Order P06-01

AN INCORPORATED DENTIST'S PRACTICE

David Loukidelis, Information and Privacy Commissioner
March 24, 2006

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Summary: Applicant requested access to her personal information in the hands of the organization, a dentist. The organization provided copies of the applicant's clinical records but refused access under ss. 23(3)(a) and (c) and 23(4)(c) and (d) of PIPA to its "College/Litigation file", comprising 16 records related to the applicant's complaint to the College of Dental Surgeons. The organization also said that it was not able to sever the records under s. 23(5). Sections 23(4)(c) and (d) do not apply to all of the information in the records and severing under s. 23(5) is possible. The organization is, however, authorized by s. 23(3)(c) to refuse access to 15 records in their entirety and by s. 23(3)(a) to the 16th record.

Key Words: personal information—organization—personal or domestic capacity—investigation or proceeding—collection authorized by law—disclosure authorized by law—solicitor-client privilege.

Statutes Considered: *Personal Information Protection Act*, ss. 3(2)(a) & (i), 3(5), 12(1)(i), 18(1)(j) & (o), 23(3)(a) & (c), 23(4)(c) & (d) & 23(5); s. 49, *Dentists Act*.

Authorities Considered: B.C.: Order F05-03, [2002] B.C.I.P.C.D. No. 3; Order 02-01, [2001] B.C.I.P.C.D. No. 1.

1.0 INTRODUCTION

[1] This decision arises out of a request by a patient for access to her file in the hands of the organization, a dentist. In her request, she cited both the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and the *Personal Information Protection Act* ("PIPA"). The organization responded that FIPPA did not apply to it and said that it had already provided a copy of its clinical treatment records to the applicant's "new dentist".

[2] The applicant wrote back to the organization acknowledging that FIPPA did not apply to it. She pointed out that PIPA did, however, and requested a response under that statute. The organization then responded through its lawyer, who said that the organization had two files related to the patient. The first was the clinical file which, the lawyer noted, the organization had already sent to the applicant's new dentist. The lawyer said that, if the patient wanted a new copy of the file, the organization would provide a second copy and charge 25 cents for each page. The lawyer said that the second file, the "College/Litigation file", related to the patient's complaint against the organization to the College of Dental Surgeons ("College"), the self-governing professional regulatory body for dentists in this province. The lawyer said that the organization would not be providing a copy of the College/Litigation file for the following reasons:

> First, we doubt the College/Litigation file is "personal information" about you as it is information about [the organization]. Accordingly, a copy of it should not be forwarded to you. (The remaining reasons for not forwarding a copy of the College/Litigation File deal with the possibility that the file is personal information about you.)
>
> Second, the College/Litigation File contains information collected for the purposes of an Investigation relating to Proceedings. Accordingly, pursuant to Section 23(3)(c) of PIPA, [the organization] is not required to produce this information.
>
> Third, the College/Litigation File contains personal information about another individual or individuals. Accordingly pursuant to Section 23(4)(c) [the organization] may not provide you with a copy.
>
> Fourth, disclosure of the College/Litigation File would reveal the identity of an individual or individuals who have provided personal information about another individual. The individual or individuals who provided the information do not consent to the disclosure of their identity. Accordingly, pursuant to Section 23(4)(d) of the PIPA [the organization] may not provide you with a copy.
>
> Fifth, the information in the College/Litigation File was collected on or before January 1, 2004. Accordingly, pursuant to Section 3(2)(i) of PIPA the Act does not apply.
>
> We are not able to remove the impediments to disclosure referred to above such that a redacted version of the College/Litigation File could be provided as contemplated pursuant to Section 23(5) of PIPA.

[3] The applicant requested that this Office review the denial. Mediation was not successful in resolving the issues in this case and the matter proceeded to an inquiry under Part 11 of PIPA.

2.0 ISSUE

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

1. Do the records constitute "personal information" as defined in s. 1 of PIPA?

2. Do the records contain information collected on or before January 1, 2004 and, accordingly, under to s. 3(2)(i) of the Act, are the records subject to the provisions of PIPA?

3. Was the organization authorized to withhold records under s. 23(3)(c)?

4. Was the organization required to withhold records under ss. 23(4) (c) and (d)?

5. Has the organization complied with s. 23(5)?

[5] The organization also argues, at paras. 22-26 and 29 of its initial submission, that the dentist is not an "organization" for PIPA purposes. This was not listed as an issue in the notice issued for this inquiry, but I have considered it. The applicant had an opportunity to respond to this contention and it relates to whether I have jurisdiction to review the decision in issue here.

[6] Section 51 of PIPA sets out the burden of proof in inquiries as follows:

> 51 At an inquiry into a decision to refuse an individual
>
> (a) access to all or part of an individual's personal information,
>
> (b) information respecting the collection, use or disclosure of the individual's personal information,
>
> (c) the names of the sources from which a credit reporting agency received personal information about the individual,
>
> it is up to the organization to prove to the satisfaction of the commissioner that the individual has no right of access to his or her personal information or no right to the information requested respecting the use or disclosure of the individual's personal information or no right to the names of the sources from which a credit report agency received personal information about the individual.

3.0 DISCUSSION

[7] **3.1 Background**—The organization says it provided dental services to the applicant and that the applicant later filed a complaint with the College. The organization says the College told the applicant that it had investigated the applicant's complaint and had decided not to take any action against the organization. The organization says that the applicant "purported" to appeal this decision to the Supreme Court of British Columbia under s. 55 of the *Dentists Act*. It says that the College in turn claimed that the applicant's proceeding was "procedurally misconceived". The organization says that the

applicant later amended her statement of claim and also began a proceeding against the organization in small claims court.[1]

[8] The organization says it has two files referring to the applicant. The first contains clinical treatment records relating to the organization's treatment of the applicant as the dentist's patient. The organization says it has provided copies of this file both to the applicant's new dentist and to the applicant. The second file is the so-called College/Litigation file which, as noted above, the organization has not provided to the applicant. The organization says that the College/Litigation file

> … consists of copies of correspondence between the Applicant and the College, correspondence between the Dentist and the College, correspondence from the College to another person, the College's notation of a telephone conversation and a two-page memorandum to the Dentist from his counsel (the "Privileged memorandum").[2]

[9] The organization also says that the applicant requested records from the College under FIPPA. The organization provided a table showing the 16 records contained in its file, none of which it disclosed to the applicant. The table indicates that the College had 15 of the 16 records, some of which the College categorized as "previously released" or addressed to the applicant. It categorized others as "releasable" in full or severed form. The organization's table indicates that the final record, a memorandum to the organization from its legal counsel, was not in the College's possession.[3]

[10] In my initial review of the parties' submissions, I noted the organization's reference to the College's response to the applicant's FIPPA request, as outlined above. The applicant's reply submission indicates, at p. 1, that she requested a review by this Office of the College's response under FIPPA, but asked that the PIPA inquiry proceed as the FIPPA review was then still underway. In view of this information, I wrote to the parties, noting that the FIPPA review had likely been resolved in the meantime and requesting clarification from the parties as to whether all the records originally in dispute were still in issue. I then requested the parties' views on whether it was necessary to conduct an inquiry on 15 of the 16 records in issue here as, if the FIPPA matter had been resolved, the only record in dispute would be the "Privileged Memorandum".

[11] The applicant responded that all 16 records are still in dispute, as there is no method of determining if the records on which the College provided a response are the same as those in the organization's file. She suggests that the organization is making assumptions on this matter but that, if it can provide proof of its assumptions regarding particular records, those records can be excluded from consideration in this inquiry.[4] The organization replied that it had not participated in proceedings involving the College

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[1] Paras. 1-9, initial submission.
[2] Paras. 10-14, initial submission.
[3] Paras. 15-17, initial submission.
[4] Letter of December 13, 2005.

and the applicant under FIPPA and did not know if any such proceedings had been resolved.[5]

[12] As the applicant did not provide me with copies of the records she received from the College, I have no way of knowing whether they are indeed the same as those in the organization's file. I have therefore dealt with all 16 of the records in dispute in this case. For convenience, I have numbered the records from one to sixteen, in the order in which they appear in the table of disputed records that the organization provided to me for this inquiry.

[13] **3.2 Is the Dentist an "Organization" Under PIPA?**—The organization acknowledges that it acted in a commercial capacity when providing dental services to the applicant and in collecting the clinical records, which it then released to the applicant and her new dentist. It argues, however, that the proceedings under the *Dentists Act* to which the records in dispute relate are personal to the dentist and involve his interaction "in an intensely personal capacity" with the College. The organization continues as follows:

> 24. …. In the context in which the Dentist collected and used those records, the Dentist's ability to practice his chosen profession was being threatened and defended. Rights personal to the Dentist were directly at issue.

[14] The organization thus argues that the dentist was collecting, using and disclosing the patient's personal information in a personal capacity, not as an organization, referring to PIPA's definition of "organization", s. 3(2)(a) of PIPA and *Wilson v. British Columbia (Medical Services Commission)*[6] for support.[7]

[15] The organization has, in advancing this point, not distinguished between the corporation named as a party in the notice of inquiry that this Office issued and the individual dentist whose practice is in question and about whom the applicant complained to the College. I will, for the purposes of discussion only, similarly ignore the separate existence of the corporation named in the notice of inquiry.

[16] The term "organization" is defined as follows:

> **"organization"** includes a person, an unincorporated association, a trade union, a trust or a not for profit organization, but does not include
>
> (a) an individual acting in a personal or domestic capacity or acting as an employee,…

[5] Letter of December 19, 2005.
[6] (1988), 30 B.C.L.R (2d) 1.
[7] Paras. 22-29, initial submission.

[16] Section 3(2)(a) of PIPA reads as follows:

> ***Application***
>
> 3(1) Subject to this section, this Act applies to every organization.
>
> (2) This Act does not apply to the following:
>
> (a) the collection, use or disclosure of personal information, if the collection, use or disclosure is for the personal or domestic purposes of the individual who is collecting, using or disclosing the personal information and for no other purpose; …

[17] PIPA does not explicitly use the concept of "commercial capacity" in distinguishing between organizations and others. The term "organization" is defined to include, but is not limited to, any number of entities. It also applies to individuals. It does not, however, apply to an individual acting in a personal or domestic capacity or as an employee. Perhaps this is why the organization argues that one must be acting in a "commercial capacity" to be an organization under PIPA. Yet PIPA is clearly intended to apply to not-for-profit organizations, which will most often not be acting in any "commercial capacity".

[18] The real issue is whether the dentist involved in this case was acting in a personal capacity in dealing with the College.[8] When responding to the applicant's complaint to the College, which flowed from the dental services that the organization provided to the applicant, the dentist was acting in relation to his professional practice. The fact that the results of the complaint investigation might have had a personal effect on the dentist in the form of discipline or some other sanction does not mean that he was acting in a personal capacity in collecting, using and disclosing the applicant's personal information in order to respond to the complaint. I see no distinction for PIPA's purposes between the dentist's functions and activities in these two areas, such that the dentist compiled the personal information in the disputed documents in a personal capacity. I find that the dentist was an "organization" for PIPA purposes throughout the dealings with the College on the applicant's complaint.[9]

[19] **3.3 Does the *Dentists Act* Prevail?**—The organization argues that s. 49 of the *Dentists Act* applies here.[10] The organization says that, under s. 82 of the *Dentists Act*, it is an offence to contravene s. 49, which reads as follows:

> ***Confidential information***
>
> 49 Any person who, in the course of carrying out duties under this Act, obtains information, files or records that are submitted in accordance with a request or obligation under this Act, must not disclose the information, files or records to

[8] PIPA excludes cases where someone is acting in a "personal" or "domestic capacity", but the dentist only argued in this case that he or she was acting in a "personal" capacity.

[9] I deal with the individual dentist's privacy later in this decision, in relation to publication of the organization's name.

[10] Para. 17, initial submission.

> any person other than for the purposes of carrying out his or her duties under this Act or the rules or when required by law.

[20] On its face, this confidentiality obligation applies to those who, in discharging their duties under the *Dentists Act*, acquire information, files or records. It is not clear how the organization thinks this provision applies to it in relation to a request under PIPA. The provision is directed at the College's activities under the *Dentists Act*, not at the dentist involved here.

[21] Even if s. 49 did apply to the organization itself, and to the information in issue here, I note that s. 49 provides that the duty of non-disclosure does not apply when disclosure is "required by law". This would include a legal obligation under PIPA to disclose the applicant's personal information to her, subject only to any PIPA exceptions.

[22] Moreover, PIPA prevails over the *Dentists Act*. Section 3(5) of PIPA reads as follows:

> 3(5) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless another Act expressly provides that the other enactment, or a provision of it, applies despite this Act.

[23] There is no provision in the *Dentists Act* providing that it prevails over PIPA in any way.

[24] The organization also argues that it is "premature" to deal with the issues regarding access to the records in the College/Litigation file, without also dealing with the same issues respecting the College.[11]

[25] It is not clear how the organization believes this matter under PIPA must somehow be suspended until the applicant's request for review under FIPPA, which involves the College, and not the organization, is resolved. This matter will proceed.

[26] **3.4 Whose "Personal Information" Is Involved?**—The organization takes the position that the information in issue here is not "personal information" about the applicant for the purposes of PIPA. It says, without elaborating, that it is personal information about the dentist.[12] The applicant points out that she does not know what is in the file and asks that I determine whether she is entitled to her personal information in the file.[13]

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[11] Para. 19, initial submission.
[12] Para. 21, initial submission.
[13] Page 2, initial submission.

[27] Personal information is defined in s. 1 of PIPA as follows

> **"personal information"** means information about an identifiable individual and includes employee personal information but does not include
>
> (a) contact information, or
> (b) work product information;

[28] The organization's argument appears to be that, because the documents in the file have the dentist as their subject, all of the information in the records is "about" the dentist, and thus all his or her personal information, not also that of the applicant or others. I do not agree with this interpretation of PIPA's definition of personal information. The records in dispute contain information about a number of individuals mentioned by name, including the applicant, the dentist, an employee of the dentist and other dentists. It is information about all of these identifiable individuals and is thus their "personal information" as defined in PIPA.

[29] **3.5 Does Section 3(2)(i) Apply?**—The organization says that much of the information in its College/Litigation file was collected on or before January 1, 2004. Accordingly, it argues, under s. 3(2)(i), PIPA does not apply to the disputed records. The organization also argues that "it is strongly presumed that legislation is not intended to be retroactive",[14] referring to R. Sullivan, Sullivan and Driedger on the Construction of Statutes.[15]

[30] Section 3(2)(i) reads as follows:

> ***Application***
>
> 3(1) Subject to this section, this Act applies to every organization.
>
> (2) This Act does not apply to the following: …
>
> (i) the collection of personal information that has been collected on or before this Act comes into force.

[31] This section simply states that PIPA's limitations on and requirements for the collection of personal information do not apply retroactively to information collected before January 1, 2004, the date PIPA came into effect. The other rights and obligations under PIPA for personal information, including conditions for its use and disclosure, and an individual's right of access to her or his personal information, do apply.

[32] It follows that I reject the organization's arguments on this point. PIPA applies to the applicant's personal information in the organization's control and the applicant has a right of access to that information, subject to any exceptions.

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[14] Paras. 27-28, initial submission.
[15] 4th ed., Markham, Ontario, Butterworth's 2002 at page 554.

[33] **3.6 Is There an Investigation or Proceeding?**—The organization argues that s. 23(3)(c) applies to the first 15 of the records in dispute. The relevant provisions read as follows:

> ***Access to personal information***
>
> 23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances: …
>
> (c) the information was collected or disclosed without consent, as allowed under section 12 or 18, for the purposes of an investigation and the investigation and associated proceedings and appeals have not been completed; …
>
> **"investigation"** means an investigation related to
>
> (a) a breach of an agreement,
> (b) a contravention of an enactment of Canada or a province,
> (c) a circumstance or conduct that may result in a remedy or relief being available under an enactment, under the common law or in equity,
> (d) the prevention of fraud, or
> (e) trading in a security as defined in section 1 of the *Securities Act* if the investigation is conducted by or on behalf of an organization recognized by the British Columbia Securities Commission to be appropriate for carrying out investigations of trading in securities,
>
> if it is reasonable to believe that the breach, contravention, circumstance, conduct, fraud or improper trading practice in question may occur or may have occurred;
>
> **"proceeding"** means a civil, a criminal or an administrative proceeding that is related to the allegation of
>
> (a) a breach of an agreement,
> (b) a contravention of an enactment of Canada or a province, or
> (c) a wrong or a breach of a duty for which a remedy is claimed under an enactment, under the common law or in equity;

[34] The organization says[16] it was permitted to collect the applicant's personal information from another source without consent under s. 12(1)(c),[17] s. 12(1)(h)[18] and s. 12(1)(i)[19] and that it was authorized to disclose the applicant's personal information without consent under s. 18(1)(c),[20] s. 18(1)(j)[21] and s. 18(1)(o).[22]

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[16] At paras. 30-32 of its initial submission.

[17] Where "it is reasonable to expect that collection with the individual's consent would compromise the availability or the accuracy of the personal information and the collection is reasonable for an investigation or proceeding".

[18] Where the "collection is authorized by law".

[19] Where "the information was disclosed to the organization under sections 18 to 22".

[20] If "it is reasonable to expect that disclosure with the individual's consent would compromise an investigation or proceeding and the disclosure is reasonable for purposes relating to an investigation or proceeding".

[21] If the "disclosure is to a public body or law enforcement agency in Canada, concerning an offence under the laws of Canada or a province, to assist in an investigation or in the making of a decision to undertake an

[35] The organization says that the College initiated an investigation under the *Dentists Act* at the applicant's request and contends that this is an "investigation" as described in paragraphs (c) and (d) of the definition set out above. The organization says that the College/Litigation file contains information collected without the applicant's consent for the purpose of investigating her complaint. The organization then says that the investigation or proceedings in respect of that investigation have not yet been completed as, although the College decided not to take any action as a result of its investigation, the applicant "purported to appeal that decision under s. 55 of the *Dentists Act*". The organization says the applicant originally sought an order from the Supreme Court of British Columbia that the College re-open its investigation and an order that the College answer her questions about the investigation. Having amended her claim, it continues, she is now also seeking an order that the College was negligent in its investigation. She has also sued the organization. The organization says that, if the applicant is successful in her "purported appeal" and the Court orders that the College investigation recommence or associated proceedings otherwise continue, the applicant could be a witness and "her evidence shaped by the material contained in the records disclosed". The organization refers to Order F05-03[23] for support.[24]

[36] The organization also provides copies of three affidavits sworn by Brian Casey, a Deputy Registrar of the College, and filed by the College in the Supreme Court proceedings associated with the applicant's "purported appeal" of the College's handling of her complaint under s. 55 of the *Dentists Act*. Dr. Casey describes the processing of the applicant's complaint, the College's decision not to proceed with an investigation and the applicant's follow-up correspondence and court actions. Attached to these affidavits are a number of exhibits, among them an extract from the College's rules (including "Article 16 – Complaints"), correspondence related to the applicant's complaint to the College and the applicant's legal action against the College, the applicant's statements of claim, the College's Notice of Motion, the applicant's notice of claim against the organization and correspondence related to the applicant's access request to the College. The items related to the applicant's legal actions are dated from September 2004 to November 2004.

[37] The applicant says that the College's investigation of her complaint concluded in July 2004.[25] She acknowledges that she commenced a legal action against the organization in small claims court in November 2004 and appears to suggest that the organization delayed responding to her request because of this litigation.[26]

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investigation to determine whether the offence has taken place or to prepare for the laying of a charge or the prosecution of the offence".

[22] Where the "disclosure is required or authorized by law".

[23] [2005] B.C.I.P.C.D. No. 3.

[24] Paras. 33-39, initial submission.

[25] Page 2, initial submission.

[26] Page 3, reply submission.

[38] The issue here is whether the organization collected the applicant's personal information in accordance with one or more of ss. 12(1)(c), (h) and (i), or disclosed it in accordance with one or more of ss. 18(1)(c), (j) and (o), and whether it did so for the purposes of an investigation, where that investigation, or proceedings or appeals associated with that investigation, are not yet concluded.

[39] The organization does not explain how it believes that the various provisions in ss. 12 and 18 of PIPA that it cites apply here. I have therefore had to determine from a review of the materials before me—including the records themselves, the *Dentists Act* and the College's rules on complaints—whether any of these provisions authorized the organization to collect or disclose personal information and thus whether s. 23(3)(c) of PIPA applies.

[40] Under s. 28 of the *Dentists Act*, the College has the power to make rules on a number of things, including investigations and hearings and what constitutes unbecoming or unprofessional conduct. Sections 37 through 39 set out an inspector's powers in conducting an investigation. Section 43 gives the College authority, among other things, to determine if a registrant has contravened the Act or a rule made under the Act, has engaged in unprofessional or unbecoming conduct or has practiced dentistry incompetently. On making a determination under s. 43, the College may dismiss the matter, reprimand, suspend or fine a registrant, or cancel, limit or impose conditions on the registrant's registration.

[41] Article 16 of the College's rules sets out the process for investigating complaints. According to this rule, upon receipt of a complaint, the College must provide a copy of the complaint to the registrant (for example, a dentist or dental assistant). The registrant may then provide a written response to the complaint to the College. The College may also require the registrant to submit practice records relevant to the complaint and may require the registrant to respond to further written requests for information relevant to the complaint. The College may also request a written report or other information from any person or committee that it considers may be of assistance in reviewing the complaint.

[42] The College may attempt to resolve a complaint informally or by mediation, may refer the complaint to the College's Practice Standards Committee or the Professional Conduct Committee or may decide to take no action respecting the complaint. Article 16 says that the College will notify the registrant under review, its Council and any other persons authorized in Council guidelines that it has taken any of these actions. It also describes the various committee review and discipline processes.

[43] In this case, the College investigated the applicant's complaint and decided to take no action. It informed the applicant of its disposition of her complaint in July 2004.[27] The material before me indicates that the applicant's "purported appeal" of its disposition of her complaint was still ongoing at the time of this inquiry. Certainly, neither of the parties provided me with any evidence showing that the Supreme Court

[27] Para. 6, organization's initial submission.

proceedings associated with this supposed appeal have since been concluded. I am therefore satisfied that there was an "investigation" for PIPA purposes and that the investigation and the proceeding associated with that investigation were not yet completed at the time of this inquiry.

[44] In this light, I will consider whether ss. 12 and 18 of PIPA authorized the organization to collect or disclose information for the purposes of the investigation. Beginning with the records that consist of correspondence that the College sent directly to the organization or that the College provided to the organization (records 1-3, 5, 6, 8, 10-15), I am satisfied that s. 12(1)(i) of PIPA authorized the organization to collect the personal information in those records, as the College's rules—a form of "enactment" within the meaning of the *Interpretation Act* and thus law for PIPA's purposes—required the College to provide a copy of the applicant's complaint to the organization and to notify the organization of the outcome of its investigation.

[45] As for correspondence from the organization to the College (records 4, 7 and 9), I am satisfied that s. 18(1)(j) authorized the organization to disclose personal information in those records to the College, a public body, to assist in its investigation of the applicant's complaint, and that s. 18(1)(o) applies, as the College's rules authorized the organization to respond to the applicant's complaint.

[46] Taking all these factors together, I find that s. 23(3)(c) applies to records 1-15.

[47] **3.7 Personal Information of Others**—The organization also says that the file should be withheld because it contains personal information about another individual or individuals and that, under s. 23(4)(c), the organization may not provide the applicant with a copy of the file. Moreover, the organization argues, disclosure of the file would also reveal the identity of an individual or individuals who provided personal information about another individual and, it says, the individual or individuals who provided the information do not consent to the disclosure of their identity. Thus, under s. 23(4)(d) of PIPA, the organization says, it may not provide the applicant with a copy of the records.[28] This is all the organization says about these exceptions. The applicant points out that PIPA requires the organization to remove the personal information of others.[29]

[48] The organization's chart lists s. 23(4)(c) for all 16 records. Although the organization's submission appears to argue that both sections apply to all 16 records, its chart lists s. 23(4)(d) only for records 4, 6 and 9-11. I will, nonetheless, proceed on the basis that the organization's argument is that s. 23(4)(d) applies to all 16 records. I need not consider whether ss. 23(4)(c) and (d) apply to record 16, as I find elsewhere that s. 23(3)(a) applies to this record in its entirety.

[28] Paras. 40-42, initial submission.
[29] Page 3, initial submission.

[49] The relevant sections read as follows:

> 23(4) An organization must not disclose personal information and other information under subsection (1) or (2) in the following circumstances: …
>
> (c) the disclosure would reveal personal information about another individual;
> (d) the disclosure would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to disclosure of his or her identity.

[50] In my view, the organization is going too far with its arguments on these points. While the records contain information about or provided by other individuals, they also contain the applicant's personal information. The fact that a record contains third-party personal information or information identifying an individual who provided information about another individual—and who has not consented to the disclosure of her or his identity—does not mean the entire record must be withheld, much less a file comprising many documents, as is the case here. Moreover, severance of the records is possible here and is therefore required by PIPA.

[51] I find that ss. 23(4)(c) and (d) do not apply to the applicant's own personal information, but do apply to third-party personal information in the disputed records and to information identifying those who provided information about other individuals.

[52] **3.8 Solicitor-Client Privilege**—The organization says that, in addition to the other exceptions, one record, which it describes as the "Privileged Memorandum" (record 16), falls under s. 23(3)(a) of PIPA because it is protected by solicitor-client privilege. The organization describes this record as a "memorandum dated August 31, 2004 to the Organization from the Organization's counsel (the Privileged Memorandum)".[30] The organization says that this record "falls within s. 23(3)(a) of PIPA", *i.e.*, "the information is protected by solicitor-client privilege".[31]

[53] The relevant exception to the right of access reads as follows:

> 23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:
>
> (a) the information is protected by solicitor-client privilege; …

[53] I consider that the Legislature, by referring to "solicitor-client privilege" in s. 23(3)(a) of PIPA, intended to import both branches of solicitor-client privilege. These are legal professional privilege (which protects confidential communications between lawyer and client related to the seeking or giving of legal advice) and litigation privilege (which protects information where the dominant purpose of its creation was to

[30] See table at para. 16 of organization's initial submission.
[31] Para. 43, initial submission.

advise on or assist in the conduct of litigation contemplated or under way at the time the document came into existence). Both kinds of solicitor-client privilege have been the subject of numerous orders under FIPPA—see, for example, Order 02-01[32]—and the relevant principles are well-established. Without repeating them, I have applied here the principles reflected in FIPPA decisions, noting that these principles are the same as those adopted by the courts in addressing issues of solicitor-client privilege.

[54] At para. 2 of her first affidavit, Leticia Shamim, a legal secretary with the office of the organization's legal counsel, deposed that the organization's submission includes an entire copy of the "College/Litigation file",

> …with the exception of a two-page memorandum which I am advised by Ludmilla Herbst of our office has been removed because of solicitor-client privilege. I am advised by Ms. Herbst that the privileged document removed is the last document listed in the table that ends on page six of the Submission filed by our clients in this matter.

[55] Apart from one brief reference,[33] I could find no other mention or description of the allegedly "Privileged Memorandum". I concluded that the material provided by the organization did not suffice to enable me to determine if s. 23(3)(a) applies to the Privileged Memorandum. Because of the need for me to address solicitor-client privilege issues with care, I invited the organization to provide further argument and evidence on the solicitor-client privilege issue.

[56] The organization said the following in response:

> … In short, the memorandum is a solicitor-client communication conveying legal analysis, opinion and advice on the application of certain legislation relating to freedom of information and protection of privacy and, in this regard, on whether or not records must be released to [the applicant]. Privilege attaches "to all direct communications between a solicitor and client or their agents made for the purpose of obtaining of obtaining professional legal advice". [citation omitted] Further, given this limited content, the memorandum is not in any event relevant to any of the events in issue.

[57] In support of its submission on this point, the organization provided a further affidavit from Leticia Shamim, the salient portions of which follow:

> 2. I referred at paragraph 2 of my Affidavit #1 to advice from Ludmilla Herbst with respect to a privilege two-page memorandum (the "Privileged Memorandum"). Ms. Herbst is a lawyer at Farris.
>
> 3. The Privileged Memorandum is the memorandum dated August 31, 2004 to [the organization] from Farris noted in the last row of the table in paragraph 16 of the Submission of [the organization]. I am advised by Ms. Herbst, and from my

[32] [2002] B.C.I.P.C.D. No. 1.
[33] Para. 14, initial submission.

> own review of the Privileged Memorandum confirm, that it consists of legal analysis, opinion and advice on the application of certain legislation relating to freedom of information and protection of privacy and, in this regard, whether or not records must be released to [the applicant].

[58] From a careful review of the argument and evidence before me, I am satisfied that record 16 is protected in its entirety by solicitor-client privilege. I find that s. 23(3)(a) applies to it.

[59] **3.9 Is It Reasonable to Sever the Records?**—The organization says, without explaining why it takes this position, that it is

> …not able to remove the impediments to disclosure referred to above such that a redacted version of the College/Litigation File could be provided as contemplated pursuant to s. 23(5) of PIPA.

[60] The relevant section reads as follows:

> (5) If an organization is able to remove the information referred to in subsection (3)(a), (b) or (c) or (4) from a document that contains personal information about the individual who requested it, the organization must provide the individual with access to the personal information after the information referred to in subsection (3)(a), (b) or (c) or (4) is removed.

[61] I have found that s. 23(3)(c) applies to all of the information in dispute in this case, so the question of severance does not arise here. However, I will say in passing that, as indicated above, the organization is arguing for an inappropriately narrow view of PIPA's obligation to remove, or sever, information from records. PIPA says an organization must provide an applicant with her or his own personal information if the organization is "able to remove" information to which access exceptions apply. I acknowledge that the comparable FIPPA provision, s 4(2), expressly says that a public body need only sever information where that can "reasonably" be done, while PIPA contains no such qualification.

[62] The implications of this, if any, need not be addressed in this case, since it would clearly be both possible and reasonable for the organization in this case to remove third-party personal information, and information identifying any individuals who provided personal information about an individual and who have not consented to the disclosure of their identities, and disclose the remainder of the disclosable information to the applicant. To be clear, the organization is not required to do this, but that is only because s. 23(3)(c) applies to the entirety of the documents in issue in the particular circumstances of this inquiry.

[63] **3.10 Identification of the Organization**—Comment is necessary about identification of the organization involved in this inquiry. The general approach of this office will be to include in orders such as this the name of the organization involved in

the inquiry and subject to the order. This case presents special, though not necessarily unique, circumstances that warrant a departure from that general approach.

[64] The organization involved here is a corporation. The corporation's name includes the name of the dentist about whose conduct the applicant had complained to the College. Disclosure of the corporation's name would readily identify the individual dentist.

[65] Exercising its regulatory authority respecting dentists, the College investigated the applicant's complaint and decided not to proceed against the dentist. As I indicated earlier, the applicant is disputing that decision.[34] As I also mentioned above, the applicant made an access to information request to the College under FIPPA. The status of that request and proceedings involving this Office under FIPPA is not known to me.

[66] I said earlier that, in collecting personal information of the applicant, the organization was subject to PIPA's requirements and did not fall outside PIPA on the basis that, as contemplated by s. 3(2)(a), the dentist was acting in a personal or domestic capacity in relation to the College complaint. This is not to say, however, that, in considering whether to identify the dentist by publishing the organization's name here, privacy implications for the dentist can be ignored.

[67] Privacy interests of individuals subject to regulatory actions by self-governing professions and occupations have figured in decisions under FIPPA. In Order 02-01, I said the following:

> [55] I consider that information about the existence of a complaint against a lawyer is personal information that relates to the employment or occupational history of the lawyer within the meaning of s. 22(3)(d) of the Act [FIPPA]. Section 22(3)(d) provides that disclosure of such information is presumed to unreasonably invade the personal privacy of the individual whose personal information it is. Even though such information is not, properly understood, an indication of any actual wrongdoing, it is nonetheless likely that negative conclusions will be drawn about the member or former member from the mere existence of such information. I consider that disclosure of this information would be an unreasonable invasion of the personal privacy of the Law Society members or former members involved here.[35]

[68] Again, I am not aware of the nature or status of any FIPPA proceedings in this Office involving the applicant's access request to the College. In the circumstances, I am not prepared to identify the dentist and risk vitiating the outcome of any ongoing FIPPA proceedings or any decision of the College respecting the dentist's privacy without the benefit of evidence and argument addressing the merits there arising. The merits of any such proceedings or decision will be resolved on evidence and argument aimed at the

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[34] Affidavit of Brian Casey.

[35] I went on to find that there were no circumstances that overrode the presumption of unreasonable invasion of privacy and upheld the decision of the Law Society of British Columbia to withhold the names of lawyers about whom complaints had been made, but against whom no formal citation or discipline decision had been issued or made.

applicable circumstances. I have in this light decided not to publish here the name of the organization involved in this case.

[69] In doing this, I am mindful that s. 41(3) of PIPA requires me not to disclose any personal information requested under s. 27 that an organization would be required or authorized to withhold and that s. 47(3) of FIPPA contains a similar prohibition as regards personal information.

4.0 CONCLUSION

[70] For the above reasons, under s. 52(2)(b) of PIPA, I confirm that the organization is authorized by s. 23(3)(c) of PIPA to refuse the applicant access to records 1-15 and by s. 23(3)(a) to refuse access to record 16.

[71] For reasons given above, no order respecting ss. 23(4)(c) and (d) and 23(5) is necessary.

March 24, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OIPC File No. P04-22524