Order F23-14

COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

Elizabeth Barker
Director of Adjudication

March 9, 2023

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Summary: An applicant requested the College of Physicians and Surgeons of British Columbia (College) give him access to his registrant file. The College refused access to some of the records and parts of records under several exceptions to disclosure in the *Freedom of Information and Protection of Privacy Act* (FIPPA) and pursuant to s. 26.2 of the *Health Professions Act* (HPA). The adjudicator finds that ss. 13(1) (policy advice or recommendations), 14 (solicitor client privilege) and 22(1) (unreasonable invasion of third party's personal privacy) of FIPPA and s. 26.2 of the HPA apply to most of the information in dispute. The adjudicator orders the College to give the applicant access to the information to which those provisions do not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(7) (formerly s. 79), 13(1), 13(2), 14, 22(1), 22(2)(f), 22(3)(a), 22(3)(d), 22(3)(h), 22(3)(j). *Health Professions Act*, RSBC 1996, c. 183, ss. 26.2(1)(a), 26.2(1)(b), 26.2(6).

INTRODUCTION

[1] The applicant, now a former registrant of the College of Physicians and Surgeons of British Columbia (College), requested access to his complete registrant file under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The College provided him with records but withheld some information under ss. 13 (policy advice or recommendations), 14 (solicitor client privilege), 22 (harm to personal privacy) and 79 of (FIPPA's relationship to other Acts) of FIPPA. The College said it was refusing access under s. 79 because s. 26.2 (confidential information) of the *Health Professions Act* (HPA) applied.

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review of the College's decision. Mediation by the OIPC did not settle the matter and it proceeded to inquiry under s. 56(1) of FIPPA.

Preliminary Matters

Section 79 of FIPPA

[3] The College says in its access decision and in its inquiry submissions that it is refusing access to some records under s. 79 of FIPPA. It has marked 15 pages as being withheld under s. 79.

[4] Section 79 was repealed in late 2021 and the same provision is now found at s. 3(7) of FIPPA, so I will refer to it by its new numbering from this point forward.

[5] Section 3(7) is not an exception to disclosure. Rather, it says that if a provision of FIPPA is inconsistent or in conflict with a provision of another Act, the provision of FIPPA prevails unless the other Act expressly provides that it, or a provision of it, applies despite FIPPA.

[6] Section 26.2(6) of HPA expressly provides that s. 26.2(1) of HPA applies despite FIPPA. Based on what the College says in its inquiry submissions, I understand that it is refusing access to the information on the 15 pages under s. 26.2(1) of HPA.

Scope of this inquiry

[7] The applicant's access request was for the records in his own College registrant file. He sought a review of the College's decision to sever information from those records and that is the matter that proceeded to inquiry.

[8] However, just before the inquiry commenced, the applicant wrote to the OIPC to say that he wanted to shift the focus of his access request to the records in another physician's College registrant file. The OIPC decided that he would not be allowed to change the scope of the review and confirmed that the only records under review in this inquiry are the records from his own registrant file.[1] Despite this, the applicant's inquiry submission discusses why he thinks the inquiry should be expanded to include information in the other physician's registrant file. The applicant's inquiry submission also discusses what took place with a previous request for review and an associated complaint to the OIPC regarding the College. Both of those matters were closed by the OIPC in 2019.[2]

[1] OIPC Director of Investigation's August 9, 2022 letter to applicant. He was also told that if he wanted to access information in the other registrant file he could make a new access request for that information. At para. 38 of its reply submission, the College says that the applicant subsequently did make that new request to the College. The applicant does not dispute this.
[2] OIPC complaint file F19-80585 was closed as being unsubstantiated and the associated request for review file F19-79943 was closed because the applicant did not dispute the severing.

[9] In my view, there is nothing in what the applicant says in his submission that would justify expanding the scope of this inquiry to include records in another registrant's College file or revisiting matters that the OIPC concluded years ago. Therefore, I find that what the applicant says about the other physician's file and his already closed FIPPA files is not relevant to the issues to be decided in this inquiry.

ISSUES

[10] The issues to be decided in this inquiry are as follows:

1. Is the public body authorized to refuse to disclose information under ss. 13 and 14 of FIPPA?
2. Does s. 26.2 of HPA prohibit the public body from disclosing the information?
3. Is the public body required to refuse to disclose information under s. 22(1) of FIPPA?

[11] Section 57 of FIPPA sets out the burden of proof. The College has the burden of proving that ss. 13(1) and 14 apply. The applicant has the burden of proving disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[3]

[12] However, FIPPA does not say who has the burden of proving that s. 26.2 of HPA applies. Previous orders have said that in such cases it is in the interests of both parties to present argument and evidence in support of their positions.[4]

DISCUSSION

Background

[13] The College is the body that governs physicians in British Columbia in accordance with HPA. The applicant is a former registrant of the College.

[14] Over the years, the College received and investigated complaints about the applicant. It eventually resolved to investigate his clinical practice. That investigation never took place, however, because the applicant executed an undertaking agreeing to cease clinical practice and limit his professional activities

[3] The public body has the initial burden of proving the information is personal information: Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.
[4] Order F10-41, 2010 CanLII 77327 (BC IPC); Order F18-01, 2018 BCIPC 01, quashed on judicial review at 2019 BCSC 354 but not for reasons related to the burden of proof; Order F20-17, 2020 BCIPC 19 (CanLII); F21-27, 2021 BCIPC 34.

to research unless the College determined the undertaking should be removed. The applicant subsequently resigned altogether from the College.

[15] The applicant then filed a petition in the Supreme Court of British Columbia (BCSC) for judicial review of the College's decision to investigate his clinical practice and its decision to close the investigation when he signed the undertaking. His petition and subsequent appeals to the British Columbia Court of Appeal (BCCA) were unsuccessful.[5]

[16] In January 2020, the applicant requested the College provide him with access to his complete registrant file. This inquiry is about that request and the College's March 2020 decision in response.[6]

Records at issue

[17] There are 4410 pages of records some of which are completely severed and others only partially severed. In addition to a table of records, the College has provided the OIPC an unsevered copy of the disputed records, including the information it withheld under solicitor-client privilege.[7]

Advice and recommendations, s. 13

[18] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.[8]

[19] Section 13(1) applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.[9] In addition, the term "advice" includes "an opinion that involves exercising judgment and skill to weigh the significance of matters of fact," including "expert opinion on matters of fact on

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[5] The College's submission included copies of the courts' decisions.
[6] The decision to send the matter to inquiry was made by an OIPC Director of Investigation on August 23, 2021.
[7] The College explains that voluntarily providing the privileged information to the Commissioner for the purposes of deciding this inquiry does not constitute a waiver of privilege over those materials by the College, and it cites s. 44(2.1) of FIPPA. (College's initial submission at para. 40).
[8] *John Doe v. Ontario (Finance*), 2014 SCC 36 [*John Doe*] at paras. 45-51.
[9] Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).

which a public body must make a decision for future action."[10] Advice also includes a public servant's view of policy options and alternative courses of action to be accepted or rejected in relation to a pending decision.[11] Further, advice or recommendations do not have to actually be communicated to the decision-maker in order for s. 13(1) to apply.[12]

[20] The first step in the s. 13 analysis is to determine whether disclosing the information in dispute would reveal advice or recommendations developed by or for the public body. If it would, then I must decide if ss. 13(2) or (3) apply to the information. If they apply, the public body must not refuse to disclose the information under s. 13(1).

Does the information reveal advice or recommendations?

[21] The College withheld parts of a *Reviewer's Summary and Points for Consideration* document and the entirety of several emails under s. 13.[13] The College says the *Reviewer's Summary and Points for Consideration* document was provided to an Inquiry Committee panel in respect of a complaint received about the applicant, and the emails are between its in-house legal counsel and its Director of Records, Information and Privacy.

[22] The applicant makes no submission about s. 13.

[23] I find that some of the information withheld from the *Reviewer's Summary and Points for Consideration* reveals the opinion of the medical reviewer tasked with reviewing the situation and preparing the document for the Inquiry Committee panel. That information is the type of expert opinion on matters of fact on which a public body must make a decision for future action, that case law says is advice."[14] However, the balance of the severed information is merely topics or questions for the Inquiry Committee to consider, accompanied by a factual statement which reveal nothing about advice or recommendations.

[24] As for the emails, they are between the College's in-house legal counsel and its Director of Records, Information and Privacy. Only a small portion of what has been withheld reveals advice or recommendations, in the form of the Director's opinion about an issue related to records and information practices. However, the balance of the emails does not reveal advice or recommendations; rather it reveals discrete factual statements about events, process steps, signature blocks and email header details.

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[10] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*] at para. 113.
[11] *John Doe, supra* note 8 at paras. 25-27.
[12] *John Doe, supra* note 8 at paras. 48-51.
[13] At pp. 475, 1474-75, 1476 and 1488-89 of the records.
[14] *College of Physicians, supra* note 10 at para. 113.

Section 13(2) and 13(3)

[25] Section 13(2) lists types of information and records that a public body must not refuse to disclose under s. 13(1). The College says that s. 13(2) does not apply. I agree and find that none of the provisions in s. 13(2) apply.

[26] Section 13(3) says that s. 13(1) does not apply to information in a record that has been in existence for ten or more years. In this case the records are not that old, so s. 13(3) is not called into play.

Conclusion, s 13

[27] In conclusion, I find that the College has established that disclosing some of the information it withheld under s. 13(1) would reveal advice or recommendations developed by or for the College. Sections 13(2) and (3) do not apply to that information, so the College may withhold it under s. 13(1). However, the College has not established that s. 13 applies to all of the information it withheld on pages 475, 1474-76 and 1488-89 of the records. For clarity, I have highlighted the only information on those pages that may be withheld under s. 13(1).

Solicitor client privilege, s. 14

[28] The College applied s. 14 to most of the information in dispute. Section 14 states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s. 14 of FIPPA encompasses both legal advice privilege and litigation privilege.[15] The College says it is relying on both in this case, but it does not specify where precisely in the records it claims legal advice and/or litigation privilege applies.

Legal advice privilege

[29] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[16] In order for legal advice privilege to apply, each document must meet the following criteria:

- a communication between solicitor and client (or their agent);
- that entails seeking or providing legal advice; and
- that is intended by the solicitor and client to be confidential.[17]

[15] *College of Physicians, supra* note 10 at para. 26.
[16] *College of Physicians, supra* note 10 at para. 31.
[17] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837; *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.

[30] Not every communication between client and solicitor is privileged, but if the above criteria are satisfied, then legal advice privilege applies to the communication and the records relating to it.[18]

Parties' submissions

[31] The College says that some of the records are protected by legal advice privilege. It explains that its in-house counsel and its external counsel provided legal advice and litigation advice to the College in relation to the applicant's proceedings in the BCSC and the BCCA, and it provides the names of its legal counsel. It adds that all discussions with in-house and external counsel for the College respecting the applicant were treated as confidential and only shared internally on a confidential basis.

[32] More specifically, the College says that the information it withheld under s. 14 is as follows:[19]

a. Communications between the College's Deputy Registrar and Chief Legal Counsel (Chief Legal Counsel), its in-house counsel and its external counsel which related to the giving or receiving of legal advice;
b. Communications between the College's external counsel or communications between external counsel and its Chief Legal Counsel and in-house counsel which related to litigation involving the applicant;
c. Advice and information relating to the applicant's court proceedings; and
d. Internal working drafts and materials prepared in relation to the applicant's court proceedings.

[33] The College also provides an affidavit from its Chief Legal Counsel who oversees and directs legal services provided by the College's in-house counsel and external counsel. He says the College has been, and continues to be, involved in a number of legal matters initiated by the applicant, including two petitions to the BCSC and two appeals to the BCCA.[20] He names the three external legal counsel the College hired to handle the applicant's court proceedings. He says that the College treated all discussions with in-house counsel and external counsel respecting the applicant as confidential and only shared these discussions internally on a confidential basis.[21]

[34] The applicant's submission does not address s. 14 and solicitor client privilege.

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[18] *Solosky, Ibid* at p. 837; *R. v. B*., 1995 CanLII 2007 (BC SC) at para. 22.
[19] College's initial submission at para. 62.
[20] Chief Legal Counsel's affidavit at para. 57.
[21] Chief Legal Counsel's affidavit at para. 61.

Legal advice privilege, analysis and findings

[35] The information being withheld under s. 14 is largely in emails between the College's lawyers and College staff in which they discuss legal issues they are working on for the College. Some of those emails have documents attached, which the lawyers are sharing to solicit input and/or approval. There are also handwritten notes by the College lawyers recording their communications with the College's other lawyers about the legal issues.

[36] I find that almost all of the records in dispute under s. 14 are communications that occurred for the purpose of the College seeking and obtaining legal advice. The College's in-house lawyers are College employees, and it is plain on the face of the records that they are communicating both as the College's lawyers and also on behalf of their employer, providing instructions to external legal counsel and receiving their legal advice.

[37] I also accept the College's submission and evidence that these communications were intended to be confidential. There are no participants in the communications other than the College's in-house and external lawyers and staff and some of the records are even expressly marked as privileged and confidential.

[38] Therefore, with the exception of six records which I will discuss next, I am satisfied that the information withheld under s. 14 is protected by legal advice privilege and the College may refuse to disclose it on that basis.

[39] I find, however, that legal advice privilege does not apply to the following six records:

1. Response to Petition (working draft),[22]
2. Draft Respondents' Argument,[23]
3. Application to Dismiss (handwritten),[24]
4. Pleadings Binder (working materials),[25]
5. Respondents' Factum (working draft),[26]
6. Draft letter from the College to the applicant.[27]

[40] These six records are not addressed to anyone and they are not attachments to any communication such as an email or letter. I find that they do

[22] At pp. 4405-09 of the records.
[23] At pp. 2618-23 of the records.
[24] At pp. 2630-39 of the records.
[25] At pp. 2786-3113 of the records.
[26] At pp. 3747-73 of the records.
[27] At pp. 4347-48 of the records.

not reveal communications made between a client and their solicitor for the purposes of seeking and providing legal advice. For that reason, I am not satisfied that legal advice privilege applies.

[41] I will now consider if litigation privilege applies to these six records.

Litigation privilege

[42] While legal advice privilege protects confidential communications between a client and a lawyer for the purpose of seeking or providing legal advice, whether or not litigation is pending, litigation privilege protects communications or documents created or obtained for the dominant purpose of anticipated litigation.[28] The object of litigation privilege is to create a "zone of privacy" that ensures the effectiveness of the adversarial process by allowing parties to prepare their positions in private, without interference and without fear of premature disclosure. Once the litigation has concluded, the privilege ends.[29]

[43] To succeed in a claim of litigation privilege the party invoking it must establish that:

a) litigation was "in reasonable prospect" when the document was produced; and
b) the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.[30]

[44] The threshold for determining whether litigation is "in reasonable prospect" is a low one and it does not require certainty.[31] The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?[32]

[45] There is no absolute rule for determining whether litigation was the "dominant purpose" for the document's production. A finding of dominant purpose is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.[33]

[46] The College says that litigation privilege applies to exchanges between external and in-house legal counsel regarding court proceedings, draft pleadings, notes about the legal advice from external counsel and internal working materials

[28] *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 79.
[29] *Blank v. Canada (Minister of Justice),* 2006 SCC 39 at paras. 27-34.
[30] *Raj v. Khosravi*, 2015 BCCA 49 [*Raj*], at para. 20. Also, *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259 (CanLII) at para. 32.
[31] Raj, *Ibid* at para 10.
[32] *Raj, Ibid* at para. 11 citing *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.
[33] Raj, *Ibid* at para. 17.

in relation to the court proceedings.[34] It says that litigation privilege in relation to the proceedings in the Supreme Court and Court of Appeal have not expired and the applicant continues in his most recent action in the Supreme Court of British Columbia to pursue matters that are integrally related to prior proceedings. The College says that the litigation with the applicant "is a considerable way from being concluded."[35] The Chief Legal Counsel says the College continues to be involved in a number of legal matters involving the applicant.[36] The applicant does not dispute what the College says about the continuing nature of the litigation.

[47] I find that when records 1-5 were created litigation was clearly underway. Given the records are pleadings, it is equally clear that the dominant purpose for their creation was the litigation. Also, based on the College's affidavit evidence and submission, I conclude that the litigation is not yet concluded.

[48] However, I am not persuaded that the dominant purpose for the creation of the draft letter from the College to the applicant (i.e., record 6) was to obtain legal advice or to conduct litigation. The contents of the letter do not appear to be part of the court proceedings as set out in the court decisions the College provided to explain the litigation. I cannot provide more details here without disclosing the actual information in dispute. The College's submissions and evidence do not adequately explain how litigation privilege applies to this draft letter.

[49] I also considered the College's assertion that "there is ample basis to establish that the information withheld under s. 14 is presumptively privileged."[37] In support, it cites case law about how there is a rebuttable presumption that a lawyer's billing information is protected by solicitor-client privilege. I find that presumption does not apply here as the draft letter does not contain any information about a lawyer's legal fees.

[50] In summary, I find that litigation privilege applies to records 1-5 but not to record 6.

Conclusion, s. 14

[51] With the exception of a draft letter from the College to the applicant at pages 4347-48 of the records, the College has proven that the records withheld under s. 14 are protected by solicitor-client privilege.

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[34] College's initial submission at para. 123.
[35] College's initial submission at para. 124.
[36] Chief Legal Counsel's affidavit at para. 57.
[37] College's initial submission at para. 125, citing *British Columbia (Attorney General) v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132 (CanLII) and Order F20-29, 2020 BCIPC 35 (CanLII).

Section 26.2 of the HPA

[52] The College submits that s. 26.2 of HPA prohibits disclosing 15 pages of the records. Section 26.2 of HPA states as follows:

> Confidential information
>
> 26.2 (1) Subject to subsections (2) to (6), a quality assurance committee, an assessor appointed by that committee and a person acting on that committee's behalf must not disclose or provide to another committee or person
>
> (a) records or information that a registrant provides to the quality assurance committee or an assessor under the quality assurance program, or
>
> (b) a self assessment prepared by a registrant for the purposes of a continuing competence program.
>
> (2) Despite subsection (1), a quality assurance committee, an assessor appointed by that committee or a person acting on behalf of that committee may disclose information described in that subsection
>
> (a) to show that the registrant knowingly gave false information to the quality assurance committee or assessor, or
>
> (b) to the provincial health officer or a medical health officer within the meaning of the *Public Health Act* for the purpose of reporting a risk of significant harm to the health or safety of the public or a group of people.
>
> (3) If a quality assurance committee has reasonable grounds to believe that a registrant
>
> (a) has committed an act of professional misconduct,
>
> (b) has demonstrated professional incompetence,
>
> (c) has a condition described in section 33 (4) (e), or
>
> (d) as a result of a failure to comply with a recommendation under section 26.1 (3), poses a threat to the public,
>
> the quality assurance committee must, if it considers the action necessary to protect the public, notify the inquiry committee which must treat the matter as if it were a complaint under section 32.
>
> (4) Records, information or a self assessment obtained through a breach of subsection (1) may not be used against a registrant except for the purposes of subsection (2).
>
> (5) Subject to subsection (2), records, information or a self assessment prepared for the purposes of a quality assurance program or continuing competence program may not be received as evidence
>
> (a) in a proceeding under this Act, or
>
> (b) in a civil proceeding.

> (6) Subsection (1) applies despite the *Freedom of information and Protection of Privacy Act*, other than section 44 (2) or (3) of that Act.

[53] The BCSC has said that s. 26.2 of HPA is intended to shield quality assurance program records from disclosure to the public but also from disclosure to the registrant who is being assessed.[38]

[54] Section 26.2(6) of HPA expressly provides that s. 26.2(1) of HPA applies despite FIPPA. Thus, if I find that s. 26.2(1) applies to the information the College is withholding, then the applicant's right under s. 4 of FIPPA to access records in the custody or under the control of the College does not apply.

The parties' submissions

[55] The College explains that it administers a number of quality assurance activities to ensure that the medical services to which the public has access are safe, reliable, and professionally delivered by competent practitioners registered with the College. One of the ways it does this is through a Physician Practice Enhancement Program (PPEP), which is overseen and directed by the College's Quality Assurance Committee (QAC). The College explains that in 2014 the applicant was put through the PPEP review process and the information it is withholding under s. 26.2 relates to that.

[56] The College submits that s. 26.2 requires the College to shield from disclosure all records and information created and received as part of its quality assurance program, except in limited circumstances, which are not applicable here.[39] More specifically, the College says:

> The College withheld from disclosure a portion of the information relating to the application of the PPEP program to assess (the applicant's] practice. The information withheld included internal College records of the PPEP processes, including selection for the PPEP, and a record of steps completed including information received under the College's Quality Assurance Committee, and assessment information. The information withheld also include confidential records or information provided to the Quality Assurance Committee or an assessor under the quality assurance program in the course of the PPEP.[40]

[57] The applicant made no submission about the application of s. 26.2 of HPA to the records.

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[38] *College of Physicians and Surgeons of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 354 at para. 95, on judicial review of Order F18-01, 2018 BCIPC 01 (Can LII). See also F20-17, 2020 BCIPC 19 (Can LII) at paras. 33-35.
[39] College's initial submission at paras. 77 and 82.
[40] College's initial submission at para. 50. The College reiterates this at para. 81.

Analysis and findings

[58] Based on my review and the College's submissions and evidence, I find that the records and information withheld under s. 26.2 are as follows:

1. *Assessment File Tracking Sheet* – This appears to be a print-out from the College's case management system. It provides chronological notes of the administrative steps in the applicant's PPEP review case.[41] The College says that this page is an internal College record relating to the PPEP assessment process.[42]

2. *QA Assessment Summary* – This is a report that appears to have been generated from the College's case management system and it provides general administrative information about the applicant's PPEP review case.[43] The College says that this page is an internal College record relating to the PPEP assessment process.[44]

3. *Confidential Comments* – These are handwritten comments on a PPEP form. The College says that it received this from the assessor.[45]

4. *Medical notes* – These are handwritten notes about patients, such as one would find in a medical chart. The College says that it received them from the assessor but does not explain further.[46] Given their context and what the College says, I conclude they are examples of the applicant's medical charting practices, which the assessor included as part of her assessment.

5. *College of Physicians and Surgeons of British Columbia Summary Report* – This one-page report appears to have been generated from the College's case management system. It provides the averages of how the applicant was rated by various groups during the PPEP review.[47] The College says that this is an internal College record relating to PPEP and it is "assessment ratings".[48] It is evident that this information is derived from a mathematical calculation based on underlying information, which is not included on the face of the record.

[41] Pages 1168-1169 of the records.
[42] College's initial submission at para. 81(c).
[43] Page 1174 of the records.
[44] College's initial submission at para. 81(c).
[45] Page 1186 of the records. College's initial submission at para. 81(d).
[46] Pages 1187-1192 of the records. College's initial submission at para. 81(d).
[47] Page 1193 of the records.
[48] College's submission at para. 81(c).

6. *Physician Practice Enhancement Program File Tracking Sheet* – This is a one-page report, apparently generated from the College's case management system. It provides general administrative information about the applicant's PPEP review case.[49]

7. *QA Event List* – This is a print-out also from what I understand is the College's case management system.[50] It is a series of chronological entries about administrative matters taken in the applicant's PPEP review case.

[59] The College has not said whether it is relying on s. 26.2(1)(a) or s. 26(1)(b) or both to withhold these records. I will consider both, beginning with s. 26.2(1)(a).

[60] Section 26.2(1)(a) applies to records or information that a registrant provides to a quality assurance committee or an assessor under the quality assurance program. The College says that the information in dispute was "created and received as part of the Quality Assurance Program," "provided to the quality assurance committee or an assessor under the quality assurance program" and "received from the PPEP assessor."[51] It also says the information includes "internal College records relating to PPEP assessment process."[52]

[61] Based on the College's submissions and what I can see in the records, the disputed information relates directly to the PPEP review of the applicant, which was conducted under the oversight and direction of the QAC. Therefore, I am satisfied that the information was provided to a "quality assurance committee or an assessor under the quality assurance program."

[62] However, the College must also prove that the disputed information was provided by a "registrant" as required by s. 26.2(1)(a). That term is defined in HPA as follows:

> 1 In this Act
>
> "registrant" means, in respect of a designated health profession, a person who is granted registration as a member of its college in accordance with section 20;

[49] Page 1220 of the records.
[50] Pages 1221-1223 of the records.
[51] College's initial submission at paras. 82, and 81(b) and (d).
[52] College's initial submission at para. 81(d).

> 26 In this Part:
>
> "registrant" includes a former registrant, and a certified non-registrant or former certified non-registrant to whom this Part applies;

[63] The College says some of the information was received from the assessor, and I am satisfied that she is a "registrant" because she is conducting a "peer" review of a registrant and she uses the title "Dr". I can see from the record and the context provided by the surrounding records that the assessor reported back to the QAC as part of her peer assessment of the applicant under PPEP program. I find that s. 26.2(1)(a) applies to the *Confidential Comments* and the *Medical Notes* because the assessor is a registrant and she provided that information to the QAC.

[64] I can also see some of the chronological notes in the *Assessment File Tracking Sheet* are what the applicant said during a phone call. Given the applicant was a registrant at that time, I find that the note of what he said is information provided by a registrant to the QAC and s. 26.2(1)(a) applies. Similarly, I also find that some of what was recorded in the *QA Event List* is what a doctor said, so that is also information provided by a registrant to the QAC and s. 26.2(1)(a) applies.

[65] However, it is not apparent on the face of the records that the balance of the information withheld under s. 26.2 is information provided by a "registrant" and the College does not explain how it is. For instance, most of the *Assessment File Tracking Sheet* and the *QA Event List* and all of the *Physician Practice Enhancement Program File Tracking Sheet* and the *QA Assessment Summary* comprise information about administrative steps taken during the PPEP review. There is nothing to indicate that the person providing that information is a doctor and thus a registrant. It seems unlikely given the administrative and clerical nature of what is recorded. Therefore, I am not persuaded that s. 26.2(1)(a) applies to this information.

[66] The College also does not say who provided the information in the *College of Physicians and Surgeons of British Columbia Summary Report*. Absent any explanation, I am not satisfied that this record and the information in it was provided by a registrant. Also supporting my conclusion that s. 26.2(1) does not apply is the fact the College already disclosed this same information to the applicant elsewhere in the records.

[67] As for s. 26.2(1)(b), it applies to a "self assessment prepared by a registrant for the purposes of a continuing competence program." The College does not explain how the disputed records or information amount to a self assessment, and I cannot see how they could be interpreted as such. For that reason, I conclude that s. 26.2(1)(b) does not apply.

Conclusion, s. 26.2

[68] In conclusion, I find that s. 26.2(1)(a) applies to all of the *Confidential Comments* and the *Medical Notes*. It also applies to the small amount of information that I have highlighted in a copy of the *Assessment File Tracking Sheet* and the *QA Event List* that are provided to the College with this order. I also find that the applicant has no right of access to that information under s. 4 of FIPPA because s. 26.2(6) says that s. 26.2(1) applies despite FIPPA.

[69] However, I find that neither ss. 26.2(1)(a) nor (b) apply to the balance of the information that the College withheld under s. 26.2.

Unreasonable invasion of a third party's personal privacy, s. 22

[70] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[53]

[71] The College submits that all of the information it withheld under s. 22 is personal information and its disclosure would be an unreasonable invasion of third party personal privacy. The applicant says nothing about s. 22 in his inquiry submission.

Personal Information

[72] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[54]

[73] The College withheld individuals' names, home and personal contact information, personal health numbers (PHN), birth dates, gender and details of medical treatment. All of that information is about identifiable individuals and is their personal information. None of it is "contact information".

[74] The College also withheld physician ID numbers (CPSID). The name of the physician associated with each CPSID was disclosed, so the CPSIDs in the

[53] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.
[54] See Schedule 1 of FIPPA for the definitions of personal information and contact information.

context of these records reveals information about identifiable individuals. For that reason, I find that the CPSIDs are personal information.

[75] The College also withheld references regarding the applicant's suitability to become a College registrant when he first applied.[55] These references are the opinion of identifiable individuals, so it is their personal information. It is simultaneously the applicant's personal information because the references are about him.

[76] Although the College disclosed almost all instances of other physicians' names in the records, it made an exception for a list of physicians who (in addition to the applicant) received a follow-up letter after disclosing to the College that they were licensed to practice in another jurisdiction.[56] I find these physician names are personal information.

[77] The College also withheld remarks a physician faxed to the College.[57] The name of the physician has been disclosed, and the remarks are about the physician, so this information is about an identifiable individual and is their personal information.

[78] I find that all of the information the College withheld under s. 22 is about identifiable individuals and it is third-party personal information. Only a small amount, in the references, is also the applicant's personal information.

[79] I also find that some of the information that I concluded is not protected by s. 26.2(1), which the College did not withhold under s. 22, is third-party personal information. It is the names of individuals who were involved in their work capacity in the assessment of the applicant, some CPSIDs and one physician's home contact information.[58]

Not an unreasonable invasion, s. 22(4)

[80] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If s. 22(4) applies, disclosure would not be an unreasonable invasion of a third party's personal privacy.

[81] The College submits s. 22(4) does not apply.

[82] I find that s. 22(4)(e) applies to a small amount of personal information. Section 22(4)(e) says that a disclosure of personal information is not an

[55] At pp. 829-33 of the records.
[56] At pp. 954-55 of the records.
[57] This information is on p. 120 of the records.
[58] That information is on pages 1168-69 and 1220-1223 of the records.

unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. I find that s. 22(4)(e) applies to the names of College employees in the context of the administrative and clerical functions they were performing. Therefore, disclosure of those employees' names would not be an unreasonable invasion of his personal privacy under s. 22(1), so I will not consider them any further.[59] Other than that small amount of s. 22(4)(e), s. 22(4) does not apply to the information in the records.

Presumptions, s. 22(3)

[83] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to any personal information to which s. 22(4) does not apply. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party personal privacy. The College submits that ss. 22(3)(a), (d), (h) and (j) apply.

[84] Medical history, treatment and evaluation, s. 22(3)(a) - Section 22(3)(a) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. I find that some of the personal information is about patients' medical treatment and s. 22(3)(a) applies to that information.

[85] Employment history, s. 22(3)(d) - Section 22(3)(d) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to their employment, occupational or educational history.

[86] The College says that s. 22(3)(d) applies to the physician CPSIDs because they are analogous to employee numbers which BC orders have found relate to employment history.[60]

[87] Past orders have consistently found that employee identification numbers or other unique work-related identifiers relate to employment history under s. 22(3)(d).[61] Similarly, orders have found that s. 22(3)(d) applies to nurses'

[59] That information is at pp.1220-1223 of the records.
[60] College's initial submission at para. 94, citing Order F22-17, 2022 BCIPC 19, para 39; Order F21-09, 2021 BCIPC 13, para. 39,
[61] Order F22-34, 2022 BCIPC 38 at para. 203; Order F22-17, 2022 BCIPC 19, para 39; Order F21-35, 2021 BCIPC 43 (CanLII) at para. 189; Order F21-09, 2021 BCIPC 13, para. 39; Order F20-51, 2020 BCIPC 60 (CanLII) at para. 22; Order F20-13, 2020 BCIPC 15 (CanLII) at para. 56; Order F14-41, 2014 BCIPC 44 (CanLII) at para. 46; Order F15-17, 2015 BCIPC 18 (CanLII) at para. 37; Order 03-21, 2003 CanLII 49195 (BCIPC) at paras. 25-26 and Order No. 161-1997, 1997 CanLII 1515 (BC IPC) at p. 5.

nursing license numbers[62] and to a lawyer's Law Society identification number.[63] I make a similar finding here. The CPSIDs are unique personal identifiers that pertain to the physicians' registration with the regulatory body that governs their profession. I find that the CPSIDs relate to the physicians' occupational history and s. 22(3)(d) applies.

[88] I also find that s. 22(3)(d) applies to the list of physicians who were sent a letter about practicing medicine outside BC. These physicians received a follow-up letter because they revealed to the College that they held a license to practice medicine in another jurisdiction. Section 22(3)(d) also applies to a list of physicians who, like the applicant, were the subject of a PPEP assessment. All of this is information about the occupational history of those physicians.

[89] Recommendations or evaluations, s. 22(3)(h) - Section 22(3)(h) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if it would reveal (i) the identity of a third party who supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, or (ii) the content of a personal recommendation or evaluation, character reference or personnel evaluation supplied, in confidence, by a third party, if the applicant could reasonably be expected to know the identity of the third party.

[90] The College submits that s. 22(3)(h) applies to the references provided on behalf of the applicant when he first applied to the College. The College says the references were supplied in confidence and they reveal the referees' identities as well as their personal recommendations, evaluations or character references about the applicant.[64] The College adds that it treats information received in personal recommendations, character references and personal evaluations in confidence and does not disclose them to registrants.

[91] The references are provided on a College form. The form's preamble says the applicant gave their name as a reference and the College will hold their answers in the strictest confidence.

[92] I find that the references were supplied in confidence and even if the referees' names and addresses were separated from what they wrote, the applicant could reasonably be expected to know who they are. It would be evident who said what about him, based on the dates and what they say about their interactions with him. Therefore, I find that s. 22(3)(h) applies to these

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[62] Order F19-27, 2019 BCIPC 29 (CanLII) at para. 54.
[63] F18-29, 2018 BCIPC 32 (CanLII) at paras. 27 and 35. Similarly, past orders have found that a student's identification number relates to the student's educational history under s. 22(3)(d). For example, Order F19-27, 2019 BCIPC 29 (CanLII) at para. 54 and Order F09-21, 2009 CanLII 63565 (BC IPC) at para. 40.
[64] College's initial submission at para. 95, which I assume has a typo and is meant to refer to pp. 829-833 of the records, not "pp. 928-333".

references and disclosing them would be an unreasonable invasion of the referees' personal privacy.

[93] Mailing lists or solicitations – s. 22(3)(j) - Section 22(3)(j) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[94] The College says that s. 22(3)(j) applies because a significant portion of the personal information consists of third parties' names, their home contact information, addresses, email addresses, or phone numbers. However, the College does not explain why it thinks this personal information is going to be used for mailing lists or solicitations. I can see nothing in the materials before me that suggests that anyone has any intention to use the third parties' personal information in that way. I find s. 22(3)(j) does not apply.

Summary, s. 22(3) presumptions

[95] In summary, with a few exceptions, I conclude that s. 22(3)(a), (d) and (h) apply to the third-party personal information in the records. The exceptions are the name of a physician and his remarks on a fax and several instances where peoples' names appear in the context of their work on the PPEP review of the applicant.[65]

Analysis of relevant circumstances and conclusion

[96] The fourth step in a s. 22 analysis is s. 22(2). Section 22(2) says that in determining 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 those listed in s. 22(2). It is at this step that any applicable s. 22(3) presumptions may be rebutted.

[97] Although the burden is on the applicant to establish that disclosing any personal information would not be an unreasonable invasion of third-party personal privacy, he said nothing about s. 22 or relevant circumstances to consider.

[98] For its part, the College raised s. 22(2)(f) of FIPPA, which requires considering whether the personal information was supplied in confidence. The College says the personal information was submitted in confidence to the

[65] This information is on pp. 120, 1168-1169 and 1220-1223 of the records.

College and the College treated it in confidence, so this is a factor that favours withholding the information.[66]

[99] I will first consider whether, in light of the relevant circumstances, the s. 22(3) presumptions have been rebutted. Then, I will consider whether disclosing the personal information that is not protected by a s. 22(3) presumption would be an unreasonable invasion of personal privacy.

[100] In my view, there is only one circumstance that weighs in favour of disclosure of the reference information that is protected by the s. 22(3)(h) presumption. It is the fact that some of the information is about the applicant and is his personal information, specifically the information in the references. However, without more, I find that factor is not sufficient to rebut the s. 22(3)(h) presumption that disclosing the references would be an unreasonable invasion of the referees' personal privacy.

[101] I also find that there are no circumstances that rebut the s. 22(3)(a) presumption that applies to the third parties' medical information, nor the s. 22(3)(d) presumption that applies to the third parties' employment history.

[102] In this case, I can see no reason to consider whether the information that is protected by the s. 22(3) presumptions was supplied in confidence under s. 22(2)(f). If it was supplied in confidence, it would merely strengthen the application of the s. 22(3) presumptions.[67] If it was not supplied in confidence, I do not think that circumstance alone would be sufficient to rebut the presumptions, given the nature of that third-party personal information.

[103] In conclusion, I find that the s. 22(3) presumptions have not been rebutted. Disclosing the third-party personal information to which ss. 22(3)(a), (d) and (h) apply would be an unreasonable invasion of the third parties' personal privacy.

[104] As for the information that is not protected by a s. 22(3) presumption, I find that only some of it may be disclosed. It would not be an unreasonable invasion of third-party personal information to disclose the names of individuals who worked on the PPEP review of the applicant. No presumptions apply to that information and there is no indication it was supplied in confidence. It is not sensitive information and most of it is already known to the applicant such as the name of the individuals who assessed him and his own lawyer.

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[66] The College does not specify which information it means, so I understand it to be arguing that all of the personal information it withheld under s. 22(1) was supplied to it in confidence.
[67] This would not assist the applicant in his desire to gain access to the information withheld under s. 22.

[105] I find otherwise, however, when it comes to the physician's name and remarks in the fax. That information was clearly supplied in confidence because the fax is labeled "confidential" at the top, and that is a circumstance that weighs against disclosure. In addition, the remarks in the fax are not about the applicant, so they are not the applicant's personal information. Weighing all this, I find that disclosing the physician's personal information in this fax would be an unreasonable invasion of his personal privacy.[68]

[106] In conclusion, I find that disclosing most of the third-party personal information would be an unreasonable invasion of third parties' personal privacy and the College must refuse to disclose it under s. 22(1). However, s. 22(1) does not apply to some of the third-party personal information on pages 1168-1169 and 1220-1223 of the records. For the sake of clarity, I have highlighted the only third party personal information on those pages that must be withheld under s. 22(1).

CONCLUSION

[107] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm the College's decision to refuse access to information under s. 13(1).

2. On pages 475, 1474-1476 and 1488-1489, s. 13(1) only authorizes the College to refuse to disclose the information that I have highlighted in a copy of those pages which are sent to the College with this order. The College is required to give the applicant access to the information that is not highlighted on those pages.

3. Subject to item 4 below, I confirm the College's decision to refuse access to information under s. 14.

4. Section 14 does not authorize the College to refuse to disclose the information on pages 4347-4348 and the College is required to disclose that information to the applicant.

5. Subject to item 6 below, s. 22(1) requires the College refuse to disclose information in the records.

[68] This information is on p. 120 of the records.

6. On pages 1168-1169 and 1220-1223, s. 22(1) only applies to the information that I have highlighted in a copy of those pages which are sent to the College with this order. The College is required to give the applicant access to the information that is not highlighted on those pages.

7. Sections 26.2(1) and 26.2(6) of HPA apply to pages 1186-1192 and the information I have highlighted on pages 1168-1169 and 1220-1223 in a copy of those pages which are sent to the College with this order. Given ss. 26.2(1) and 26.2(6) apply, the applicant has no right of access to that information under FIPPA.

8. Sections 26.2(1) and 26.2(6) do not apply to pages 1174 and 1193 and the information that is not highlighted on pages 1168-1169 and 1220-1223. The College is required to give the applicant access to that information.

9. The College is required to concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records disclosed in compliance with items 2, 4, 6 and 8 above.

[108] Pursuant to s. 59(1) of FIPPA, the College is required to comply with this order by **April 24, 2023**.

March 9, 2023

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F20-82803