



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

Order F08-15

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

Michael McEvoy, Adjudicator

September 4, 2008

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Summary: The applicant requested records from the College relating to the investigation of a complaint the applicant made against a psychologist. The College is required to refuse disclosure of personal information because it would be an unreasonable invasion of the psychologist's personal privacy. The personal information was compiled as part of an investigation into a possible violation of law and also related to the occupational history of the psychologist. The applicant did not rebut the presumptions of unreasonable invasion of personal privacy thus raised.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 22(2)(a), 22(3)(b), (d) and (g), 25.

Authorities Considered: B.C.: Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 01-53 [2001] B.C.I.P.C.D. No. 56; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-16, [2003] B.C.I.P.C.D. No. 16; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order F07-22, [2007] B.C.I.P.C.D. No. 36.

1.0 INTRODUCTION

[1] The applicant made a complaint about a psychologist ("psychologist") to the College of Psychologists of British Columbia ("College"). He was not satisfied with the College's response and asked the College for all records related to its investigation of his complaint. The College disclosed a number of records, some of which were severed under ss. 22(3)(b), (d) and (g) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant asked this Office to review the College's decision and when mediation failed to resolve the matter it was referred for an inquiry under Part 5 of FIPPA. The applicant requested that s. 25 of FIPPA be considered in the inquiry, arguing

that the records in dispute must be disclosed because it is in the public interest to do so.

[2] This Office gave notice of the inquiry under s. 54(b) of FIPPA, to the psychologist, whose personal information was withheld under s. 22.

[3] The applicant made both initial and reply submissions while the College made only an initial submission. The psychologist made no submissions.

2.0 ISSUES

[4] The issues in this inquiry are:

1. Whether the College must, without delay, disclose to the applicant the requested records under s. 25 of FIPPA.
2. Whether the College is required by s. 22 of FIPPA to refuse to disclose certain records.

[5] Section 57(1) of FIPPA provides that the applicant bears the burden of proving that disclosure of the psychologist's personal information would not be an unreasonable invasion of third-party privacy. Section 57 is silent on the burden of proof for s. 25. As Commissioner Loukidelis has said, where, as here,

...an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.¹

3.0 DISCUSSION

[6] **3.1 Background**—The applicant sought a disability pension from the Worker's Compensation Board of BC ("WCB"). The application was initially denied but, after eighteen months, finally granted.² The applicant says the long delay adversely affected his family and he blames the wait time on entries made by the psychologist on his WCB file.³ The applicant contends those entries were a "sloppy off-the-cuff diagnosis"⁴ which were incorrect and a contravention of the College's Code of Conduct ("Code"). The applicant complained to the College, which in turn investigated the matter through its Inquiry Committee ("Committee"), a body deriving its authority under the *Health Professions Act*.⁵

¹ Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 39

² Applicant's initial submission, para. 2.

³ My review of the records indicates that the psychologist's services were contracted by WCB.

⁴ Applicant's initial submission, para. 10.

⁵ College's initial submission, para. 5(b).

[7] After completing its investigation the Committee reported in writing to the applicant that the psychologist agreed to take certain measures to enhance his practice and that of WCB's.⁶ The Committee concluded that it would take no further action as it considered the matter resolved.⁷

[8] The applicant disagreed, believing the College should have referred the complaint to its disciplinary committee. He referred to the Committee's report as a "whitewash"⁸ and requested access to all other documentation connected with the complaint investigation.

[9] As noted above, the College disclosed a number of records, some of which were severed. What remains in dispute are 35 pages of records consisting of correspondence between the College and the psychologist or the psychologist's counsel.

[10] **3.2 Public Interest Disclosure**—The applicant argues that the records must be disclosed under s. 25(1)(b) of FIPPA. I will deal with this argument first because if s. 25(1)(b) does apply in this case, it would override any other exceptions to the disclosure of the requested records, including s. 22.

[11] Section 25 states in relevant part:

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[12] I have applied here the approach to interpretation and application of s. 25(1)(b) taken in previous orders under FIPPA.⁹

[13] The applicant argues that it should be "self-evident" that this provision is triggered here and that "it is in the best interest of the public that the Colleges' failure to fulfill its mandate should be disclosed".¹⁰

⁶ Complaint Investigation Report of the Inquiry Committee, p. 3 and 4. The applicant argued that the comments placed on his file constituted a professional psychological opinion. The psychologist said they were not. The Inquiry Committee suggested, and the psychologist agreed, to enhance his practice by clearly noting any limitations which might apply to file entries. The psychologist also agreed to encourage WCB to develop standardized procedures that would ensure greater awareness among clients concerning matters relating to informed consent.

⁷ Complaint Investigation Report of the Inquiry Committee, p. 4.

⁸ Applicant's initial submission, para. 19.

⁹ See, for example, Order 02-38.

¹⁰ Applicant's initial submission, para. 5.

[14] The applicant describes the College's alleged failures in the following way:¹¹

1. they have been granted powers to thoroughly investigate these matters, but fail to do so.
2. they have been granted the power to determine the truth or falsehood of each allegation and are supposed to come to a determination based on a consideration of evidence gathered by their investigation. They ignore evidence as a matter of course.
3. they have been granted power to decide on punishment for violations of varied degrees of severity, but every violation somehow is plea-bargained down to a minor misdemeanour and while
4. they have been granted the power to refer the matter to a Disciplinary Committee, have formed one for just such purpose: they never use it. The Registrar in her 2005 Annual Report proudly points out that for six whole years they have managed to avoid any referral to the Committee and have thus escaped the high costs of a hearing with its' irritating legal requirements such as sworn testimony and the actual consideration of facts and evidence. [original underlining]

[15] The applicant argues that ordering disclosure of the records under s. 25 would have immediate and significant health, financial and legal implications for WCB claimants. He says it is his intention to make public any records he obtains.¹²

[16] The applicant also submits that, while the College is mandated to regulate the practice of psychology in BC, it has ignored this role as concerns psychologists working for WCB. He describes this as "malfeasance" on the part of the College and contends that the "victims" of it are often mentally handicapped persons who give up when their claims are denied. The applicant argues that disclosure of the requested records is in those persons' best interest and that of the public generally.¹³

[17] The College submits that this is not a case where the public interest requires disclosure. It argues that the statutory and regulatory framework that govern the College allow it to conduct an inquiry of the kind undertaken here to deal with the applicant's complaints. It says that the environment within which complaints are made is sometimes emotionally charged. The College submits that for an individual psychologist the issues raised sometimes present a threat to their license to practice. The College submits:

¹¹ Applicant's initial submission, para. 4.

¹² Applicant's initial submission, para. 5.

¹³ Applicant's initial submission, para. 8.

...that the ability of parties to fully and frankly bring forward their complaints and for the psychologist's to respond to them depends heavily on an environment of confidentiality where concerns about the repercussions of the other party's response to criticism do not have to be factored in to the response and where highly personal matters can be discussed without concern that any detail is being disclosed to the other party.¹⁴

[18] Commissioner Loukidelis considered s. 25 at length in Order 02-38 and said this about s. 25(1)(b):

[53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.¹⁵

[19] He also considered s. 25(1)(b) in Order 01-20¹⁶ and stated:

[T]he fact that the public may be, or may have been, interested in a record does not necessarily mean that is "clearly in the public interest" to disclose it, without delay, under s. 25(1)(b) of the Act.

[20] The applicant believes that release of the records would serve the public interest by exposing the College's investigation of his case. Even if I assume, without deciding, that disclosure of the requested documents is clearly in the public interest within the meaning of s. 25(1)(b), the required elements of urgent and compelling need for publication are not present in this case.

[21] For this reason, I find that s. 25(1)(b) does not require the College to disclose the requested records.

[22] **3.3 Third-Party Privacy**—The parts of s. 22 relevant to this case are as follows:

- 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

¹⁴ College's initial submission, para (n).

¹⁵ Order 02-38, para. 53.

¹⁶ [2001] B.C.I.P.C.D. No. 21, paras. 37 and 38.

- (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,
...
- (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,

[23] In Order 01-53,¹⁷ the Commissioner discussed the application of s. 22 and I have applied that decision and other decisions from this office without elaboration.

[24] **3.4 Does the Record Contain Personal Information?**—The applicant submits that he does not seek anyone's personal information in his access request.¹⁸ Rather, he says, he is attempting to gain "some sort of muddled reasoning [that] resulted in [the College's] conclusion that I would accept the inept report they issued as resolving my complaint".¹⁹

[25] Personal information is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information".

[26] The records, as noted above, consist of correspondence between the psychologist or his lawyer and the College. This includes a letter from the College to the psychologist containing questions asked by the Committee in the course of conducting its investigation. The psychologist's reply ("reply letter") to these questions is the lengthiest of the records in dispute. The main focus of all of these records is on the conduct of the psychologist acting in his professional capacity.

¹⁷ [2001] B.C.I.P.C.D. No. 56 at paras. 22-24.

¹⁸ Applicant's initial submission, para. 1, "I want to establish at the beginning that I do not wish to access or obtain any information related to the psychologist that he would consider to be private, confidential, or a source of further embarrassment to him".

¹⁹ Applicant's initial submission, para. 1.

[27] Although the applicant states he does not seek the psychologist's personal information, I find that the records responsive to his request²⁰ contain, for the most part, the personal information of the psychologist exclusively. The exception to this is the reply letter, which contains a significant amount of personal information about the psychologist but also some personal information of the applicant and other individuals. The applicant's information is not third-party personal information as concerns the application of s. 22 of FIPPA and would normally be disclosed to applicant.²¹ However, in this case, I find that the personal information of the applicant, the psychologist and other third parties is interwoven in such a manner that it is impossible in these circumstances to separate it. I reach this conclusion because attempting to sever the information in question under s. 4(2) of FIPPA would leave the remaining material without any context and unresponsive to the applicant's request for records.²²

[28] Having found that the disputed records contain personal information of the psychologist, I will now consider whether its disclosure would be an unreasonable invasion of the psychologist's personal privacy.

[29] **3.5 Unreasonable Invasion of Privacy**—The College argues that the release of the records is presumed to be an unreasonable invasion of the psychologist's personal privacy because:

- The record was compiled and is identifiable as part of an investigation into a possible violation of the law.
- It is personal information relating to the occupational history of the psychologist.
- It consists of a personal evaluation of the psychologist.

Investigation into a possible violation of the law

[30] The College argues it is clear that the records are concerned with an investigation of the psychologist resulting from the complaint of the applicant under the Code. The College submits that the Code is established under ss. 19(1)(k) and (l) of the *Health Professions Act*, making it a "law" for the purposes of s. 22(3)(b), and that the records on their face show that there was an "investigation" because the College was seeking response and comment from the psychologist about allegations raised by the applicant for the purpose of investigating the possible violation of the Code.

²⁰ All records relating to the College's inquiry of the applicant's complaint.

²¹ Third party information is defined in Schedule 1 of FIPPA as personal information other than that of the person who made the access request.

²² I adopt here the Commissioner's approach to s. 4(2) in Order 03-16, [2003] B.C.I.P.C.D. No. 16. In particular see paras. 53 to 61.

[31] The applicant replies that this and all other College arguments relating to s. 22 are a “red herring” designed to avoid disclosure of documentation related, not to the psychologist, but to the College’s failure to address the applicant’s complaint in a proper manner.²³ The applicant submits that the College asks for acceptance of its argument at face value, not on factual content. He argues that there was either no investigation or the investigation was so flawed that it “neglected fact in favour of fiction”.²⁴

[32] I conclude that the College’s actions were an “investigation” of the psychologist as authorized under statutory authority, that is, s. 19(1) of the *Health Professions Act*. There was, in other words, “an investigation into a possible violation of law” within the meaning of s. 22(3)(b) of FIPPA. That the records in question were “compiled and...identifiable” as part of that investigation is clear on the face of the records. These findings are consistent with Order F05-18²⁵ in which a similar conclusion was reached concerning the College. For these reasons, I find that s. 22(3)(b) applies to disclosure of the personal information of the psychologist.

Employment history

[23] The College submits that, on their face, the records relate to the psychologist’s employment history within the meaning of s. 22(3)(d). The College cites Order 01-53 and Order 03-24²⁶ in support of its arguments.

[24] The applicant says that at no time has he requested information about the psychologist’s employment history. He submits that while the disclosure of the psychologist’s personal information might be a reason to refuse to disclose the records, the College is using s. 22

to conceal evidence of their own lack of due diligence and malfeasance in protecting the public.²⁷

[35] In Order 02-01²⁸ the Commissioner reviewed the application of s. 22(3)(d) in cases involving self-governing professions and concluded that

[p]ersonal information arising from a disciplinary investigation by a regulatory body involving an individual subject to that body’s authority is information that relates to the individual’s occupational history.

[36] As indicated above, the records in issue are letters between the College and the psychologist in relation to the College’s investigation into the applicant’s complaint. I am persuaded that the personal information of the psychologist is

²³ Applicant’s reply submission, pp. 2 and 3.

²⁴ Applicant’s reply submission, p. 4.

²⁵ [2005] B.C.I.P.C.D. No. 26.

²⁶ [2003] B.C.I.P.C.D. No. 24.

²⁷ Applicant’s reply submission, p. 3.

²⁸ [2002] B.C.I.P.C.D. No. 1.

related to the psychologist's employment history and for that reason the presumption under s. 22(3)(d) applies.

Personal evaluations

[37] The College argues that s. 22(3)(g) applies to the personal information in this case. It is not necessary for me to find whether this third presumption applies here, since the two presumptions addressed above apply to the same personal information.

[38] **3.6 Relevant Circumstances**—The presumptions under ss. 22(3)(b) and (d) are rebuttable. Section 22(2) provides that, in determining whether a disclosure of personal information is an unreasonable invasion of a third party's personal privacy, "all relevant circumstances" must be considered. Section 22(2) contains a non-exhaustive list of relevant circumstances.

Public scrutiny

[39] Neither party specifically raised s. 22(2)(a) in its submissions. However, the applicant made numerous references to the public interest and the need for public exposure of the College's actions.²⁹ I set out most of these points above in the context of the applicant's s. 25 arguments and, for the sake of completeness, I will consider them here in relation to s. 22(2)(a).

[40] In Order F05-18, Adjudicator Austin-Olsen stated that:

What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.³⁰

[41] In Order F07-22,³¹ I determined that s. 22(2)(a) was a circumstance that favoured disclosure in the circumstances of that case. The College of Chiropractors had a policy of non-disclosure concerning investigations of public complaints.³² Indeed, it would not even tell the applicant, initially at least, why her complaint to the College was rejected.³³ I concluded that the objective of public scrutiny would be advanced in that circumstance by "lifting what appears...to be a blanket policy of non-disclosure".³⁴ I noted that this would enhance the public's trust and confidence in that College's processes.³⁵

²⁹ See for example applicant's initial submission, para. 20

³⁰ [2005] B.C.I.P.C.D. No. 26, para. 49.

³¹ [2007] B.C.I.P.C.D. No. 36.

³² [2007] B.C.I.P.C.D. No. 36, para. 36.

³³ [2007] B.C.I.P.C.D. No. 36, para. 35.

³⁴ [2007] B.C.I.P.C.D. No. 36, para. 36.

³⁵ [2007] B.C.I.P.C.D. No. 36, para. 36.

[42] This case differs. In this instance, after completing its investigation, the College reported its decision to the applicant and the reasons for it. The report letter set out the allegations made by the applicant and then indicated how the psychologist responded to each. The College then reported the resolution it reached with the psychologist, which it believed addressed the applicant's concerns. In the result, the College decided it would take no further action, specifically, that it would not send the matter to its discipline committee.

[43] The applicant clearly remains unhappy with this outcome. He holds the psychologist responsible for the delay in receiving his disability pension. He states this delay caused him significant stress, not just to himself but to other family members as well. It would be fair to say that the applicant finds it incomprehensible that the College did not find in his favour. He wants to get more information about how the College made its decision beyond the reasons already provided to him in writing. This is really at the heart of his request for information.

[44] I have carefully considered the applicant's submission as well as that of the College. I conclude that public scrutiny of the College would not be advanced by disclosure of the requested records in this case. Unlike Order F07-22, the College's processes here have been reasonably transparent in the sense of providing an explanation of what it did and the reasons for doing so. To the extent the applicant's argument here is really, at its heart, a criticism of the College's reasoning and its expression, I have no authority under FIPPA to address the fulsomeness or brevity of the College's reasons.

[45] The applicant also expresses doubt that the records in issue here—severed correspondence between the College and the psychologist—are the only records responsive to his request:

[a]pparently there never was a meeting of the Inquiry Committee to discuss the merits of the complaint or at least they kept no written record...[w]here are the minutes of the meeting, and the vote tally?...Was there any informed discussion or did they simply accept a recommendation from the Registrar that they dispose of a little complaint and save the cost of a Disciplinary Committee?³⁶

[46] This is really an argument about whether the College has made all reasonable efforts to respond to his information request. That is not an issue set out in the Notice of Inquiry and it was therefore not addressed by the College in its submissions. I decline to address this issue.

[47] I find for the above reasons that s. 22(2)(a) is not a relevant circumstance in this case.

³⁶ Applicant's reply submission, p. 2.

[48] Neither party addressed other relevant circumstances, including any of the others found in s. 22(2), and I see no others.

Section 22 conclusions

[49] The applicant bears the burden of proving that disclosure of the psychologist's personal information would not be an unreasonable invasion of the psychologist's privacy. I have already concluded that disclosure of the records is presumed to be an unreasonable invasion of the psychiatrist's privacy under ss. 22(3)(b) and (d). The applicant has not provided any submission or evidence to rebut those presumptions and there are no circumstances present to rebut these presumptions. Therefore, I have concluded that, in this case, disclosure of the personal information to the applicant would unreasonably invade the psychologist's personal privacy, such that the College is required to refuse disclosure.

4.0 CONCLUSION

[50] Under s. 58(2) of FIPPA, for the reasons given above, I require the College to refuse access to the information it has withheld from the applicant under s. 22(1) of FIPPA.

September 4, 2008

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator