCC 53; *Law Society of BC v. Schauble*, 2009 LSBC 11; *Law Society of BC v. Seifert*, 2009 LSBC 17; and *Law Society of BC v. Tak*, 2009 LSBC 25.

[62] The onus of proof or standard of proof we have adopted in this case has been articulated in these ways:

> … [E]vidence must be scrutinized with care ... [and] must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency. (*McDougall* at paras. 45 and 46).
>
> … [T]he burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. (*Seifert* at para. 13).

[63] The test for professional misconduct is described in the leading case *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 154 in this way:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[64] In *Re Lawyer 12*, 2011 LSBC 11, the Panel commented at para. 14:

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

Failure to comply with an order

[65] Lawyers must comply with orders made under the *Legal Profession Act* or Law Society Rules: *Code of Professional Conduct for British Columbia,* Rule 7.1-1.

[66] A lawyer engages in professional misconduct if a lawyer fails to respond to Law Society requests for disclosure during the course of an investigation or fails to comply with an order of a hearing panel.

[67] We agree with the Law Society's submission that a lawyer's obligation to give complete and substantive responses to the Law Society when requested by the Law Society is a primary obligation of lawyers and a disregard of this obligation "undermines the Law Society's ability to govern lawyers effectively and constitutes very serious misconduct." (*Law Society of BC v. McLean*, 2015 LSBC 09 at para. 131) Indeed, a disregard of an order made by a hearing panel is "misconduct of a most serious nature." (*Law Society of BC v. Coutlee,* 2010 LSBC 27 at para. 14)

[68] In the instant case the question is whether the Law Society has proved on a balance of probabilities that the Respondent failed to comply with the 2016 Order. Our inquiry must first determine the scope of the 2016 Order and, second, whether the Respondent's conduct amounted to full compliance with that order.

The Order

[69] There is a difference between the Law Society and the Respondent as to what the Respondent was ordered to produce by the 2016 Order. The Law Society asserts that the 2016 Order required production of the emails on the LC file that AB sent or received from his ABLaw account. The Respondent says that the 2016 Order did not extend to include that email account.

[70] The 2016 Order requires the Respondent "to produce all emails as requested in the letter dated May 13, 2015 from Mr. Wedel within two weeks of this order."

[71] Regrettably, Mr. Wedel's letter of May 13, is not before this Panel.

[72] The letter is referred to in Decision No. 1 at para. 50 where the Panel sets out the five categories of documents and records that Mr. Wedel requested:

> ... Mr. Wedel made a request for more specific additional material relating to the complaints as follows:
>
> 1. All timekeeping records;
>
> 2. The accounts receivable ledgers;
>
> 3. All email correspondence (to/from and within the firm, including the Respondent's email address);
>
> 4. All notes of meetings/conversations; and
>
> 5. Evidence of delivery of statements of account.

[73] By separate letter also dated May 13, 2015, the Law Society also wrote to AB requesting that he provide information related to the investigation of the complaint, including "email correspondence to/from [AB's] Gmail account." (Decision No. 1 at para. 51)

[74] The interpretation of the 2016 Order is a matter for this Panel.

[75] We accept that Mr. Wedel told the Respondent, by email dated February 5, 2016, that his May 13, 2015 request captured emails available in the ABLaw account. Mr. Wedel's view was put to the Respondent in cross-examination. The Respondent unequivocally disagreed with his view of the scope of the 2016 Order.

[76] However, after a careful consideration of the wording of the 2016 Order, and all of the evidence before us, we are unable to conclude that the 2016 Order extends to require the Respondent to produce emails from an account over which the Respondent has never had access or control.

[77] During Hearing No. 1, the Respondent admitted that he had not produced any of the emails from his account as requested by the Law Society. The hearing panel referred to this admission at paras. 90 to 92 of Decision No. 1:

> The Respondent does not deny that he did not fully respond to the Law Society's May 13, 2105 request to produce documents including, in particular, the email correspondence to and from and within his firm, including the Respondent's [REmail] address.
>
> However, he argued that that he took steps to respond to that request by delegating the obligation to respond to AB. Based on what AB told him, he believed that a response had been provided.

> It is the Respondent's position that those steps should be sufficient to vitiate a finding of professional misconduct notwithstanding his failure to respond to communications from the Law Society.

[78] In its decision, the panel rejected the Respondent's assertion that he had delegated his own obligation to disclose emails to AB and that AB had accepted that responsibility. Further, the hearing panel concluded that the Respondent knew or ought to have known that AB did not disclose the Respondent's emails well prior to the commencement of Hearing No. 1. The Panel concluded at paras. 128 to 130:

> Firstly, on its face, AB's August 28, 2015 response letter is made on his behalf alone. The subject line only references AB's own complaint file number. In it, AB states, "This letter and the enclosures will constitute my reply and response."
>
> Secondly, and more significantly, the letter clearly discloses that the only emails that AB printed and provided to the Law Society were those he obtained from his Gmail Account. There is absolutely no reference to AB's R Email Address (which would have included those emails "to/from and within the firm") or to the Respondent's email address, both of which were expressly included in the broader request of the Respondent.
>
> For those reasons, we conclude that, by August 28, 2015, the Respondent knew, or ought to have known, that AB had not provided a response to the Law Society's May 13, 2015 request on behalf of the Respondent. He still took no steps to do so on his own behalf.

[79] The Panel described the Respondent's conduct in this way at para. 133:

> At best, the Respondent demonstrated a lax and indifferent attitude toward his obligation to respond to the Law Society's request. At worst, he blatantly and knowingly ignored the Law Society's request and his obligation to respond to that request. Even at best, his conduct cannot be condoned.

[80] In the earlier proceedings, the panel did not expressly state what is meant by "the email correspondence to/from and within his firm, including the Respondent's REmail address. Indeed, there is no clear statement on the face of the decision that that phrase includes the ABLaw email account controlled by AB.

[81] On the face of the 2016 Order, read in context with the whole of Decision No. 1, we conclude that the Law Society has not proved on a balance of probabilities that

the Law Society's request of May 13, 2015 included emails that solely resided on AB's ABLaw account.

[82] The Respondent made full disclosure of all emails under his control to the Law Society on February 9, 2016.

[83] The Law Society's case is not that the Law Society did not receive from the Respondent all emails to and from the firm within the time required, but rather that the Respondent breached the 2016 Order by failing to access and produce all emails residing on AB's ABLaw account, an account over which the Respondent has never had control or access.

[84] We disagree.

[85] The 2016 Order did not require the Respondent to provide to the Law Society emails that were not within his control. He did not control the ABLaw account, and the 2016 Order neither implicitly nor explicitly included the ABLaw account.

DECISION

[86] Accordingly, for the reasons set out above, we conclude that the Law Society has not met the burden of proving on the balance of probabilities that the Respondent failed to comply with the 2016 Order and the citation issued to the Respondent on May 5, 2016 is dismissed.

[87] If the parties are unable to agree on costs, they may make written submissions to this Panel within 30 days of the issuance of this decision.

NON-DISCLOSURE ORDER

[88] A non-disclosure order was issued by the Chair of this Panel on December 9, 2016. The Law Society and the Respondent consented to the order pursuant to s. 88 of the *Legal Profession Act.* The order was made in order to protect information, files or records that are confidential or are subject to solicitor-client privilege that was disclosed in the course of the hearing.