Office of the Information & Privacy Commissioner for British Columbia

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Order F18-01

COLLEGE OF PHYSICIANS AND SURGEONS OF BC

Elizabeth Barker
Senior Adjudicator

January 10, 2018

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Summary: A physician requested records of an assessment of his medical practice conducted by the College's Physician Practice Enhancement Program. The College refused the applicant access to the records under s. 26.2(1) (quality assurance committee records) of the *Health Professions Act*. It also refused to disclose the records under s. 13 (policy advice or recommendations) and s. 22 (disclosure harmful to personal privacy) of *the Freedom of Information and Protection of Privacy Act*. The adjudicator found that the College was not required or authorized by any of those provisions to refuse to disclose the records to the applicant. The College was ordered to disclose the records to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 22(1), 22(4)(a) and 79; *Health Professions Act*, ss. 1, 16, 26, 26.1, 26.2, 26.2(1), 26.2(1)(a), 26.2(6) and 53; *Evidence Act*, s. 51.

Authorities Considered: BC: Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII); Order F10-41, 2010 CanLII 77327 (BC IPC).

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC); *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025.

Other: Legislative Assembly of British Columbia, Official Report of Debates of the Legislature (*Hansard)*, 37th Parl, 4th Sess, No 16 (October 6, 2003) at 7186 (Hon S. Hawkins).

INTRODUCTION

[1] The applicant is a physician who requested records under the *Freedom of Information and Protection of Privacy Act* (FIPPA) related to an assessment of his professional practice. Specifically, he asked the College of Physicians and Surgeons of BC (College) for access to the questionnaires his peers completed about him under the College's Physician Practice Enhancement Program (PPEP).

[2] The College refused the applicant access to the records under s. 26.2(1) (quality assurance committee records) of the *Health Professions Act* (HPA). It said that even if s. 26.2(1) does not apply, it was authorized to refuse disclosure under s. 13 (policy advice or recommendations) and required to refuse disclosure under s. 22 (disclosure harmful to personal privacy) of FIPPA.

[3] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the College's decision. Mediation did not resolve the issues in dispute and the applicant requested that the matter proceed to an inquiry.

[4] Shortly after the Notice of Inquiry was issued, the College of Dental Surgeons of British Columbia and the College of Registered Nurses of British Columbia each requested permission to intervene in the inquiry. I determined that their interests were not sufficiently engaged and their participation would not contribute in a meaningful or substantial way to the proceedings. Therefore, I informed them that they would not be given a copy of the request for review or be invited to make representations at the inquiry.

Preliminary matters

[5] The applicant raises two preliminary concerns in his submission. First, he requests that I disregard the College's initial submission because it is too long. He calculates that it is 25 pages single-spaced although the OIPC's *Instructions for Written Inquiries* states that submissions should be 25 pages double-spaced. FIPPA provides the OIPC with the discretion to control its own procedures and to determine what is fair given the circumstances of each case. The applicant does not explain in what way he has been prejudiced by the length of the College's submission. There is no evidence that it has affected his ability to fully respond to the College's submission. I am not convinced that the applicant suffered any prejudice or that it would be unfair to consider the College's 25-page, single-spaced initial submission. Therefore, I will not disregard it.

[6] The applicant's second concern is that he believes that the College's initial submission raises new grounds for refusing him access to the records (i.e., ss. 16 and 53 of HPA). However, the College is not relying on those provisions to refuse access to the records. Where the College discusses these other statutory provisions, it is not raising new exceptions to disclosure but providing its legal argument. I can confirm that no new issues have been raised or added to the inquiry and it will continue to be limited to the issues set out in the Notice of Inquiry.

ISSUES

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

1. Does s. 26.2 of HPA prohibit the College from disclosing the requested records to the applicant?

2. Is the College authorized to refuse the applicant access to the records under s. 13 of FIPPA?

3. Is the College required to refuse the applicant access to the records under s. 22 of FIPPA?

[8] Section 57 of FIPPA states that a public body has the burden of proving s. 13 authorizes it to refuse to disclose the requested information. It also says that an applicant has the burden of proving disclosure of personal information would not unreasonably invade third party personal privacy under s. 22. FIPPA does not say who has the burden of proof regarding provisions such as s. 26.2 of HPA. However, previous orders have said that in such cases it is in the interests of both parties to present argument and evidence in support of their positions.[1]

DISCUSSION

Background

[9] PPEP is a quality assurance program operating under the oversight of the College's Quality Assurance Committee.[2] The College explains that PPEP promotes quality improvement in the medical practices of community-based physicians by evaluating them and highlighting areas for further professional development. Physicians are randomly selected for review and participation is compulsory. The College uses a service provider to administer PPEP.

[10] The PPEP evaluation involves three components. Two components are a peer's review of the physician's patient care records and a review of his office

[1] Order F10-41, 2010 CanLII 77327 (BC IPC).
[2] The Quality Assurance Committee was established pursuant to s. 26.1 of the *Health Professions Act* and the College's Bylaw 1-19.

management and procedures. The third component is a multi-source feedback assessment (MSF assessment).[3] It is the records from this MSF assessment component that are at issue in this case.

[11] The College says that the objective of the MSF assessment is to gather multiple points of view about the physician's competencies.[4] During the MSF assessment, the physician's patients, medical colleagues and non-physician coworkers complete a questionnaire about the physician.[5] The questionnaire rates elements of the physician's medical competency, communication skills and office management. The questionnaire respondent is required to consider performance statements, such as "Makes the correct diagnosis in a timely fashion" or "Respects the personal values of patients," and to select one of six choices ranging from "strongly agree" to "unable to assess."[6]

[12] Physicians who are being assessed are responsible for selecting who will complete their MSF questionnaire. They must tell the service provider who they have chosen to complete a medical colleague questionnaire and a non-physician coworker questionnaire. From that point forward, the service provider takes over and communicates directly with the medical colleagues and non-physician coworkers and arranges for them to complete a questionnaire (online or by mail). However, the physicians being assessed are responsible for giving the patient questionnaires to 25 of their patients and forwarding the completed ones to the service provider.

[13] The College explains that in the ordinary course, it does not have the ability to connect a questionnaire respondent's identity to the marks he or she gave on a questionnaire. That is because the service provider administers the process and anonymizes the questionnaire responses before giving them to the College. The physician being assessed gets a report based on all parts of the assessment, but only gets aggregate data about the MSF questionnaires.[7] The College says that in this case, however, it obtained the completed MSF questionnaires from the service provider in order to respond to the applicant's access request.

Records in dispute

[14] The College identified the following records as responsive to the applicant's access request:

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[3] Deputy Registrar's affidavit, paras. 6-7.
[4] Deputy Registrar's affidavit, Exhibit A.
[5] The physician is also required to provide a self-assessment.
[6] This information comes from a blank Medical Colleague Questionnaire the applicant submitted.
[7] Deputy Registrar's affidavit, para. 18. The report based on all three components is eventually shared with the physician.

(a) A one page explanation of the questionnaire's grading scale.[8]

(b) Thirteen data tables.[9] It is apparent the service provider entered the data from the completed questionnaires into a computer program and that the tables are a print-out from that program. There is one table each for seven named medical colleagues and six named non-physician coworkers. The questions and marks in the tables are identical to those in their corresponding questionnaires.

(c) Three completed medical colleague questionnaires. The name of the medical colleague is on their questionnaire.[10]

(d) Five completed non-physician coworker questionnaires. The name of the coworker is on their questionnaire.[11]

(e) Twenty-five completed patient questionnaires. There is no name or other information that would identify the patient in the questionnaire.[12]

[15] In his inquiry submission, the applicant clarifies that he does not want access to the records and information about the patient questionnaires. Therefore, I conclude that the records in (e) above are no longer in dispute and I will not consider them any further.

Parties' positions

[16] The College submits that s. 26.2 of HPA is a complete bar to the applicant's request for records and it is authorized to refuse disclosure on that basis alone. However, it submits that even if s. 26.2 does not apply, the College is required by s. 22 of FIPPA to refuse access to the records and also authorized by s. 13 to refuse to disclose them.

[17] The applicant says that his access request is based on his concerns that the service provider may have erroneously entered data from the questionnaires to produce the report. He says that he was unable to reconcile some aspects of the PPEP assessment with his own self-analysis and previous assessments by peers and coworkers. He also says that he thinks that the service provider downgraded his marks because he complained about how it processed the MSF questionnaires, in particular how long it took.[13] He says that if the process is designed to encourage professional development and promote self-reflection,

[8] Page 1 of the records.
[9] Pages 2-14 of the records.
[10] Pages 40-45 of the records.
[11] Pages 46-50 of the records.
[12] Pages 15-39 of the records.
[13] Applicant's submission, ref. 11.

it is counterproductive to deny access to potentially beneficial information when there is a question of error in data entry.

Health Professions Act

[18] The College submits that s. 26.2 of HPA applies to all of the requested records and prohibits their disclosure to the applicant. Although the College does not specify, I understand it to be arguing that s. 26.2(1)(a) applies as there is no suggestion that the records in dispute are the type described in s. 26.2(1)(b).

[19] Section 26.2 says:

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

(b) in a civil proceeding.

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

[20] The following definitions in HPA are relevant in this case:

26 In this Part:

…

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

1 In this Act

…

"certified non-registrant" means a non-registrant to whom registrants of a college may delegate aspects of practice or who may be authorized to provide or perform aspects of practice in accordance with a bylaw of the college made under section 19 (1) (k.1) and who is certified by the college in accordance with a bylaw of the college made under section 19 (1) (l.2);

…

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

Parties' submissions

[21] The College submits that s. 26.2 should be interpreted broadly as applying not only to records and information provided by a registrant but also to records and information provided on behalf of a registrant. The College says:

> The Legislature clearly intended to protect more than "records or information that a physician provides" in the strict sense of materials that a physician provides to the College. This is clear from the legislative intention as evinced in legislative debate and by the statutory context in which section 26.2 appears. It is submitted that applying the required purposive interpretation readily leads to the conclusion that section 26.2 covers "records or information" that a co-worker or patient provides at the request of the physician under assessment.[14]

[22] The College also says:

> As a practical matter, as a matter of common sense, participating co-workers and patients provide their assessments on behalf of, and through, the physician by virtue of the physician having selected them. The physician identifies those who are to provide information and, while the physician does not physically, directly, provide the material to the

[14] College's initial submission, para. 55.

> College, in every meaningful way it is provided to the College by, or on behalf of, the physician.[15]

[23] The College submits that a purposive interpretation readily leads to the conclusion that s. 26.2 covers records or information provided to the College on behalf of, and at the request of, the registrant being assessed. The College submits that the intended scope is as broad as possible and that all information associated with quality assurance measures are protected. It says that it is not plausible to interpret s. 26.2 as suggesting that only some types of information derived through some aspects of quality assurance programs are protected under s. 26.2.

[24] In support of its interpretation, the College quotes from the 2003 debate in the Legislature when s. 26.2 was first introduced under the *Health Professions Amendment Act*, 2003 (Bill 62). During the second reading debate, the Minister of Health Planning said:

> There will be enhancements in the quality of care, in that every professional college will be required to establish quality assurance programs to improve public protection. This program will be designed to promote good practice and minimize the possibility that practitioners are providing substandard care to patients. Consistent with the well-established process of peer reviews within hospitals, information contained and recorded through quality assurance measures will be kept confidential.[16]

[25] The College says that it is fundamentally important for PPEP's success that participants be assured that what they say will be kept confidential. Without that assurance, it says, their assessments or opinions about physicians will not be as frank and honest as they need to be.[17]

[26] The College also says that the statutory context of s. 26.2 reveals the legislative intention to protect everything to do with quality assurance programs. It says that s. 26.2 strengthens s. 53 of HPA, which already provides a default of confidentiality over "all matter or things" that a college employee or official learns while discharging their duties under HPA. Section 53 states:

> Confidential information
>
> 53(1) Subject to the Ombudsperson Act, a person must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty under this Act unless the disclosure is

[15] College's initial submission, paras. 57.
[16] *Hansard*, 37th Parl, 4th Sess, No 16 (October 6, 2003) at 7186 (Hon S. Hawkins).
[17] College's initial submission, para. 45.

> (a) necessary to exercise the power or to perform the duty, or
>
> (b) authorized as being in the public interest by the board of the college in relation to which the power or duty is exercised or performed.
>
> (2) Insofar as the laws of British Columbia apply, a person must not give, or be compelled to give, evidence in a court or in proceedings of a judicial nature concerning knowledge gained in the exercise of a power or in the performance of a duty under Part 2.1 or Part 3 unless
>
> (a) the proceedings are under this Act, or
>
> (b) disclosure of the knowledge is authorized under subsection (1) (b) or under the bylaws or regulations made under this Act.
>
> (3) The records relating to the exercise of a power or the performance of a duty under Part 2.1 or Part 3 are not compellable in a court or in proceedings of a judicial nature insofar as the laws of British Columbia apply unless
>
> (a) the proceedings are under this Act, or
>
> (b) disclosure of the knowledge is authorized under subsection (1) (b) or under the bylaws or regulations made under this Act.

[27] The College submits that s. 51 of the *Evidence Act* (see appendix) also provides relevant context for understanding what the Minister meant during debate when she referenced the confidentiality of the peer review process within hospitals. The College says that hospital committees and PPEP share the goal of evaluating physicians' practices and the care they provide. It submits that s. 51 of the *Evidence Act* protects the work of hospital committees that study, investigate or evaluate the medical or hospital practice of, or care provided by, health care professionals in the hospital, including physicians. It also says that s. 51 and s. 26.2 both impose confidentiality on peer review processes, bar evidence or testimony in court and override FIPPA. It says that this last similarity in particular "shows that the Legislature has decided that the public interest in effective, confidential, peer review and quality improvement under either scheme outweighs the public interest in access to records under the Act."[18]

[28] The applicant disputes that s. 26.2 of HPA applies to the records provided by his non-physician coworkers because those individuals are not "registrants" as defined by HPA. He points out the inconsistency in how the College is handling disclosure to him. He says that it gave him a copy of the notes and report made by the peer who conducted a review of his patient care records and office management and procedures. He also says that the questionnaires are not anonymous in the sense that he already knows who completed them. He remarks too about how the information at issue "is part of a formative process to

[18] College's initial submission, para. 44.

encourage professional development and promote self-reflection" so he thinks it is counterproductive to deny him access to it.[19]

Analysis

Access rights under FIPPA

[29] Part 2 of FIPPA provides a right of access to any record in the custody or under the control of a public body subject only to limited exceptions. Section 79 of FIPPA provides that, if a provision of FIPPA is inconsistent or in conflict with a provision of another Act, the provision of FIPPA prevails unless the other Act expressly provides that it, or a provision of it, applies despite FIPPA. Section 26.2(6) of HPA is such a provision, and it expressly provides that s. 26.2(1) applies despite FIPPA.[20] That means that in a situation where s. 26.2(1) prohibits disclosure, information and access rights under Part 2 of FIPPA do not apply.

The service provider

[30] Section 26.2(1) applies to records or information provided to the quality assurance committee or an assessor under the quality assurance program. Therefore, a preliminary consideration is how the fact that the questionnaires were provided to a service provider affects the application of s. 26.2(1). Based on the evidence provided by the College about how the quality assurance assessment process works, I conclude that the service provider is acting as the agent, and at the behest of, the College's quality assurance committee. Therefore, I am satisfied that providing records and information to the service provider equates to providing those records and information to the College's quality assurance committee or assessor for the purposes of s. 26.2(1).

Meaning of "to another committee or person"

[31] An essential question to answer in this case is what is meant by prohibiting disclosure of records or information under s. 26.2(1) "to another committee or person."[21] The College submits that this phrase has the widest scope and is intended to "prevent disclosure to anyone at all."[22] By this, I understand the College to be saying that this includes prohibiting disclosure to the registrant who provided the information under s. 26.2(1).

[32] The modern approach to statutory interpretation requires that the words of an Act are to be read in their entire context, in their grammatical and ordinary

[19] Applicant's submission, pp. 7-8 and ref. 6a and b.
[20] Other than ss. 44 (2) or (3), which are not relevant to this analysis.
[21] This prohibition against disclosure is lifted for the circumstances set out in 26.2(2) and (3), which do not apply in this case.
[22] College's initial submission, para. 58.

sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The HPA provides a common regulatory framework for the governance of health professions in BC. Section 16 lists the duties and objects of the health profession colleges, and broadly speaking they are serving and protecting the public and superintending and regulating the profession and the interactions between the colleges and their members. Quality assurance programs clearly support the object of serving the public and protecting its safety and regulating college members.

[33] Sections 26.1 and 26.2 provide colleges with the power to create a quality assurance program governing their registrants. Section 26.1 outlines the powers and duties of the quality assurance committee. Section 26.2 governs the exchange of information between a college and a registrant who is being assessed during the quality assurance process.

[34] Section 26.2 controls who may have access to the records or information provided by a registrant. In my view, the purpose of the s. 26.2 non-disclosure protection is to ensure that quality assurance information is only disclosed to those with the authority under the HPA and a college's bylaws to carry out a college's quality assurance and public safety functions. Section 26.2 specifies when such information can be shared and with whom.

[35] Sections 26.2(1), (2), (4) and (5) state the rules around disclosure and use of information provided or prepared by a registrant. Section 26.2(3) describes what the quality assurance committee may do when it learns certain things about a registrant's conduct during the assessment process. Section 26.2(6) provides a FIPPA override for the information provided or prepared by a registrant at s. 26.2(1). All parts of s. 26.2 are directed at controlling who has access to quality assurance records and information beyond the bounds of the quality assurance committee, assessor and registrant.

[36] Section 26.2(1), prohibits disclosure of the type of information listed in s. 26.2(1)(a) or (b) to "another committee or person." I do not interpret this phrase as broadly as the College, who submits it prevents disclosure to "anyone at all." By using the phrase it did, the Legislature specifically delineated who should not have access to this type of quality assurance information. In my view, the phrase "to another committee or person" does not include the registrant who provided the record or information to the quality assurance committee or assessor. The first part of s. 26.2(1) must be read as a whole, in combination with s. 26.2(1)(a) and (b), in order to understand its full meaning. The word "registrant" in s. 26.2(1)(a) and (b) specifies the source of the records and information. The phrase to "another committee or person" identifies who may not have access to those records and information. The phrase "to another committee or person" is used to differentiate those individuals from the registrant who provided or prepared the records or information pursuant to s. 26.2(1)(a) and (b).

[37] The term "registrant" is exhaustively defined by s. 26 and s. 1 of the HPA and there is no ambiguity as to its meaning in s. 26.2. This is a strong indicator of legislative intention and the fact that concerted thought went into conveying the precise meaning of the term "registrant" where it is used in the HPA. Nothing suggests that it was anything other than an conscious choice on the part of the legislators to *not* use the word "registrant" to identify who is prohibited from accessing records or information the registrant provides under s. 26.2(1)(a) and (b). Instead a completely different phrase was chosen, namely, "to another committee or person."

[38] In my view, the non-disclosure protection provided in s. 26.2(1) fosters honest and full engagement in the quality assurance process. Information gathered about a registrant during that process may be critical and it has the potential to damage the registrant's self-esteem, professional reputation and ability to earn a living. It seems to me that a registrant will be more willing to participate fully and meaningfully in the process if assured that any information about the registrant will not be disclosed beyond those who are conducting the assessment and working with the registrant to help improve the quality of his or her medical practices.

[39] I do not think that the intent of s. 26.2(1) is to prohibit a registrant from accessing a record or information about the registrant that the registrant provided under s. 26.2(1). To interpret s. 26.2(1) in that way would cause absurd results.[23] For instance, it would mean that a quality assurance committee or assessor could not return to a registrant a record or information originally provided by that registrant. Similarly, they would be prevented from revealing details to, or having a discussion with, the registrant about the records or information the registrant provided. This would defeat the improvement and educational component of the quality assurance program. In order for a quality assurance process to be meaningful and effective there needs to be communication between the assessor and the assessed about the very type of records and information that s. 26.2(1)(a) and (b) capture.

[40] Further, my understanding of the meaning of "to another committee or person" is supported by s. 26.2(1)(b), which is about a self-assessment prepared by the registrant. It would be absurd to prohibit disclosure to a registrant of their own self-assessment, and I do not think that this is what was intended by s. 26.2(1).

[41] The Minister stated during debate that the intention was to maintain the confidentiality of information contained and recorded through quality assurance

[23] It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 27.

measures. My interpretation of "to another committee or person" as not including the registrant does not run counter to that stated intent. As I interpret the non-disclosure provision in s. 26.2(1), the records and information must not be disclosed beyond the circle of individuals who have a right to know. Those individuals are the registrant whose assessment is the subject of the records and information and the college officials mandated under the HPA and college bylaws to assess competency, take corrective measures and protect public safety. In my view, the aim of the non-disclosure provision in s. 26.2(1) is to protect the confidentiality of the registrant. It does not contemplate the confidentiality of others, which is addressed by the broader language in the s. 53.

[42] The College's evidence about how they treat the PPEP records outside the context of a FIPPA request also bolsters my understanding that s. 26.2(1) is not designed to prohibit disclosure to the registrant whose assessment is the subject of the records and information. The College's Deputy Registrar says, "Electronic and paper materials for the program are accessible only to program staff within the College, unless the physician has authorized another College department to access the physician's program materials."[24] It seems illogical to give a registrant authority to control who may see records that they are themselves denied access to.

[43] In conclusion, I find that s. 26.2(1) does not prohibit disclosure to a registrant of records or information provided by the registrant under s. 26.2(1). In the context of s. 26.2(1), the phrase "to another committee or person" does not include the registrant who provided the record or information.

Records or information a registrant provides

[44] Section 26.2(1)(a) applies to records or information that a registrant provides to the quality assurance committee or an assessor under the quality assurance program. In this case, the completed questionnaires were not provided by the applicant but by individuals chosen by him. At issue, therefore, is what it means for a registrant to provide records and information pursuant to s. 26.2(1)(a).

[45] The College submits that s. 26.2(1) should be interpreted broadly as applying not only to records and information provided by a registrant directly but also to records and information provided on behalf of, and at the request of, a registrant. The College says that because the registrant chooses the individuals who will provide the records or information, what they provide is provided on behalf of, and at the request of, the registrant.

[46] I agree that s. 26.2(1) should be interpreted as covering records or information that someone provides on behalf of, or at the request of, a registrant.

[24] Deputy Registrar's affidavit, para. 19.

In my view, s. 26.2(1)(a) should not be so narrowly interpreted as to only include what is directly provided by the registrant. A broader interpretation increases the scope of confidentiality protection for evaluative information about a registrant without limiting the means by which that information reaches the quality assurance committee or assessor and it helps fulfil the purpose of a quality assurance program operating under ss. 26.1 and 26.2. Including records or information provided on behalf of a registrant within the scope of s. 26.2(1) non-disclosure protection, widens the field of information available to the quality assurance program and offers it the ability to conduct a more informed assessment.

[47] This expanded meaning is compatible with the purposes of the quality assurance process, which is to assess registrants' professional performance and maintain the confidentiality of the information in that process. I can see no logic to maintaining confidentiality of records or information about such matters when they are provided directly by the registrant as opposed to having been provided by someone else on behalf of, and at the request of, the registrant. Regardless of the source, that type of evaluative information fulfills the same purpose, specifically giving colleges the information they need to ensure that the quality of physician care the public receives is safe and meets expected standards.

[48] In summary, I conclude that "records or information that a registrant provides" includes records and information which are provided on behalf of the registrant.

[49] Based on the evidence discussed below, I find that all of the questionnaires in dispute were provided on behalf of the applicant pursuant to s. 26.2(1)(a).

[50] I have reviewed the applicant's communication with the service provider, the College and his peers during the assessment process as well as letters that the College and the service provider sent. Those communications characterize the action of completing a questionnaire as something that is done on behalf of the registrant and to assist the registrant with his continuing education. For example, the College's correspondence to the applicant when it told him he was going to be assessed says:

> The focus is about the identification of what you can do to enhance your practice of medicine. While participation is compulsory, it is not an audit and it is not an exam. All information collected by this program is confidential, protected, and can only be used for your educational guidance.[25]

[51] The service provider's letter to the physician colleagues says:

[25] Applicant's submission, ref. 2.

> Your physician colleague, Dr. [Name], is participating in a Multi-Source Feedback (MSF) assessment, which is a component of the College of Physicians and Surgeons of British Columbia's Physician Practice Enhancement Program. Dr. [Name] has identified you as a medical colleague best suited to provide this information and requests that you kindly complete the enclosed questionnaire… On behalf of Dr. [Name], your response is very much appreciated.[26]

[52] The service provider's letter to the non-physician coworkers says:

> Your objective and honest responses will provide Dr. [Name] with important information regarding areas of excellence and potential opportunities for improvement…. On behalf of Dr. [Name], your response is very much appreciated.[27]

[53] In the applicant's correspondence to the College and to those he asks to complete a questionnaire, he too refers to the questionnaires as having been completed on his behalf. In an email to the service provider, he says:

> As all physician contacts had been contacted before submitting their names and had given their permission and agreement, I find it hard to belief [sic] that anyone had changed their minds regarding their willingness to complete a questionnaire on my behalf.[28]

[54] In a letter to the College, the applicant writes:

> I have also taken into account that the majority of the individuals submitted as Colleagues and Co-workers have previously completed similar assessment forms on my behalf and have also written formal professional reference letters.[29]

[55] When the applicant wrote to his physician colleagues and non-physician coworkers to ask them to consent to his accessing their completed questionnaires, he said:

> I am sending this letter to everyone who agreed to complete a questionnaire on my behalf for the PPEP (Physician Practice Enhancement Program).[30]

[56] All of the above evidence indicates that both the applicant and the College believed that the questionnaires were provided on behalf of the applicant. I find that the questionnaires were provided on his behalf pursuant to s. 26.2(1)(a).

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[26] Applicant's submission, ref. 12.
[27] Affidavit of College's Deputy Registrar, exhibit B (5.0).
[28] Applicant's submission, ref. 4.
[29] Applicant's submission, ref. 11.
[30] Applicant's submission, ref. 13.

[57] In the end, I agree with the College that s. 26.2(1)(a) covers records or information that someone provides on behalf of a registrant. Therefore, I find that the phrase "records or information that a registrant provides" in s. 26.2(1)(a) means records or information that a registrant provides as well as records or information that someone else provides on behalf of the registrant. The latter situation applies in this case. The evidence and submissions establish that the questionnaires were provided to the service provider on behalf of the applicant. This applies to all of the questionnaires, including those provided by the medical colleagues. While the medical colleagues are registrants themselves,[31] in the context of the MSF process they provided a questionnaire on behalf of another registrant, namely, the applicant. In conclusion, I find that s. 26.2(1) does not prohibit the College from disclosing the questionnaires in dispute to the applicant.

The tables

[58] The records in dispute also include the service provider's 13 tables, which record the marks from the completed questionnaires. The information in these tables reproduces exactly the information in the corresponding questionnaires. For the same reasons as given for the corresponding questionnaires, I find that s. 26.2(1) does not prohibit disclosure to the applicant.

Description of grading scale

[59] I find that s 26.2(1) does not apply to the description of the grading scale at page one of the records. It is the College's or the service provider's explanation of the grading scale. It is not a record or information provided to the quality assurance committee or assessor by a registrant or on behalf of a registrant under s. 26.2(1)(a).

Conclusion, s. 26.2(1)

[60] In this case, s. 26.2(1) does not prohibit disclosure of the information in dispute to the applicant. Therefore, I will consider the College's decision to apply ss. 13 and 22 of FIPPA to refuse the applicant access to the information.

Advice or Recommendations, s. 13

[61] Section 13(1) says that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister. The College submits that the questionnaires "qualify as 'advice or recommendations' to the College about the

[31] The applicant was instructed to choose physicians practicing in BC to complete the medical colleague questionnaires.

applicant's practice performance, skills, and more."[32] The applicant disputes that the information in dispute is advice and recommendation developed by or for the public body. He says that it is a collection of third party opinions intended to assist him with his professional development.[33]

[62] The purpose of s. 13 is to protect a public body's internal decision making and policy making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.[34] BC orders have said that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations but also when it would allow accurate inferences about the advice or recommendations.[35] Further, the Court of Appeal said in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* [*College of Physicians*] that the term "advice" includes "opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body."[36]

[63] The College submits that the questionnaires qualify as advice because they are expert opinions of the type *College of Physicians* says qualify as advice. It says that all of the questionnaire respondents are experts: "In any case, the peer physicians, co-workers and patients who provided their opinions and evaluations of the applicant have an expertise, are expert, in the matter based on education, skills, personal experience and judgement, or a combination of these."[37] It also says that the evaluations and opinions in the questionnaires are necessary to the College's deliberations about what course of action to take regarding a physician under review.

[64] I am not persuaded that the questionnaire respondents are "experts" in the sense used in *College of Physicians*. There is insufficient evidence for me to conclude that they possess special expertise in assessing whether a registrant meets College performance standards, needs remedial training, what such training would consist of and how it would be delivered.

[65] In addition, regardless of whether the opinions in the questionnaires were provided by an expert, to my mind, they are qualitatively very different from the opinions in *College of Physicians*. The opinions sought in *College of Physicians* were about the actual question being deliberated. The Court said the following about them:

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[32] College's initial submission, para. 76.
[33] Applicant's submission para.
[34] Order 01-15, 2001 CanLII 21569 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC).
[35] Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F06-16, 2006 CanLII 25576 (BC IPC).
[36] *College of Physicians*, 2002 BCCA 665, at para. 111.
[37] College's initial submission, paras. 81 and 85.

> The experts were expressly asked by the College's lawyer for their opinions of whether hypnosis had been performed and for suggestions for further investigation of the complaint. Two of the experts expressly commented on whether the evidence was sufficient to support the Applicant's allegations, and one provided his view on whether Dr. Doe's explanation was "acceptable and reasonable". Thus, the reports contain advice on whether the College should take further action, bringing them within the meaning of "advice" as found by the Commissioner.[38]

[66] As is evident from that quote, the medical experts in *College of Physicians* were asked to use their expertise to provide an opinion about the very question that the College was deliberating. The opinions in the present case are not at all the same.

[67] The questionnaires do not contain opinions on the question that the College is attempting to answer in the PPEP process, namely whether the applicant meets the College's standards or needs further education and training and what that training would look like. Instead, each completed questionnaire provides a series of opinions comprised of a numerical grade paired with a performance standard statement like "Selects diagnostic tests appropriately", "Admits to hospital appropriately," "Accepts an appropriate share of the work," and "Arrives for work on time."[39] The people completing the questionnaires had to fill-in bubbles ranging from 1 (strongly disagree) to 6 (unable to assess).

[68] The Court in *College of Physicians* said that s. 13(1) includes information whose purpose is to "present background explanations or analysis for consideration in making a decision."[40] However, in the present case, the questionnaires provide no explanation or analysis. The fact that the information in dispute in the questionnaires was gathered during a deliberative process about what course of action is warranted for the physician under assessment does not suffice, in my view, to qualify that information as advice or recommendations under s. 13(1). That is not what I understand *College of Physicians* to be saying. The information gathered must in some manner reveal advice or recommendations developed by or for the public body. That is the kind of information at issue in *College of Physicians* where the expert opinions were about the question under deliberation by the public body. The experts were asked to weigh-in on that specific question.

[69] In this case one cannot tell anything about what, if anything, the questionnaire respondents think the College should do about how the applicant

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[38] *College of Physicians* at para. 114.

[39] This information comes from a blank "Medical Colleague Questionnaire" that the applicant provided with his submission.

[40] *College of Physicians* at para. 110. The BC Supreme Court says the same in *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 29.

practices medicine. There is no evidence that they were asked to provide any opinion about that matter. If the questionnaire respondents had any opinions on that, their completed questionnaires do reveal those opinions.

[70] The College also points to *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner) [PHSA]*[41] as support for its submission that s. 13(1) applies to the questionnaires. In *PHSA*, the records were the executive summaries from internal audit department reports. The Court found that the factual information in the records was compiled and selected by experts, using their expertise, judgment and skill and it was integral to their analysis and opinions as expressed in the records. For that reason, the Court said the factual information was "advice" under s. 13(1) and not "factual material" under s. 13(2)(a). The College does not explain why what the *PHSA* says about factual information pertains to the questionnaires. The information in dispute in this case is opinions unaccompanied by any factual information that may have informed those opinions.

[71] In conclusion, while each grade on the questionnaire is an opinion of the registrant's performance, I do think that these opinions are "advice" as defined by *College of Physicians*. I find that disclosing the questionnaires and associated tables and grading scale would not reveal advice or recommendations developed by or for the College. Therefore, that information may not be withheld under s. 13(1).

Disclosure harmful to personal privacy, s. 22

[72] The College is also refusing to disclose the records and information in dispute under s. 22. Section 22 states that 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.[42]

Personal information

[73] The records contain both third party personal information and the applicant's personal information. The third party personal information is the names of the individuals who completed questionnaires and the grade they gave for each performance standard. The grades are their personal information because they reveal their opinion or evaluation of the applicant. The records also contain the applicant's personal information because it is about him and how he practices medicine.

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[41] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 2322.

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

[74] There is also information in the records that is not personal information, such as the description of the grading scale and instructions on how to fill in the questionnaire. Information that is not personal information may not be withheld under s. 22.

Consent for disclosure

[75] Section 22(4)(a) says that disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party has, in writing, consented to or requested the disclosure.

[76] The applicant obtained written consent from 14 of the individuals he asked to complete a questionnaire.[43] With one exception, these third parties' names coincide with the 13 names in the records in dispute. There is no explanation for why there is no questionnaire or table information for one of the third parties who signed a consent letter.

[77] The College says the following about these consents:

> The names of the third parties are their personal information and, unless these third parties consent to disclosure of their names—in prescribed form and, it is submitted in the present context, with sufficient evidence of consent given without duress or influence—section 22(1) of the Act requires the names to be withheld. [44]
>
> Last, the fact that the applicant has already purported to obtain the written consent of several third parties does not mean the College must or should give them effect. The validity of those consents, including in complying with the consent requirements prescribed under the Act, remains to be established by the applicant.[45]

[78] The College does not explain what it means by "the consent requirements prescribed under the Act." There are no consent requirements other than s. 22(4)(a) that would apply to personal information withheld under s. 22(1).[46] As I see it, the consents the applicant provides meet the requirements of s. 22(4)(a). Each is written, dated, signed and specifically consents to disclosure to the applicant of "all original records and or questionnaires" which the person supplied to the service provider for the applicant's PPEP program assessment.[47]

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[43] Applicant's submission, Ref. 13.
[44] College's initial submission, para. 64.
[45] College's initial submission, para. 74.
[46] The consent provisions in s. 11 of the *Freedom of Information and Protection of Privacy Regulation* apply to ss. 26 (d), 30.1 (a), 32 (b) and 33.1 (1) (b) of FIPPA.
[47] Applicant's submission, Ref. 13.

[79] The College's submissions imply that the consents were not freely given, but the College provides no evidence that this was the case. Nor does it explain what it means by "sufficient evidence of consent given without duress or influence." It seems to me that the onus is on the party challenging the validity of a written, signed and dated consent to establish that it was not freely given. For his part, the applicant disputes that that the consents were obtained under duress. He responds to the College's suggestion that anyone who was his employee would have been in a vulnerable position when it came to providing consent by saying that none of these individuals have ever been in his employ. The applicant also provides the cover letter that he sent to the third parties when he asked for their written consent for the disclosure. There is nothing coercive about the letter and it clearly communicates that the third party has a choice in the matter.

[80] In conclusion, I find that s. 22(4)(a) applies to the third party personal information in the questionnaires and the tables. The third parties consented in writing to disclosure of the questionnaires to the applicant. Furthermore, disclosing the applicant's personal information to the applicant would not be an unreasonable invasion of third party personal information. Therefore, the College may not refuse to disclose any of the information in dispute to the applicant under s. 22(1).

CONCLUSION

[81] For the reasons provided above, I make the following order under s. 58 of FIPPA:

1. The College is not required or authorized to refuse to disclose the information in dispute to the applicant pursuant to s. 26.2(1)(a) of HPA or ss. 13 or 22 of FIPPA.
2. The College must give the applicant access to all of the records that it refused to disclose.
3. The College must comply with this Order on or before February 22, 2018 and concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the record sent to the applicant in compliance with this Order.

January 10, 2018

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

APPENDIX

Health Care Evidence

51(1) [definitions]

(2) A witness in a legal proceeding, whether a party to it or not,

> (a) must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and
>
> (b) must not be asked to produce nor be permitted to produce, in the course of the legal proceeding, a record that was used in the course of or arose out of the study, investigation, evaluation or program carried on by a committee, if the record
>
> > (i) was compiled or made by the witness for the purpose of producing or submitting it to a committee,
> >
> > (ii) was submitted to or compiled or made for the committee at the direction or request of a committee,
> >
> > (iii) consists of a transcript of proceedings before a committee, or
> >
> > (iv) consists of a report or summary, whether interim or final, of the findings of a committee.

(3) Subsection (2) does not apply to original or copies of original medical or hospital records concerning a patient.

(4) A person who discloses information or submits a record to a committee for the purpose of the information or record being used in a course of study, an investigation, evaluation or program of that committee is not liable for the disclosure or submission if the disclosure or submission is made in good faith.

(5) A committee or any person on a committee must not disclose or publish information or a record provided to the committee within the scope of this section or any resulting findings or conclusion of the committee except

> (a) to a board of management or, in the case of a committee described in paragraph (b.1) of the definition of "committee", to the boards of management that established or approved the committee,
>
> (b) in circumstances the committee considers appropriate, to an organization of health care professionals, or
>
> (c) by making a disclosure or publication
>
> > (i) for the purpose of advancing medical research or medical education, and
> >
> > (ii) in a manner that precludes the identification in any manner of the persons whose condition or treatment has been studied, evaluated or investigated.

(6) A board of management or any member of a board of management must not disclose or publish information or a record submitted to it by a committee except in accordance with subsection (5) (c) or (6.1).

(6.1) If information or a record submitted by a committee to a board of management of a hospital includes information that the board of management considers relevant to

medical or hospital practice or care in another hospital, or during transportation to or from another hospital,

> (a) the board of management may disclose the information or record to the board of management of the other hospital, and
>
> (b) the board of management of the other hospital must not disclose or publish the information or the record disclosed to it under paragraph (a), except in accordance with subsection (5) (c).

(7) Subsections (5) to (6.1) apply despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (1)(b), (2), (2.1) and (3) of that Act.

(8) Subsection (7) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for at least 100 years or to other information that has been in existence for at least 50 years.