

LSO developing policy for bencher information requests amid lawsuit over unreleased information

Bencher Murray Klippenstein brought a claim against the regulator last year

At Convocation last week, the Law Society of Ontario tabled a motion to approve a policy on bencher information requests. Benchers want more time to consider the issue, which is the subject of bencher Murray Klippenstein's ongoing lawsuit against the LSO.

In 2022, the LSO treasurer at the time, Teresa Donnelly, created an advisory group of senior LSO executive members and benchers to consider a policy for bencher requests for information not readily available from the committee and Convocation processes. The advisory group produced a policy proposal, and the strategic planning and advisory committee (SPAC) reviewed the policy and recommended that Convocation approve it.

Over the last four years, the law society had received many bencher information requests that went beyond the usual information that comes before the committees, says Megan Shortreed, a member of SPAC and a partner at Paliare Roland Rosenberg Rothstein. "This was simply a way to streamline the process for those requests," she says.

The mover of the table motion was Heather Hansen, a bencher, family lawyer, and partner at McCarthy Hansen & Company LLP. Speaking at Convocation, she said several benchers had raised concerns and requested that the issue be tabled to make room for "more fulsome debate."

Hansen said she wanted more information on the roles and responsibilities of benchers as law society directors. Under the proposed policy, bencher information requests must relate to their "appropriate duty" and must be required to fulfill their oversight and policy-making responsibilities.

While she said there are many elements of the policy she supports, she struggles with the mechanism proposed that brings information requests denied by the Treasurer to Convocation for a majority vote.

"In the context of the potential conflict we may see related to directors' roles and responsibilities, I think that issue requires some work," she said.

From a procedural perspective, the motion to table was an invitation for further dialogue and an example of Convocation "doing what it is supposed to do," Hansen told *Law Times*.

“It’s a really good example of how this Convocation is trying to work cooperatively on difficult issues,” she says. “That’s the takeaway for me.”

In her remarks at Convocation, Hansen noted that the proposed policy also relates to a piece of active litigation.

Klippenstein brought a claim against the law society last year over his denied request for internal documents related to the regulator’s equity, diversity, and inclusion initiatives. In 2012, the LSO created the challenges faced by racialized licensees working group and hired consultants (STRATCOM) to survey lawyers and paralegals in the province. Following the survey and a round of consultations, the working group produced its [final report](#): “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions.”

The report included 13 recommendations, including that the law society requires every licensee to “adopt and abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public.” The recommendations also included requiring legal workplaces to have a diversity policy, complete an EDI self-assessment every two years, and the LSO to publish a public inclusion index based on workplace surveys every four years.

Klippenstein claims there are statistical deficiencies in the STRATCOM report, important missing meeting records, and that the consultant hiring process was secretive.

“All of those seem to raise pretty serious governance issues,” he says.

When Klippenstein requested the information, the Treasurer said she lacked the authority to fulfill the request and referred it to the SPAC, which would consider it and make a recommendation to Convocation. The law society said it is up to Convocation to decide whether the requested information is reasonably required for Klippenstein to fulfill his bench obligations. He argues he is legally entitled to the information as a corporate director.

According to the [SPAC’s report](#), LSO benchers are governors of a corporate entity, with fiduciary and duty-of-care obligations, and with information entitlement “akin to that of a corporate director.” To fulfil their roles, said the report, benchers have access to committee materials, including

policy reports, research, budgetary information, and survey or consultation results; Convocation minutes, transcripts, and other materials; “additional supporting and educational resources posted in the bencher resource centre;” and information regarding oral or written briefings on “major policy or other initiatives.” The report adds that the LSO’s governance structure allows benchers access to “wide-ranging and comprehensive information” to support their “oversight and policy-making functions.”

In devising a policy on bencher information requests, the SPAC considered the LSO’s obligations to provide information, the scope of LSO information benchers need to do their job, and the person who should be responsible for dealing with requests and exercising discretion under the policy. The committee also examined the implications that fulfilling requests would have on LSO resources, where there would be disagreement on the policy’s application, and how to deal with that.

The policy would apply where a bencher does not receive the information they request. The first requirement is that requested information must directly relate to a bencher’s “appropriate duty” as a governor, and the information must be “reasonably required” for the bencher to fulfill their oversight or policy-making responsibilities. The bencher would submit a form to the Treasurer detailing how the request was aligned with the first requirement, and the Treasurer would consult with the CEO on the work and associated costs that fulfilling the request would require.

If the Treasurer denies the request because it is not consistent with the first requirement or if the Treasurer and the CEO decide fulfilling the request would exceed the normal duties of law society staff, the bencher can take the request to Convocation, which will determine whether to fulfill it, *in camera*. If the law society produces the information, the policy proposes that it will go to all benchers and remain confidential unless Convocation decides to make it public.

“The proposed policy basically follows what most boards do in the ordinary course,” says Shortreed, “which is that management ensures there’s adequate information before the board. If a director disagrees, they usually ask the chair of the board. And if the chair disagrees, they always have the right to get enough of their fellow directors to agree with them to obtain further information.”

"It's really the kind of simple board governance that most boards engage in. All that this policy did was write that down."

Klippenstein says a bencher majority should not be able to block an information request.

"Having a majority gatekeeper function of benchers is likely to inhibit good governance by making it easy to block bencher information requests. As I understand the law, that's actually not appropriate legal principles either."

Benchers are individually tasked with oversight, so it logically follows that they should individually receive the information they think they need for their thinking and discussions, he says. "This proposed policy, to me, just doesn't cut it."

Bencher Howard Levitt says the majority's ability to block information requests allows them to prevent access to information for political reasons.

"Let's extrapolate for a moment to the political realm. It's like saying that a parliamentarian in the minority can be deprived of access to information that the Liberal-NDP coalition don't want them to have because they can find things that are embarrassing to them," says Levitt.

"Effectively convocation is a majority of the benchers. There are obviously groups that form a majority on certain issues, and they could use that majority oppressively. I'm not saying they would. I'm saying that there's that political potential."