OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F05-13

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

James Burrows, Adjudicator
April 8, 2005

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Summary: Applicant sought access to minutes of *in camera* Inquiry Committee meetings and listing of actions related to a complaint filed against him. Committee withheld entirety of responsive records under ss. 3(1)(b), 3(1)(h), 12(3)(b), 13(1), 14, 15(1)(a), 15(2)(b) and 22. Records withheld under s. 3(1)(b) do not meet required criteria. Committee entitled to withhold only substance of deliberations under s. 12(3)(b). Sections 3(1)(h), 12(3)(b), 13(1), 14, 15(1)(a), 15(2)(b) and 22 found not to apply. Public body ordered to re-consider its decision to withhold under s. 12(3)(b).

Key Words: scope of the Act – acting in a quasi-judicial capacity – personal note, communication or draft decision – *in camera* meeting – substance of deliberations – law enforcement matter – expose to civil liability – personal privacy – unreasonable invasion.

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

Authorities Considered: B.C.: Order No. 290-99, [1999] B.C.I.P.C.D. No. 3; Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order No. 331-99, [1999] B.C.I.P.C.D. No. 44; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-22, [2002] B.C.I.P.C.D. No. 22; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order F04-37, [2004] B.C.I.P.C.D. No. 38.

Cases Considered: *British Columbia (Ministry of Attorney General)* v. *British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597, [2004] B.C.J. No. 2534 (B.C.S.C.).

1.0 INTRODUCTION

[1] On July 9, 2003, the applicant submitted requests under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the College of Psychologists of British Columbia ("College") for a copy of records pertaining to him. On July 24, 2003, the College responded to the applicant, denying access to the records under ss. 3(1)(b), 3(1)(h), 12(3)(b), 13(1), 14, 15(1)(a), 15(2)(b) and 22 of the Act. On July 31, 2003, the applicant requested a review of the College's decision.

[2] The College has withheld four records. Three of the records are minutes, each two pages in length, of three *in camera* meetings of the Inquiry Committee of the College. The last record is a printout showing a listing of dates and notes about the complaint file.

[3] I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUE

[4] The issues before me in this inquiry are:

1. Was the College required by s. 22 of the Act to deny access to personal information?

2. Was the College authorized under ss. 3(1)(b), 3(1)(h), 12(3)(b), 13(1), 14, 15(2)(b) and 22 to deny access to the requested records?

[5] Under s. 57(1) of the Act, the College has the burden of proof regarding ss. 12(3)(b), 13(1), 14, 15(1)(a) and 15(2)(b). Under s. 57(2) of the Act, the applicant has the burden regarding third-party personal information. Previous decisions of the Commissioner have held that, while s. 57 of the Act is silent on the burden of proof in determining whether s. 3(1)(b) or s. 3(1)(h) applies, as a practical matter, it is in the interests of each party to present evidence as to whether s. 3(1)(b) or s. 3(1)(h) applies and requires disclosure.

3.0 DISCUSSION

[6] **3.1 Argument of the Applicant** – In his initial submission, the applicant, a member of the College and the respondent in the complaint, argued that the withheld information should be released because, in the applicant's view, the College had continued to pursue a complaint against him after the original complainant had withdrawn it. He stated that it is necessary for him to have the information to prove that the complaint was unjust. In his reply submission, he maintained that "the rules of procedural fairness and natural justice require that such information be disclosed." Further, he argues that, as he is a party to the complaint, he is entitled to minutes of the *in*

camera meetings to understand the decisions of the Inquiry Committee. The applicant also raised the issue that the various appeal bodies of the College, such as the Board itself, would be given access to this information but not the respondent of the complaint. He implied that a respondent would require that information to participate in an appeal and therefore "the statutory privilege which the College seems to be claiming should not apply" to him.

[7] The applicant did not provide specific arguments as to whether the College had appropriately applied the sections of the Act to withhold the records, with the exception of s. 15(2)(b). The applicant responded to the use of s. 15(2)(b) by the College by stating that "these concerns [of civil liability] are without merit given that the College (including the Inquiry Committee) enjoys statutory immunity from liability for all actions done in good faith."

[8] **3.2 Argument of the Public Body** – The submission of the public body provided arguments for the application of ss. 3(1)(b), 12(3)(b), 15(1)(a), 15(2)(b) and 22. It did not discuss how the other exceptions under the Act that it specified in its response to the applicant apply and did not provide evidence to support their application.

[9] In its submission the College argued that the Act did not apply to any of the records in dispute on the basis that they fall under s. 3(1)(b) of the Act.

[10] The College's submission referred to the authority for the College to establish an Inquiry Committee under s. 19(1)(t) of the *Health Professions Act* ("HPA"), the responsibility of the Committee to investigate complaints against registrants of the College under s. 33 of the HPA and to impose interim penalties, if required, under s. 35 of the HPA.

[11] The College also referred to the authority of the Inquiry Committee to hold *in camera* meetings under the bylaws of the College enacted pursuant to the HPA. In her affidavit, the Registrar of the College stated that the meetings were held *in camera* pursuant to Bylaw 57(4) of the Bylaws of the College and that the withheld records contain the substance of the deliberations at those meetings. Bylaw 57(4) reads as follows:

> **57. Inquiry Committee**
>
> …
>
> (4) Proceedings of the inquiry committee are not open to the public.

[12] In its submission, the College also argued that ss. 15(1)(a), 15(1)(c) and 15(2)(b) allowed the College to withhold the records, in that this was a matter of law enforcement. However, it did not provide evidence as to how these sections specifically related to the Inquiry Committee's role and activities nor how they apply to the information in dispute. Last, the College submitted that the information contained in the fourth record was personal information which had been "supplied in confidence" and "is identifiable as part of an investigation into the law", requiring the College to withhold that record under ss. 22(2)(f) and 22(3)(b) of the Act.

[13] **3.3 Sections 13 and 14** – Since the College has provided no arguments as to the application of s. 13(1) or s. 14 in this matter, it has made no attempt to discharge its burden of proof with regard to these sections. I have reviewed the records and, on the face of them and in light of the material before me, cannot see how these sections apply to them. I therefore find that the College has not established that s. 13(1) or s. 14 applies.

[14] **3.4 Are the Records Outside the Scope of the Act?** – The College has argued that the records are outside the scope of the Act since the Inquiry Committee was acting in a quasi-judicial capacity and the records are therefore not subject to access under s. 3(1)(b).

> **Scope of this Act**
>
> 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;
>
> …
>
> (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed; … .

[15] Even if members of the Inquiry Committee are acting in a "judicial or quasi-judicial capacity" as required by s. 3(1)(b), that section also requires that the records at issue must be either "a personal note, communication or draft decision". Assuming for the purposes of discussion, and without deciding, that Inquiry Committee members were acting in a capacity described in s. 3(1)(b) at the relevant times, I will consider whether the disputed records consist of or contain "a personal note, communication or draft decision" of Inquiry Committee members. In doing this, I will of course bear in mind that, according to s. 28(3) of the *Interpretation* Act, "words in the singular include the plural".

[16] In Order 00-16, [2000] B.C.I.P.C.D. No. 19, at pp. 7-9, the Commissioner discussed some of the types of records which fall within the categories stated in s. 3(1)(b) of the Act. I have kept the reasoning in that order and other orders dealing with s. 3(1)(b) in mind without repetition here. I have also kept in mind the recent decision of the Supreme Court in *British Columbia (Ministry of Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597, [2004] B.C.J. No. 2534 (B.C.S.C.).

[17] Firstly, I have examined whether information in the records falls within any of the three categories described in the Act, *i.e.*, "a personal note, communication or draft decision". As I stated before, three of the records are minutes recording the proceedings of the Inquiry Committee. I accept that meeting minutes may record communications—

or perhaps even personal notes—as contemplated by the Act. I have carefully reviewed these meeting minutes, however, and have concluded that they are not communications of one or more members of the Inquiry Committee within the meaning of s. 3(1)(b). Nor are they by any means personal notes or draft decisions within the meaning of the section. Again, assuming for discussion purposes that the Inquiry Committee members were acting at the relevant times in a judicial or quasi-judicial capacity, as s. 3(1)(b) requires, I find that the records in issue do not contain personal notes, communications or draft decisions of such persons.

[18] The final record is a list of correspondence which was sent to or received from the applicant or his lawyer and of the decisions of the Inquiry Committee (which were later sent to the applicant). Proceeding again on the assumption as to the capacity in which the Inquiry Committee members were acting at relevant times, this list does not fall into any of the categories described in s. 3(1)(b).

[19] For these reasons, I find that the minutes of the Inquiry Committee and the list of records are not excluded from the scope of the Act by s. 3(1)(b).

[20] The College has cited s. 3(1)(h) of the Act, but has provided no argument or evidence as to its application. Application of s. 3(1)(h) has been addressed in, for example, Order No. 290-1999, [1999] B.C.I.P.C.D. No. 3, Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, and Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44. Without repeating them here, I have considered the records in dispute here in light of the principles described in these and other s. 3(1)(h) decisions. In light of the material before me and the records themselves, I do not see how s. 3(1)(h), which relates to a "prosecution", applies to them. I therefore find that s. 3(1)(h) does not apply to exclude the records from the Act's scope.

[21] Since I have found that neither s. 3(1)(b) nor s. 3(1)((h) applies to the records, I will now consider whether any of the Act's exceptions apply to them.

[22] **3.5 *In camera* Minutes –** The College says that, in the alternative, s. 12(3) allows it to withhold the minutes. To establish that it has the authority to withhold minutes under s. 12(3)(b), a public body must meet all three parts of the section, as noted by the Commissioner in Order 02-22, [2002] B.C.I.P.C.D. No. 22:

> **Cabinet and local public body confidences**
>
> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> …
>
> (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.

[23] In its initial submission, the College argued that it was appropriate to withhold the records, the minutes of the Inquiry Committee and the list of correspondence under s. 12(3)(b). The College stated that the first requirement under the section—that the committee have statutory authority to meet *in camera*—was satisfied because the HPA authorizes Cabinet to make regulations with regard to holding of meetings.

[24] The Bylaws of the College were approved by Cabinet (by Order-in-Council 165, on February 19, 2002). Bylaw 57(4) provides that "proceedings of the inquiry committee are not open to the public." This satisfies the first requirement under the section.

[25] The second requirement is that the meetings must have been properly held *in camera*. The affidavit of the Registrar of the College states that the meetings were held *in camera* as required by Bylaw 57(4). I find that the meetings were properly authorized and were held *in camera*.

[26] The third aspect of the section limits its application to records, or parts of records, the disclosure of which would reveal the "substance of deliberations" of the Inquiry Committee. In Order 00-14, [2000] B.C.I.P.C.D. No. 17, the Commissioner distinguished the withholding of information as permitted by s. 12(3)(b) from the withholding of records as a whole. He held that the dates and times of meetings, and information disclosing the members present at a meeting (among other details), are not covered under s. 12(3)(b). He said the following at p. 4:

> The discretionary s. 12(3)(b) exception is not as broad as the Board would have it. It protects only information—not "records"—the disclosure of which would reveal the "substance of deliberations" of an *in camera* Board meeting. Section 12(3)(b) does not necessarily allow the Board to refuse to disclose records because they "refer to matters discussed" *in camera*. Nor does s. 12(3)(b) allow a local public body to "withhold *in camera* records", whatever they may be. The section does not create a class-based exception that excludes records of, or related to, *in camera* meetings. There is a clear distinction between "information" and the "records" in which information is found. The duty under s. 4(2) of the Act to sever records, and disclose information not covered by one of the Act's exceptions, applies to records which contain information protected by s. 12(3)(b).
>
> …
>
> In this case, certainly, s. 12(3)(b) does not authorize the Board to refuse to disclose the meeting minutes in their entirety. The Board withheld every iota of information, right down to the names of the Board members attending each meeting, the dates and times of each meeting, the location of each meeting, and so on. Disclosure of the identities of those attending a meeting, or details as to its time and location, would not—absent evidence to the contrary in a given case—reveal the "substance" of the "deliberations" of the meeting.

[27] In the matter before me, the College has withheld the entire record. It has not severed and disclosed any part of the record. I find that some of the information in the record, notably the names of those attending and times and dates of meeting, must be released. However, my review of the record leads me to the conclusion that the

disclosure of the remaining portions of the minutes would reveal the substance of deliberations at those meetings. The list of correspondence also contains some information which details the substance of deliberations of the Inquiry Committee although most of the record does not. Therefore, I find that the College must release some of the details of the withheld records and may sever and withhold other portions, as just described. With its copy of this decision, I have provided the College with a copy of the records showing the required release of information.

[28] This is not the end of the matter as regards s. 12(3)(b). As the Commissioner noted in Order 00-14 (and in other decisions), when a public body applies a discretionary exception, it must show that it exercised its discretion under the section to decide to disclose information that it is authorized to withhold. Where a record contains personal information of an applicant, I believe that the exercise of discretion should include consideration of what information is already known by an applicant and whether disclosure to the individual of his or her remaining personal information is appropriate despite the applicability of the exception. In this matter, as was the case in Order 00-14, the College has provided no evidence that it turned its mind to the exercise of its s. 12(3)(b) discretion and exercised that discretion one way or another, in light of what I have said and other considerations applicable to the exercise of discretion (including as referred to in Order F04-37, [2004] B.C.I.P.C.D. No. 38, and other decisions). The College must therefore exercise its discretion under s. 12(3)(b), as ordered below.

[29] **3.6 Harm to Law Enforcement** – In its initial submission, the College also argued that release of the four records could reasonably be expected to harm a law enforcement matter, harm the effectiveness of investigative techniques or expose to civil liability the author of the record or someone quoted or paraphrased in the record.

> **Disclosure harmful to law enforcement**
>
> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> …
>
> (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
>
> …
>
> (2) The head of a public body may refuse to disclose information to an applicant if the information
>
> …
>
> (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.

[30] As the Inquiry Committee is authorized under the bylaws of the College and the HPA to investigate complaints, conduct its hearings and institute penalties, even for an

interim period, I accept—noting Order 03-24, [2003] B.C.I.P.C.D. No. 24 and other decisions on this issue and on the question of applicability on the evidence of the above-quoted parts of s. 15(1)—that the Inquiry Committee's work involves the College in law enforcement. As I understand it, the College suggests that, because the work of the Inquiry Committee involves law enforcement, any records of the Inquiry Committee are covered by s. 15 (1)(a). I disagree. It is incumbent upon the College to provide evidence that harm could reasonably be expected to flow from disclosure of the information. Section 15(1)(a) creates a harms test, not a class-based exclusion of records or information. The College has not provided evidence that persuades me that disclosure of the information in dispute could reasonably be expected to harm a law enforcement matter under s. 15(1)(a) of the Act.

[31] Similarly, s. 15(1)(c) applies only where the evidence establishes a reasonable expectation that disclosure will harm the effectiveness of investigative techniques and procedures currently used or likely to be used in law enforcement. The College has not provided evidence that supports such a finding.

[32] Lastly, the College has argued that the author of the records or someone quoted or paraphrased in the records could be subject to civil liability if the records were released, such that s. 15(2)(b) of the Act authorizes the College to refuse disclosure. As the Commissioner found in Order 03-24, the record in question must be a "law enforcement record" and the public body must show that there is a reasonable expectation of harm from disclosure:

> [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).

[33] In this matter, the College has not provided evidence that establishes that 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." I note in passing only that I agree with the applicant's observation that s. 24 of the HPA provides

protection to board members or employees of the College who act in good faith. Without more, I cannot see how s. 15(2)(b) applies.

[34] **3.7 Third-Party Personal Privacy** – The College has argued that the fourth record contains personal information and therefore it must be withheld from the applicant. For s. 22(1) to apply, the test is whether or not the record contains personal information the disclosure of which would unreasonably invade a third party's personal privacy. The Commissioner has dealt with s. 22 in numerous orders, *e.g.*, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I have followed the reasoning in that and other s. 22 orders without repeating it here.

[35] The relevant parts of s. 22 reads as follows:

> **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
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …
>
> (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, … .

[36] I have reviewed the list of correspondence and conclude that most of the personal information it contains is that of the applicant's. The report appears to be a chronology of when the Inquiry Committee met or when correspondence was sent to or received from the applicant or his lawyer and a very brief summary of the contents of the correspondence. The name of the complainant is noted in the list, but I have evidence before me from both the applicant and the College that the applicant is aware of the name of the complainant. The only reference to a member of the College is a reference to the Chair of the Board of the College who was acting in that capacity when he sent a letter to the applicant. I have concluded that the only personal information in this record is that of the applicant and that the College is not required to withhold the information under s. 22 of the Act. The Commissioner has held that, where a public body seeks under s. 22 to refuse to disclose to an applicant his or her own personal information, the public body

bears the burden of proving that it is required to do so. The College did not bring to my attention any basis on which the applicant can or must be denied access to his own personal information and I see no such basis in the material before me. The College is not required to refuse disclosure.

4.0 CONCLUSION

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

1. I require the College to give the applicant access to the information that it withheld under ss. 3(1)(b), 3(1)(h), 15(1)(a) and (c), 15(2)(b) and 22 and, subject to para. 2, some of the information which it withheld under s. 12(3)(b).

2. I confirm the decision of the College to refuse access to some of the information it withheld under s. 12(3)(b), as shown underlined or circled on the set of severed records delivered to the College with its copy of this order;

3. Under s. 58(2)(b) of the Act and subject to the conditions expressed in para. 4, below, I require the head of the College to reconsider the decision to refuse access to the information that I have found it is authorized by s. 12(3)(b) of the Act to withhold; and

4. Under s. 58(4) of the Act, I require the head of the College to deliver the reconsideration decision, including reasons for the decision, to the applicant and to me within 30 calendar days from the date of this order.

[38] For the reasons given above, no order respecting s. 13(1) or s. 14 is necessary.

April 8, 2005

ORIGINAL SIGNED BY

James Burrows
Adjudicator