Order 03-24

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
June 18, 2003

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Summary: The applicant complained to the College about the conduct of a College member. The College disclosed 140 records from its complaint file, but refused to disclose, in their entirety, 19 records. The College has failed to establish that s. 3(1)(b), s. 12(3)(b) or s. 15(2)(b) apply. It is authorized to refuse disclosure of some information under ss. 13(1) and 14 and is required to refuse disclosure by s. 22(3)(d) and (g). Section 22(1) does not require the College to refuse the applicant access to her own personal information.

Key Words: scope of the Act – acting in a quasi-judicial capacity – substance of deliberations – advice or recommendations – developed by or for a public body or a minister – legal advice – solicitor client privilege – expose to civil liability – personal privacy – unreasonable invasion – opinions or views – submitted in confidence – employment or occupational history – public scrutiny – fair determination of rights – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b), 12(3)(b), 13(1), 14, 15(2)(b), 22(1), 22(2)(e), (f) and (h) and 22(3)(b), (g) and (h).

Authorities Considered: B.C.: Order No. 163-1997, [1997] B.C.I.P.C.D. No. 21; Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37; Order No. 00-08, [2000] B.C.I.P.C.D. No. 8; Order No. 00-16, [2000] B.C.I.P.C.D. No. 19; Order No. 00-52, [2000] B.C.I.P.C.D. No. 56; Order No. 01-53, [2001] B.C.I.P.C.D. No. 56; Order No. 03-09, [2003] B.C.I.P.C.D. No. 9; Order No. 03-14, [2003] B.C.I.P.C.D. No. 14.

Cases Considered: *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.).

1.0 INTRODUCTION

[1] On April 29, 2002, the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the College of Psychologists of British Columbia ("College") for access to records from the College's file respecting a complaint the applicant had made to the College about one of its members. The College had previously disclosed approximately 140 records from its file, but refused to disclose 19 others (some of which are duplicates). The College originally relied on ss. 3(1)(b), 12(3)(b), 13(1), 15, 21, 22 and 33(c) of the Act. The College said in its initial submission that it was seeking to apply s. 14 as well.

[2] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. The applicant and the College made submissions, as did the third-party psychologist about whose conduct the applicant had complained to the College.

2.0 ISSUE

[3] The issues addressed in this decision are as follows:

1. Does s. 3(1)(b) of the Act exclude some of the records from the Act's coverage?

2. Is the College authorized by s. 12(3)(b), s. 13(1), s. 14 or s. 15(2)(b) to refuse to disclose information?

3. Is the College required by s. 22(1) of the Act to refuse to disclose personal information?

[4] Under s. 57(1) of the Act, the College bears the burden of proof respecting ss. 12(3)(b), 13(1), 14 and 15(2)(b). Under s. 57(2), the applicant bears the burden of proof respecting s. 22. The College also bears the burden of proof, according to previous decisions, respecting s. 3(1)(b).

[5] The notice of written inquiry that this office issued to the parties, and the College's initial submission, both say that one of the issues is whether s. 21 of the Act applies to records. They also mention s. 33(c) as being an issue. The College did not make any submissions on these two sections, however. Nor is there any apparent basis on which this case could be said to implicate either of these provisions. I have therefore not considered them in this decision.

[6] The College's decision letter of June 7, 2002 cited s. 15(1) as one of the exceptions it was applying. This exception does not appear in the notice of written inquiry, however. Nor did the College make any submissions on this section. Accordingly, I have not considered s. 15(1) either.

3.0 DISCUSSION

[7] **3.1 Description of the Disputed Records** – As noted above, the College has disclosed a good number of records to the applicant, but has withheld 19 records. The College has grouped these records into three categories. The first consists of records that the College's Professional Standards Committee generated and consists of – to use the College's description, at para. 16 of its initial submission – "draft decisions and internal reviews [*sic*] and communications of persons acting in a quasi-judicial capacity." This class of records also includes two brief extracts from what the College says are minutes of closed meetings of its Professional Standards Committee. This category also includes draft letters, memos to file and other internal communications.

[8] The second class of records consists of records the College says were generated by its external investigator, a registered psychologist whom the College retained to deal with the applicant's complaint to the College. This category contains three letters from the external investigator to the College.

[9] The third class of records is comprised of records that the College says "were generated in the course of negotiations with a view to an attempted consensual resolution of the complaint" (para. 18, initial submission). This category includes draft letters, including to the College's external investigator and a letter that appears to be from a lawyer acting for the third party to the College.

[10] In its initial submission, the College says records 66, 110 and 119 appear to be "duplicates" of record 54. Record 66 is a draft decision of the College's Professional Standards Committee. It is not a duplicate of either record 54 or 110, but it does appear to be a duplicate of record 53. Records 54, 65 and 110 are different drafts of the same document, but they have differences and are therefore not duplicates of each other. Record 110 does, however, appear to be a duplicate of 119, as the College says. I believe the College intended to say records 65, 110 and 119 appear to be duplicates of record 54, and that record 66 appears to be a duplicate of record 53.

[11] As indicated below, I have prepared a set of severed records, with the information that I have concluded can or must be withheld by the College shown underlined on those records. A copy of that set of severed records has been delivered to the College along with its copy of this order.

[12] **3.2 No Mediation Privilege** – In addition to arguing the above-noted issues, the College contends, at paras. 18 and 48 of its initial submission, that records 54, 64, 65, 109, 110, 113, 119 and 156 can be withheld because they were "developed and discussed on a 'without prejudice' basis and the common-law bars their disclosure". At para. 4 of its reply submission, the College argues as follows:

> It is a well established rule of law that documents that are generated during a bona fide without prejudice negotiation process are not subject to disclosure in any forum, with very, very limited exceptions.

[13] This submission is not tenable. The applicant has a right of access, under the Act, to the records in dispute except to the extent one or more of the Act's exceptions to the right of access apply to part or all of those records. Common law rules that exclude "without prejudice" communications – communications between parties for the purpose of settling a legal dispute between them – are not recognized under the Act. It may be that, in the particular circumstances of a case, one or more of the Act's exceptions will authorize or require a public body to refuse disclosure in a manner similar to the common law rule. But the Act does not contain an express or implied exception comparable to the common law rule.

[14] I will also note here the College's statement, at para. 22 of its initial submission, that it is, in this case,

> … concerned to balance, according to law, the rights of the applicant and the rights of the third party as well as attempting to ensure the integrity of its own complaint investigation and management and resolution procedures.

[15] The College said much the same thing at para. 21 of its initial submission, where it refers to "the very complex task" that it faces in "balancing the competing interests and rights of complainants and respondents in a forum where both criminal and civil law principles have been held to apply". This may be true as regards the College's actions outside the Act, but its application of the Act cannot involve an attempt to "balance" the rights of applicants and the rights of third parties, however well-meaning those balancing efforts might be. The Act has been designed to protect various interests – including the public interest, the interests of public bodies and the interests of individuals and businesses – but public bodies are not permitted to embark on a generalized balancing exercise when applying the Act's exceptions to the right of access.

[16] I will also note here that the College's reliance on a "zone of confidentiality" mentioned in, among other decisions, Order No. 163-1997, [1997] B.C.I.P.C.D. No. 21, does not carry the day. As I have said on a number of occasions, the Act does not recognize a free-standing "zone of confidentiality". This is what I said in Order No. 324-1999, [1999] B.C.I.P.C.D. No. 37, at p. 4:

> In my view, the Legislature designed the Act so that a claim to 'confidentiality' will succeed only where the explicit language of the Act authorizes or requires it. There is no presumption that a public body enjoys any 'zone of confidentiality' simply because of the subject matter of a particular record or set of records. The phrase 'zone of confidentiality' is, in my view, merely a useful way to describe the result when one or more of the Act's exceptions apply to a record or set of records.
>
> Again, despite the usefulness of the phrase, it is clear from the Act that each case must be decided on its merits. It must be decided in light of the Act's explicit provisions and in light of the evidence that is available to the public body, when it makes its decision on an access request, or that is submitted in an inquiry such as this one. The subject by which a record can be described, as opposed to the contents of the records, raises no presumption of confidentiality, offers no generosity of analysis and permits no different standard of proof. Consistent with

> my understanding of what the previous commissioner meant by the term 'zone of confidentiality', I do not read any of the orders in which my predecessor used that phrase to go any further than what I have just said.

[17] In addition, the College argues, particularly at paras. 25 and 26 of its initial submission, that, if I decide it is not "legally authorized or required to refuse disclosure of documents generated" under s. 36 of the *Health Professions Act*, this will mean that the "utility and purpose of section 36 of the *Health Professions Act* may be defeated and rendered redundant." Of course, it is far from clear that this alleged result necessarily flows from a finding that the College must disclose further information. More to the point, any perceived conflict between the operation of s. 36 of the *Health Professions Act* and the Act is resolved by s. 79 of the Act. That section provides that the Act prevails over any other enactment to the extent of any conflict or inconsistency between the other enactment and the Act.

[18] **3.3 Are Some of the Records Excluded From the Act?** – The College submits that s. 3(1)(b) of the Act applies to records 14, 51-54, 66, 81, 82, 109, 122 and 126, and possibly also to record 64, although this is not clear from the College's submissions. Section 3(1)(b) reads as follows:

> **Scope of this Act**
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> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity; … .

[19] The College says, at para. 16 of its initial submission, that the records described above "are draft decisions and internal reviews and communications of persons acting in a quasi-judicial capacity." If the College is right, the right of access under the Act does not apply to these records and that is the end of the matter as regards those records.

[20] According to the College's initial submission, it now governs the psychology profession under the authority of the *Health Professions Act*, including through the College's Inquiry Committee. It appears that, at the time the disputed records were created, the College functioned under the *Psychologists Act*, including through its Professional Standards Committee.

[21] At para. 23 of its initial submission, the College says disclosure of the disputed records that were generated by and for the use and assistance of its former Professional Standards Committee "will undermine the confidential deliberations of persons acting, in the public interest, in a quasi-judicial manner." Other portions of the College's initial submission discuss what the College says would be the harm to its confidential complaint-disposition processes if the disputed records were disclosed. These are not, properly speaking, s. 3(1)(b) arguments. These are harm arguments.

[22] At para. 14 of its initial submission, the College asserts, without elaboration, that its former Professional Standards Committee "can fairly be characterized as quasi-judicial in character". At the same time, para. 24 of the College's initial submission says the following about the former Professional Standards Committee:

> The legal issues are made more complex by the fact that the Professional Standards Committee had no authority to make findings of fact. It did not weigh and assess evidence or hear viva voce evidence tested by cross-examination. Its function, as is the function of its successor committee under the *Health Professions Act*, the Inquiry Committee, was to assess whether or not there was sufficient "evidence" of misconduct or incompetence to warrant further action such as a discipline hearing. Short of a directing [*sic*] that a discipline hearing be held, the Professional Standards Committee, and now the Inquiry Committee, could do not [*sic*] more than seek the consent of the respondent to address its "concerns" in a manner deemed appropriate and consistent with its overriding statutory duty of protection of the public. At a discipline committee hearing the burden of proof is clear, cogent and convincing evidence, that is to say a burden that is perilously close the [*sic*] criminal law burden of proof beyond a reasonable doubt.

[23] In addition, at para. 10 of its initial submission, the College says there "was no final adjudication or determination of the [applicant's] complaint before a discipline committee of the College or similar tribunal having the legal authority to hear evidence and to make a finding based on the evidence."

[24] The College has, on a record-by-record basis, contended that the records mentioned above are "internal communications" by a member of the Professional Standards Committee to that committee, in every case consisting of a draft decision of a person acting in a judicial or quasi-judicial capacity or personal notes of individuals acting in such a capacity.

[25] The College has not, crucially, provided me with any basis, other than the above submissions, on which I can conclude that its former Professional Standards Committee, and therefore its members, were acting in a judicial or quasi-judicial capacity within the meaning of s. 3(1)(b). In Order 00-16, [2000] B.C.I.P.C.D. No. 19, I accepted that it is appropriate to apply the criteria articulated by the Supreme Court of Canada in *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.), in deciding whether someone is acting in a quasi-judicial capacity. See, also, Order 03-14, [2003] B.C.I.P.C.D. No. 14.

[26] The College has not provided me with evidence or argument that is expressly directed at these criteria. Nor has the College provided me with provisions under the *Psychologists Act* that could be relevant to the nature or character of these disputed records. The only evidence before me from the College is in the form of an affidavit of Dr. Andrea Kowaz, the College's Registrar. At para. 6 of her affidavit, Dr. Kowaz deposed as to her belief that the disclosure of records generated by or for the (former) Professional Standards Committee "will undermine the confidential deliberations of persons acting, in the public interest, in a quasi-judicial manner." This is, again, a harm

argument and is, in any case, an opinion respecting the very issue before me under s. 3(1)(b).

[27] Nor am I able to determine, on the face of the affected records themselves, that they are excluded from the Act's operation on the basis of s. 3(1)(b). To the contrary, a number of the records do not appear, on their face, to fall under s. 3(1)(b). Record 14, for example, is a memo to file, from a College administrative employee, respecting the general history of the complaint file to that date. As another example, record 64 is a letter from the College to the third party that does not, on its face, disclose information of a kind contemplated by s. 3(1)(b).

[28] Many previous decisions have established that a public body has the burden of proving that s. 3(1) applies and the notice of written inquiry explicitly brought this burden to the College's attention. In the absence of evidence sufficient to support the application of s. 3(1)(b), I find that s. 3(1)(b) does not apply to records 14, 51-54, 64, 66, 81, 82, 109, 122 and 126. These records are therefore covered by the Act.

[29] **3.4** ***In Camera*** **Deliberations** – The College contends that records 51-54, 64-66, 81, 82, 109, 110, 113, 119, 122, 126 and 156 were properly withheld under s. 12(3)(b) of the Act, which reads as follows:

> 12 (3) The head of a local public body may refuse to disclose to an applicant information that would reveal
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> …
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[30] Of the above records, only records 52 and 126 appear to be extracts from minutes of meetings. As indicated above, the balance of these records consist of draft letters, letters and other communications respecting the applicant's complaint to the College.

[31] The conditions that a local public body must meet before it can rely on s. 12(3)(b) have been discussed often. Most recently, in Order 03-09, [2003] B.C.I.P.C.D. No. 9, the conditions were stated as follows:

> [11] Section 12(3)(b) is a discretionary exception to disclosure. The application of section 12(3)(b) must meet the criteria outlined by the Commissioner in several previous orders. See, for example, Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39 and Order 02-22, [2002] B.C.I.P.C.D. No. 22. The criteria are as follows:
>
> 1. The local public body must establish that it has legal authority to meet *in camera*;
> 2. The local public body must establish that an authorized *in camera* meetings was, in fact, properly held; and

> 3. The local public body must establish that disclosure of the disputed records or information would reveal the substance of deliberations of the meeting.

[32] Here is the College's entire submission on s. 12(3)(b), from para. 30 of its initial submission:

> All of the meetings of the Professional Standards Committee were held *in camera*, that is were closed to the public. This procedure was given the force of law and applied to its successor committee, the Inquiry Committee, when new bylaws for the College were approved by the Provincial Cabinet in February 2002. Bylaw 57(4) of these new bylaws of the College enacted pursuant to the *Health Professions Act* provides:
>
> *Proceedings of the Inquiry Committee are not open to the public*.

[33] This is more in the nature of argument than evidence. Dr. Kowaz did depose, based on personal knowledge, "that all meetings of the former Professional Standards Committee were held in camera, that its meetings were not open to the public or to any person who is not a member of that committee" (para. 3). She also deposed, again based on personal knowledge, that meetings of the present Inquiry Committee are, under the College's by-laws (enacted under the *Health Professions Act*), held *in camera*.

[34] The difficulty remains, however, that s. 12(3)(b) explicitly provides that it applies only where an *in camera* meeting was held under appropriate statutory authority. None of the records the College has withheld under s. 12(3)(b) relates to meetings of the present Inquiry Committee. They are all meeting minutes for the former Professional Standards Committee. The College has not provided me with any basis on which I can conclude that, under the *Psychologists Act* or any other Act, the College's former Professional Standards Committee was authorized to hold *in camera* meetings of the kind necessary to cover the information in the relevant records. The College's submissions, and Dr. Kowaz's evidence, refer to the College's present bylaws, which regulate proceedings of its Inquiry Committee. They do not deal with the former Professional Standards Committee, the proceedings of which are in issue here. Nor is there any evidence before me to establish that the Professional Standards Committee actually met as authorized, that these are the minutes of those meetings or that the records would, if disclosed, reveal the substance of deliberations of the Professional Standards Committee.

[35] I find that, on the basis of the material before me, the College has not met its burden to establish that s. 12(3)(b) applies to the records. I therefore find that s. 12(3)(b) does not authorize the College to refuse to disclose records 51-54, 64-66, 81, 82, 109, 110, 113, 119, 122, 126 and 156.

[36] **3.5 Advice or Recommendations** – Section 13(1) of the Act authorizes the College to refuse to disclose "advice or recommendations developed by or for" the College. The College says s. 13(1) authorizes it to refuse to disclose records 18, 47, 48, 51-54, 64-66, 82, 109, 110, 113, 119, 122 and 156.

[37] The College says record 51 is protected under s. 13(1) because it is a communication from a member of the Professional Standards Committee to that committee in the nature of a draft decision or personal notes of that individual, who was acting in a judicial or quasi-judicial capacity. Even if the Professional Standards Committee and its members were acting in a judicial or quasi-judicial capacity, that would not mean everything it or its members did or wrote is "advice or recommendations" within the meaning of s. 13(1).

[38] Section 13(2)(a) prohibits a public body from withholding under s. 13(1) any "factual material". Some of record 51 is factual material and some of it consists of the applicant's own personal information. There are, however, portions of this record that qualify as advice or recommendations that can be withheld under s. 13(1).

[39] A similar difficulty confronts the College regarding its contention that s. 13(1) authorizes it to refuse to disclose records 52, 53, 54, 64, 66, 82, 109, 110, 113, 119, 122 and 156. Record 52 is, the College says, an extract from minutes of an *in camera* meeting of the Professional Standards Committee and consists of the draft decision of a person who is acting in a judicial or quasi-judicial capacity. Part, but not all, of this record is protected under s. 13(1). Record 53 is, the College argues, a "decision reflecting the deliberations of the Professional Standards Committee" and is therefore advice or recommendations under s. 13(1). Only part of this record qualifies as advice or recommendations protected under s. 13(1), with other parts of it being "factual material" under s. 13(2)(a) and other parts being the applicant's own personal information.

[40] Some of the information in these records is clearly "factual information", within the meaning of s. 13(2)(a), and is (I note as an aside) already known to the applicant or is her personal information. Again, s. 13(2)(a) provides that a public body "must not" withhold "factual information" under s. 13(1). I do find, however, that s. 13(1) applies to portions of the following records: record 18 (a letter from the College's investigator to the College); record 47 (a brief letter from the investigator to the College); record 48 (another letter from the investigator to the College); record 54; record 64 (a letter from the College to the third party); record 65 (another letter); record 66 (which is a duplicate of record 53); record 82 (an internal communication from a member of the Professional Standards Committee to that committee); record 109 (a letter from the College to the third party); record 110 (a letter); record 113 (a letter from the third party to the College); record 119 (a duplicate of record 110); record 122 (an internal communication from a member of the Professional Standards Committee to the committee); and record 156 (a letter from the third party's lawyer to the College). (As I indicate below, the combined application of ss. 13(1), 14 and 22(1) means that some of the records just described are to be entirely withheld.)

[41] **3.6 Solicitor-Client Privilege** – The College says s. 14 authorizes it to refuse to disclose certain information. It is well established that s. 14 recognizes both kinds of common law legal privilege, legal professional privilege and litigation privilege. See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8. The criteria to be applied in deciding

whether s. 14 applies are clear. Without repeating it here, I have applied the approach to s. 14 that I took in Order 00-08.

[42] The College only asserts privilege in relation to portions of records 122 and 126. Record 122 is an internal communication from a Professional Standards Committee member to that Committee and record 126 is an extract from, it appears, minutes of a meeting.

[43] The College did not, at first, provide me with the text of the portion of record 122 that it claims is protected by s. 14. It merely noted that it had severed that portion "in accordance with Order 00-08", citing the following passage from Order 00-08, at p. 8:

> Nonetheless, I accept that records over which solicitor client privilege is claimed should, generally speaking, be examined only in cases where the evidence and argument establish it is necessary to do so in order to decide the issue fairly. This is consistent with the practice followed by the courts in similar matters. See, for example, the recent Supreme Court of Canada decision in *Smith* v. *Jones*, [1999] 1 S.C.R. 455, at para. 100 (*per* Cory J. for the majority): "In this Court the entire affidavit of Dr. Smith [*i.e.*, the privileged record] was read and considered." See also *Descoteaux* v. *Mierzwinski*, [1982] S.C.R. 860, at pp. 895-896. In the civil context, see *Middlekamp* v. *Fraser Valley Real Estate Board*, [1993] 1 W.W.R. 436 (B.C.C.A.), *per* McEachern C.J.B.C., at p. 437.

[44] In addition, the College did not initially provide me with an unsevered copy of record 126, which it described as an "extract from the minutes of the Professional Standards Committee", which it says is protected by "solicitor client privilege". Again, it said only that it had severed the portion it contends is privileged "in accordance with the Commissioner's Order 00-08". The affidavit of Dr. Kowaz and the remainder of the College's submissions in this inquiry are silent on the question of solicitor-client privilege.

[45] The College did not provide me with any argument or evidence to support its position that s. 14 applies to these portions of records 122 and 126. After the close of submissions, I required the College to deliver to me, under s. 44 of the Act, complete copies of the two records to which it applied s. 14. Based on my examination of those records, I am satisfied that s. 14 applies to information in these two records. I make this determination from the face of the records themselves, which in part contain advice sought from, or given by, someone who happens also to have acted as the College's legal counsel in this inquiry. If it were not for the fact that the records themselves, viewed in the context of the other evidence as to the applicant's complaint and the College's handling of it, establish privilege, the College's claim that s. 14 applies would have failed. This is not a trivial point. A party that asserts solicitor-client privilege must prove that it exists. The s. 57(1) burden of proof has meaning. The privileged information can in this case be severed under s. 4(2), since it is discrete from other information in these records. The appropriate severing has been done on the records delivered to the College with its copy of this order.

[46] **3.7 Exposure to Civil Liability** – The College claims that portions of some of the records, without specifying which portions, can be withheld under s. 15(2)(b) of the Act. The College mentions s. 15(2)(b) in relation to records 18, 48, 51-54, 64-66, 82, 109, 110, 113, 119, 122 and 156. That section reads as follows:

> 15 (2) The head of a public body may refuse to disclose information to an applicant if the information
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> …
>
> (b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or … .

[47] The College appears, at some points in its submissions, to advance a general argument that the fear of, or allegedly increased exposure to, greater civil liability on the part of psychologists who are caught up in the College's processes would damage the College's ability to discharge its regulatory functions. Examples of this argument are found at paras. 23, 25 and 27 of the College's initial submission. These arguments as to alleged harm to the College's regulatory activities are not, quite apart from their speculative nature, properly raised under s. 15(2)(b).

[48] In any event, that provision only applies where a public body has established a reasonable expectation that disclosure will expose the author of a record – or will expose someone quoted or paraphrased in the record – to civil liability. The College has, first, not presented evidence to support the necessary finding that these records are "law enforcement" records within the meaning of s. 15(2)(b) or, second, that disclosure of information from these records could reasonably be expected to expose an author to civil liability. The College has merely asserted that the s. 15(2)(b) test has been met, saying only that the exception applies because individuals who have been quoted or paraphrased in the various records could also reasonably be expected to be exposed to civil liability.

[49] The records themselves and the context provided by the other material before me enable me to conclude that the records are "law enforcement" records within the meaning of the Act's definition of the term "law enforcement". The College has not, however, established the necessary reasonable expectation of harm under s. 15(2)(b). It says the applicant sued the third party, over five years ago, in the British Columbia Supreme Court, with the applicant alleging that the third party is liable to her on a variety of grounds. The College says that, on this basis, the applicant and the third party are in an adversarial position. Exhibit "A" to Dr. Kowaz's affidavit is a copy of the writ of summons filed on the applicant's behalf in 1997. Exhibit "A" includes a copy of a notice of trial date stamped in 2001. The notice of trial states that the trial is scheduled to take place in June 2003 and there are other indications in the material before me that, at the time of the inquiry, the applicant and third party are involved in litigation.

[50] None of this is by any means sufficient to support the College's assertions regarding s. 15(2)(b). The records' contents do not, on their face, suggest any basis on which their disclosure could be expected to expose anyone who might be regarded as an

"author" to civil liability on the basis of those contents. I am not persuaded that the College has established the necessary reasonable expectation of exposure to civil liability as required by s. 15(2)(b).

[51] **3.8 Third-Party Privacy** – I have discussed the application of s. 22 on a number of occasions. See, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion here, but will apply the same principles in this decision.

[52] The College argues that ss. 22(1), 22(2)(e), (f) and (h) and 22(3)(b), (g) and (h) of the Act apply in various combinations to records 14, 18, 47, 48, 52-54, 64-66, 81, 82, 109, 110, 113, 119 and 156, while the applicant argues that factors in s. 22(2)(a) and (c) mean she should get the records. She also says she wants information about the third party in his professional, as opposed to personal, capacity. Neither party explicitly argued that s. 22(3)(d) or s. 22(4)(e) applies but, as I discuss below, much of the withheld information falls under s. 22(3)(d), while some falls under s. 22(4)(e).

[53] I reproduce the relevant portions of s. 22 here:

> **Disclosure harmful to personal privacy**
>
> 22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> …
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation, … .

Applicant's personal information

[54] Some of the information in the records is the applicant's own personal information, since it relates to her complaints to the College about the third party, her actions in her workplace and her interactions with the third party. The records also contain other personal information about the applicant, including the third party's diagnostic and other comments about her made at the time of treatment or as part of the College's complaint process, and comments the third party apparently made about the applicant's health to her employer. It is these last statements that led to the applicant's complaint to the College.

[55] As noted earlier, s. 57(2) places the burden on the applicant to prove that disclosure of a third party's personal information would not be an unreasonable invasion of personal privacy. It is well established, however, that a public body has the burden of proving why an applicant should not have access to her or his own personal information. The College has not addressed this issue at all in its submissions in this case. The applicant is clearly aware of her complaints and the factual information about herself and is also aware, as the material before me indicates, the substance of what the respondent said about her and their interactions with each other. I do not consider that disclosure to the applicant of her own personal information would unreasonably invade the third party's personal privacy and it follows that the College cannot refuse under s. 22 to disclose the applicant's own personal information to her. My finding in this case is similar to the findings in Order 01-53, where I found that the applicant was entitled to information on the allegations she had made against the third party, as well as information about herself and the third party's identifying information. This finding applies to these types of personal information in records 14, 18, 48, 51, 52, 53, 66 and 82.

Presumed unreasonable invasion of privacy

[56] The College argues that s. 22(1) applies to information in records 14, 54, 65, 81, 109, 110, 113, 156 and apparently also to record 47. It states simply that disclosure of this information would be an unreasonable invasion of a third party's privacy, but does not specify whose privacy would be unreasonably invaded nor how this might occur.

[57] Similarly, where the College argues that ss. 22(3)(b), (g) and (h) apply, it does not point to the portions of the records to which those sections supposedly apply nor how portions of these records fall under those sections of the Act. The burden of proof regarding s. 22 in this inquiry is on the applicant, to be sure, but, as I have said before, a public body must, in making its decision on an access request, have some basis for concluding that s. 22 applies and requires it to refuse disclosure. In Order 00-52, [2000] B.C.I.P.C.D. No. 56, for example, I said that a public body must, on receiving an access request, "satisfy itself that one or more of the presumed unreasonable invasions of privacy under s. 22(3) actually exists in the circumstances." Here, the College has simply asserted that various parts of s. 22 apply, but has not supplied any supporting argument or evidence whatsoever.

[58] Despite the lack of evidence on the applicability of s. 22(3), I accept that, on the face of the records, s. 22(3)(g) applies to third-party personal information in records 18, 48, 51, 52, 53, 54, 65, 66, 82, 110, 113, 119, 122 and 126. It applies principally to comments by, and opinions of, the College's investigator and others about the third party's actions. The College has, however, failed to explain what "law" might be relevant for the purposes of s. 22(3)(b) and what the possible violation of such a law might have been. I therefore have an insufficient basis for concluding that s. 22(3)(b) applies here.

[59] The College appears to have applied s. 22(3)(h) only to record 82. It has not, however, explained who the third party is for the purposes of s. 22(3)(h). Nor has it shown how such a person may have provided confidential evaluations or other information captured by this section and which information in the record was so provided. The purpose of s. 22(3)(h) is to protect the identity of a third party who has supplied certain types of information in confidence, usually about the applicant. I am unable to find that s. 22(3)(h) applies to any of the information in record 82 (or in any of the other records).

[60] I have already said that s. 22(3)(d) applies to some information in the records in dispute. Neither the College nor the third party argued that this section applies, despite the fact that, in a number of previous orders (Order 01-53, for example), I have discussed the applicability of s. 22(3)(d) to information in complaint-investigation records. In this case, s. 22(3)(d) applies, in my view, to information related both to the third party's actions and to his responses to the College's actions or decisions. Section 22(3)(d) also applies to a few references to the employment history information of a College employee. Since s. 22(3)(d) is clearly triggered, and since s. 22 is a mandatory exception to the right

of access designed to protect third-party interests, I have applied it to the third-party personal information just indicated in records 18, 48, 51, 52, 53, 54, 65, 66, 81, 82, 110, 113, 119, 122 and 156.

Relevant circumstances

[61] The applicant argues that the withheld information is relevant to a fair determination of her rights as a complainant, presumably to the College. This suggests that she believes that s. 22(2)(c) is a relevant circumstance. She does not take this argument further, however, by explaining how the withheld information is relevant to her complaint to the College, particularly since she states that, before this inquiry took place, the College had told her that it had lost jurisdiction over her complaint due to its own delay in handling it. She makes further arguments on this point in her *in camera* submissions and (in an open submission) says that, as a victim, it is her right to sue civilly. She does not, however, explain how the withheld information is relevant to a fair determination of her legal rights in such a forum. The third party's legal counsel argues that s. 22(2)(c) does not apply, as the College's complaint process is over. The College does not directly address this point, but there are indications, both in its submissions and in the disclosed records, that it has finished with the complaint.

[62] I have found in previous decisions that the "rights" referred to in s. 22(2)(c) are "legal rights". The applicant has not established that she has any legal rights at stake and I find that s. 22(2)(c) is not relevant.

[63] The applicant also says that, as contemplated by s. 22(2)(a), access to the withheld records is desirable to subject the College's activities to public scrutiny. She says that, because the College lost jurisdiction over her complaint, it is her right to have access to the withheld records in order to "determine what action (or inaction) the College took in regards to my complaint and so that I may proceed from there" and also for accountability reasons. The applicant does not explain how she might "proceed" nor how she believes the withheld information would subject the College's activities to public scrutiny. The College counters the applicant's position by saying that she has already received sufficient disclosure for scrutiny and accountability purposes, while the third party suggests that the applicant wants the records only to "incriminate the Third Party in a separate litigation effort she has ongoing for her own pecuniary gain".

[64] The applicant is evidently generally aware of the College's activities in investigating her complaint and I do not consider that the withheld information, as it relates to the third party, would assist in placing the College's activities under public scrutiny.

[65] The College argues that ss. 22(2)(e), (f) and (h) all apply in this case. As with its arguments on s. 22(3), it does not point to specific parts of the records for which these circumstances might be relevant. Nor does it elaborate on how these sections apply. It merely asserts that they apply. It does not, for example, explain what unfair damage might occur to the third party's reputation through disclosure, nor how disclosure might

cause financial or other harm to the third party. It also did not show how personal information might have been supplied in confidence. I note that two items of correspondence from the external investigator to the College are marked "confidential", but this is insufficient in my view to support an argument that all of the withheld personal information was supplied in confidence. I find that ss. 22(2)(e), (f) and (h) do not apply in this case.

[66] I do, however, find that a relevant circumstance in this case is the applicant's knowledge of certain aspects of the College's investigation of her complaint regarding the third party. It is apparent from the material before me that the College has provided some information to the applicant, as revealed by the chart accompanying the College's June 13, 2002 decision letter and the disclosed records. First, the applicant is already aware, from the chart, of the name of the College's external investigator. While I would not in any event consider disclosure of such information to be an unreasonable invasion of the investigator's privacy, its previous disclosure to the applicant by means of the chart means that this information in the records themselves can be disclosed without unreasonably invading personal privacy. Second, the applicant was made aware, from information in the records she has already received, of the information about the College employee mentioned above. References to the same information in the disputed records may therefore also be disclosed without unreasonably invading that person's privacy.

Is the applicant entitled to any of the third-party information?

[67] To summarize, some of the withheld information is the applicant's own personal information (such as her complaints and the respondent's comments about her). The College has not shown why she is not entitled to have access to this information and I find that the applicant is entitled to her own personal information. I have found that third-party information falls under ss. 22(3)(d) and (g) and that the relevant circumstances do not favour disclosure of most of this personal information to the applicant. I find that the applicant has not met her burden of proof regarding the information that falls under ss. 22(3)(d) and (g) and is not entitled to this information.

[68] I find that the applicant's awareness of some third-party personal information, through the College's disclosure in response to the applicant's access request, is a relevant circumstance that favours disclosure of third-party personal information that has already been disclosed to her. The set of severed records delivered to the College reflects this consideration.

4.0 CONCLUSION

[69] In some cases where I have found a particular exception does not apply to specific information, another does apply. To give one example, I have found that s. 12(3)(b) does not apply to records that the College says are minutes of an *in camera* meeting of its Professional Standards Committee, but the substantive portions of these minutes are protected under ss. 22(3)(d) and (g) to the extent indicated above. As indicated above, I have prepared a set of records for the College showing which information it is required

or authorized to withhold and a copy of that set of records has been delivered to the College with its copy of this order.

[70] Because ss. 13(1), 14 and 22(1) apply to various parts of records 54, 64, 65, 110, 119 and 122, I consider that s. 4(2) does not require these records to be severed and they must be withheld in their entirety. The set of severed records I have delivered to the College with this order does not, therefore, include these records.

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

1. Subject to para. 3, below, I confirm that ss. 13(1) and 14 of the Act authorize the College to refuse access to information, as shown underlined or circled on the set of severed records delivered to the College with its copy of this order;

2. Subject to para. 3, below, I require the College to refuse access to information it withheld under s. 22(1), as shown underlined or circled on the set of severed records delivered to the College with its copy of this order; and

3. I require the College to give the applicant access to the information that it withheld under ss. 3(1)(b), 12(3)(b), 13(1), 15(2)(b), 22(1) and 22(3)(d) and (g) and that is not described in paras. 1 or 2, above.

June 18, 2003

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia