Order F20-17

COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

Elizabeth Barker
Director of Adjudication

April 29, 2020

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Summary: A physician requested access to records related to a complaint and two assessments of his medical practice. The adjudicator confirmed the College's decision to refuse the applicant access to records under s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act*. The College also refused to disclose records under s. 26.2(1) (confidential information) of the *Health Professions Act*. The adjudicator found that s. 26.2(1)(a) only applied to some parts of the records and ordered the College to disclose the rest to the applicant. The adjudicator also determined there was some third party personal information the College was required to refuse to disclose under s. 22(1) of *Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 22(1), 22(3)(d), 58(2), 59(1) and 79. *Health Professions Act*, ss. 1 and 26 (definitions of "registrant"), 26.2(1)(a) and 26.2(6).

INTRODUCTION

[1] The applicant is a physician and registrant of the College of Physicians and Surgeons of BC (College). He made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the College for access to all its materials about him. The College provided some records but withheld other records and parts of records pursuant to ss. 14 (solicitor client privilege) and 22 (unreasonable invasion of personal privacy) of FIPPA. It also withheld records pursuant to s. 26.2(1) (confidential information) of the *Health Professions Act* (HPA).[1]

[1] RSBC 1996, c 183.

[2] The applicant asked the OIPC to review the College's decision to refuse him access. Mediation did not resolve that matter and it proceeded to inquiry. Before the inquiry commenced, however, the applicant said that he was no longer disputing the College's application of s. 22, so that issue did not need to go to inquiry. However, the ss. 14 and 26.2(1) issues were not resolved and the applicant requested they proceed to inquiry.

ISSUES

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

1. Is the College authorized to refuse the applicant access to information under s. 14 of FIPPA?

2. Is the College required to refuse to disclose information under s. 26.2(1) of the HPA?

[4] Section 57 of FIPPA states that a public body has the burden of proving s. 14 authorizes it to refuse to disclose the requested information. FIPPA does not say who has the burden of proof regarding provisions such as s. 26.2 of the 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.[2]

DISCUSSION

Background

[5] The College of Physicians and Surgeons of British Columbia regulates the practice of medicine in the province under the HPA. All physicians who practise medicine in the province must be registrants of the College. The College has processes for responding to complaints from patients and it also administers a number of quality assurance activities to ensure the professional competence of registered physicians.

[6] In 2012 the College received a complaint about the applicant. The complaint was referred to the College's Inquiry Committee. This is the committee of the College's governing board that carries out investigative and disciplinary functions under the HPA and the College's bylaws.

[7] In 2013 and 2014 the College assessed the applicant's professional performance under the College's quality assurance program.

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[2] Order F10-41, 2010 CanLII 77327 (BC IPC). See also Order F18-01, 2018 BCIPC 01, at para. 8. Order F18-01 was quashed but not for reasons related to the burden of proof.

Records at issue

[8] One of the records in dispute is a memorandum about the 2012 complaint. There are two copies of the memorandum and the College is refusing to disclose both under s. 14.[3] The College provided me with those pages in a sealed envelope. The College says that if I do not have enough information to adjudicate the s. 14 issue, I should give it an opportunity to provide more evidence before I decide to examine the pages in the sealed envelope.

[9] I have reviewed the College's evidence regarding its claim of solicitor client privilege, which consists of two affidavits and a table of records. I find that this information is sufficient to make a decision about whether s. 14 applies to the memorandum and it is unnecessary to seek further evidence or open the sealed envelope.

[10] The other 17 pages of records at issue relate to the College's 2013 and 2014 assessments of the applicant's professional performance. They have been provided for my review. They are being withheld in their entirety under s. 26.2(1) of the HPA. They are an assessment form with accompanying notes, records about administrative files and excerpts from meeting minutes. I will describe those records in more detail below in the s. 26.2 analysis. For ease of reference, I will refer to them collectively as the Assessment Records.

[11] Finally, in its reply submission, the College says that it has already disclosed page 261 and is no longer refusing to disclose any information on pages 260 and 262. As those pages are no longer in dispute, I will not consider them any further.

Solicitor client privilege, s. 14

[12] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. The law is well established that s.14 of FIPPA encompasses both legal advice privilege and litigation privilege.[4] The College submits that legal advice privilege applies to the information it is withholding under s. 14.

[13] The Supreme Court of Canada described the criteria for solicitor client privilege as follows:

> …privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking

[3] Pages 246-50 and 283-87 of the records in dispute.
[4] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665 at para. 26.

> or giving of legal advice; and (iii) which is intended to be confidential by the parties.[5]

[14] Not every communication between client and solicitor is protected by legal advice privilege. However, if the conditions set out above are satisfied, then legal advice privilege applies to the communications and the records relating to it.[6]

College's submission

[15] The College says that the entire memorandum is a confidential privileged communication it received from its in-house lawyer, SH. The College did not provide an affidavit from SH, but it provided one from GK, who is its chief legal counsel and a member of its executive team. GK says that he oversees and directs the legal services provided by the College's in-house counsel and also personally provides legal advice and legal services to the College's governing board and its committees.

[16] GK says that SH was employed by the College as an in-house lawyer, but has not worked in that capacity since late 2017. GK says that under his direction, SH provided legal advice to the College, including the College's governing board and its committees.

[17] GK says that he has read the memorandum for the purposes of this inquiry and reviewed the relevant College file. GK says that the memorandum was prepared by SH and is marked as being "from [SH], (Staff Lawyer)." It is addressed to the College's file. GK explains the memorandum is dated January 24, 2013 and it relates to a complaint the College received about the applicant. GK says the memorandum was received by Panel C of the College's Inquiry Committee at a meeting. He says that the complaint was ultimately resolved and this fact was communicated to the applicant.

[18] GK asserts that it is evident on the face of the memorandum and from his review of the College's file that SH was acting in her capacity as the College's legal counsel when she prepared the memorandum. He says that the memorandum sets out SH's analysis of certain issues and her legal advice to the College.[7]

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[5] *Solosky v. The Queen*, [1980] 1 SCR 821 [*Solosky*] at p. 837. The Court was speaking of legal advice privilege. Solicitor-client privilege can extend to communications involving agents: *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 878-879; *Festing v. Canada (Attorney General)*, 2001 BCCA 612 [*Festing*] at para. 92 and *R. v. B.,* 1995 CanLII 2007 (BCSC) [R. v. B] at para. 22.

[6] *R. v. McClure*, 2001 SCC 14 at para. 36; *Solosky*, *ibid* at p.829. *Festing* , *ibid* at para. 92; *R. v. B., ibid* at para. 22.

[7] GK affidavit at para. 11.

[19] GK also says the memorandum is headed "Privileged and Confidential," followed by the statement "Protected under s. 14 of the Freedom of Information and Protection of Privacy Act."

[20] Further, GK says that the College considered, but decided against, waiving privilege over the memorandum given the importance of maintaining the confidential and privileged nature of its communication with its legal counsel. He says that the applicant is aware of the outcome of the complaint against him so there is no suggestion that fairness requires disclosure to him. GK says that there is no public or private interest weighing in favour of waiving privilege.

Applicant's submission

[21] The applicant disputes that the memorandum was a communication between the College and its lawyer. He says SH was not acting as the College's lawyer because she was an employee of the College and not an external lawyer on retainer. He says: "the person is a College paid bureaucrat whose actions are the College's actions, not those of an independent lawyer who directly establishes a client-solicitor relationship with the College." [8]

[22] The applicant also disputes that the memorandum was a confidential communication. His reasons for disputing its confidentiality are that some of what SH, GK and the College's legal department have said in the past to the College's board about different matters have not been confidential. For instance, some of what they said about the College's legal matters have been referred to in general terms in the College's board meeting and can be found on the internet.[9]

[23] The applicant also says the fact that the memorandum is labelled "privileged and confidential" does not make it so.[10]

Analysis and findings

[24] GK is the College's chief legal officer and he swears to having personal knowledge of the matters he deposes to. He says he has reviewed the memorandum and the related file. He says that SH was hired to work for the College as its in-house legal counsel. GK says the memorandum expressly states that it is from SH in her capacity as "Staff Lawyer" and it contains her analysis and legal advice to the College.

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[8] Applicant's submission at p. 9.
[9] Applicant's submission at p. 10. He provides an agenda and minutes of College's board meetings as well as SH's statistical report on the College's Health Professions Review Board matters.
[10] Applicant's response at p. 14.

[25] I accept GK's evidence about the memorandum. Based on what GK says, I am satisfied that SH wrote the memorandum in her capacity as the College's legal counsel and that the memorandum contains the legal analysis and advice she provided to her client, the College.

[26] I am not persuaded by the applicant's argument that SH was not acting as the College's lawyer when she wrote the memorandum because she is also an employee. The law is clear that if a communication falls within the class of communications protected by solicitor-client privilege, the fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.[11]

[27] GK's evidence also demonstrates that the memorandum was intended to be a confidential communication between SH and the College. It is labelled as being privileged and confidential and protected by s. 14 of FIPPA. GK says the memorandum is addressed to the College's file. He also says that Panel C of the College's Inquiry Committee reviewed it. There is nothing that indicates that the memorandum was ever disclosed to anyone outside of the College.

[28] It may be the case, as the applicant points out, that the College's legal counsel have said things about College matters that have not been kept in confidence. However, what the applicant says about the College's handling of other matters is not persuasive evidence that this particular memorandum and the communication it contains was not treated as confidential by the College and its legal department.

[29] In conclusion, the College has proven that the memorandum is protected by legal advice privilege. Therefore, I find the College is authorized to refuse to disclose it under s. 14 of FIPPA.

Health Professions Act

[30] The College submits that s. 26.2(1) of the HPA applies to the Assessment Records. Although the College does not say, I understand it to be arguing that subsection 26.2(1)(a) applies.[12]

[31] The parts of s. 26.2 of the HPA that are relevant in this case say:

> 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

[11] *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31 at para. 28 and *R v. Campbell*, [1999] 1 SCR 565 at para. 50.
[12] There is no suggestion by the College that s. 26.2(1)(b) applies to the Assessment Records.

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

[32] Section 79 of FIPPA plays a role in understanding how the FIPPA "override" in s. 26.2(6) works. Section 79 says that if there is an inconsistency or conflict between FIPPA and another Act, FIPPA prevails unless the other Act expressly provides that it applies despite FIPPA. Section 26.2(6) of the HPA expressly provides that s. 26.2(1) applies despite FIPPA.[13] If s. 26.2(1) applies to the Assessment Records, then the applicant's right to access those records under FIPPA does not apply.

[33] A recent order of this office, Order F18-01, also involved s. 26.2(1) of the HPA.[14] In that case, the College relied on s. 26.2(1) to refuse a physician access to questionnaires his peers had completed about his performance. In that order, I interpreted s. 26.2(1) and the prohibition against disclosure "to another committee or person" as not applying to the physician who was the "registrant" being assessed.

[34] The College applied for judicial review and the British Columbia Supreme Court quashed the order. Mr. Justice B.D. MacKenzie concluded that the interpretation of s. 26.2(1) in Order F18-01 was not an "interpretation that the statutory language can reasonably bear."[15] He accepted the College's submission that the Legislature intended s. 26.2 of the HPA to shield quality assurance program records from disclosure to assessed registrants, as well as disclosure to members of the public.[16] Justice MacKenzie agreed with the College that the context and other provisions in the HPA are evidence of the need to interpret s. 26.2(1) in a way that enhances confidentiality.

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[13] Sections 44(2) and (3) are not relevant to this analysis. They are about the commissioner's powers to conduct investigations, audits and inquiries.
[14] Order F18-01, 2018 BCIPC 01.
[15] *College of Physicians and Surgeons of British Columbia v British Columbia (Information and Privacy Commissioner*), 2019 BCSC 354 at para. 110. The OIPC filed an appeal on April 18, 2019 but later abandoned the appeal on February 27, 2020 (CA46035).
[16] *Ibid* at para. 95.

[35] In deciding the present inquiry, I will follow the interpretation provided by the Court, specifically that the term "to another committee or person" in the opening words of s. 26.2(1) includes the assessed registrant.[17]

College's submissions

[36] The College submits that the Court's decision in the judicial review of Order F18-01, affirms that s. 26.2(1) and (6) cloak quality assurance records such as those at issue here with complete confidentiality and exclude them altogether from the right of access under FIPPA.[18]

[37] The College says the Assessment Records relate to two assessments of the applicant carried out under the College's Medical Practice Assessment Program, which in 2013 was renamed the Physician Practice Enhancement Program (PPEP).[19] The College explains that the College's Medical Practice Assessment Committee was responsible for physician assessments before the Physician Practice Enhancement Panel took over the role.

[38] The College's director of physician practice enhancement (Director) says that PPEP is one of several quality assurance programs the College operates to assist and support physicians practicing in the community to provide the highest quality of patient care possible. The Director says the Physician Practice Enhancement Panel is a part of the College's Quality Assurance Committee.[20] The Director also explains that the Quality Assurance Committee members are comprised of both physicians and members of the public, who make up one third of its membership.[21]

[39] The Director says she has reviewed the Assessment Records and they "are records created and compiled as part of or in relation to the two assessments of the applicant, assessments that were carried out under the program."[22]

[40] The Director explains that the PPEP assessment process has several steps. They include having the assessor, who is a peer physician, review and assess patient charts, the quality of patient care and office management and procedures. There is also a multi-source feedback questionnaire from physician

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[17] The parties provided a supplemental submission about the Court's interpretation of s. 26.2(1), which I considered. In his submissions, the applicant submits there are flaws in the Court's reasoning and asserts that s. 26.2(1) does not prevent disclosure to the registrant who is the subject of the assessment. Ultimately, I concluded that I am bound to follow the Court's interpretation.

[18] College's April 12, 2019 submission at para. 12.

[19] College's initial submission at para. 22 and Director's affidavit at para. 25.

[20] Director's affidavit at para. 8.

[21] Director's affidavit at para. 8.

[22] Director's affidavit at para. 25.

colleagues, non-physician colleagues and patients. Ultimately, an assessment report is completed under the oversight and direction of the Physician Practice Enhancement Panel.[23] She says that the report is shared with the physician under review.

[41] The Director describes the steps taken in the two assessments of the applicant. She says that the applicant has been made aware of the outcome of the assessments and had an opportunity to address the matter with PPEP. However, he has not been given access to the specifics of what the two assessors said or the identities of the people who completed questionnaires.

[42] The College asserts that the peer practice assessment and multi-source feedback depend on confidentiality to succeed.[24] The Director says that the confidentiality of PPEP "promotes the communication to the College of frank and honest assessments and opinions about physicians. This is in the public interest given the quality assurance goals of the program."[25]

[43] The Director says s. 1-19(3) of the College's bylaws states that the Quality Assurance Committee, "will meet in camera and the committee's activities, including all correspondence and documentation, will be maintained in confidence, subject to sections 26.2(2) to (6) of the Act."[26] The Director also says the College's registrar told her that the registrar believes that the College has "consistently treated PPEP as confidential, with all information gathered, and materials produced, during the assessment process being treated as confidential."[27]

Applicant's submissions

[44] The applicant's submissions are extensive and detailed, and I have reviewed all of what he says. However, I will only relate here what is relevant to the issue of whether s. 26.2(1)(a) applies to the Assessment Records.[28]

[45] The applicant disputes what the College says about the importance of confidentiality to the integrity of the PPEP program and how the College maintains confidentiality. He says that years ago, he made a FIPPA access request and the College gave him committee information. He provides examples of the records he received, dating back to 2002 and 2003. He says, "Deliberative

[23] Director's affidavit at para. 8.
[24] College's initial submission at para. 28-29.
[25] Director's affidavit at para. 17.
[26] Director's affidavit at para. 15.
[27] Director's affidavit at para. 14.
[28] For instance, I will not address his concerns about his former employers, his disagreement with aspects of the physician assessment process, how he thinks he was ill-treated during his assessments, conflicts of interest, Medical Service Plan audits that were "bogus harassment investigations" and the politics of HPA reforms.

release of such information in the past waives the secrecy that the College may want to impose".[29]

[46] The applicant asserts that any physician being assessed should "receive the entire inspector report… and there should be no additional so-called confidential comments that the physician does not see but is seen by the PPEP or other committees."[30]

Analysis and findings

[47] I have reviewed the Assessment Records and I find that they are as follows:

- Excerpts from meeting minutes;
- A "Peer Practice Assessment" form with "Confidential Comments" attached;
- Two pages which the College says are "COMPA Assessment File Face sheets";[31] and
- A three-page record that the College says is an "Assessment File Tracking Sheet".

[48] For the reasons that follow, I find that s. 26.2(1)(a) only applies to some of the information withheld on that basis.

[49] Meeting Minute Excerpts – These records are excerpts from the minutes of five Medical Practice Assessment Committee meetings[32] and one Physician Practice Enhancement Panel meeting.[33] Some of the excerpts list the documents the meeting attendees reviewed. Most of the excerpts also include a brief history of the College's assessment of the applicant, as well as the meeting attendees' observations and directions about what should take place next and be communicated to the applicant. One excerpt is from the minutes of the Medical Practice Assessment Committee's interview with the applicant and it is a synopsis of what occurred up to that point, what was said during the interview, the committee's recommendations and its decision about next steps.

[50] Section 26.2(1)(a) protects records or information that a registrant provides to a "quality assurance committee or an assessor under the quality assurance program." The College's evidence is that the Physicians Practice Enhancement Panel, formerly called the Medical Practice Assessment

[29] Applicant's response at p. 9 and Appendices E, F and G.
[30] Applicant's response at p. 7.
[31] The College did not explain what "COMPA" means. I assume it relates to the Medical Practice Assessment Committee.
[32] Pages 524, 525, 546, 682, 683, 705 and 706-707 of the records.
[33] Page 698 of the records.

Committee, is part of the College's Quality Assurance Committee and is responsible for physician assessments. Based on that evidence, I am satisfied that if records or information were provided to the Physicians Practice Enhancement Panel, or its predecessor the Medical Practice Assessment Committee, they were in essence being provided to the College's Quality Assurance Committee.

[51] The College does not say anything about who received a copy of the meeting minutes. However, it seems reasonable to conclude that they were provided to the members of the Medical Practice Assessment Committee and the Physicians Practice Enhancement Panel who attended the meetings. In that sense, I am satisfied that the minutes, and the information they contain, were provided to the College's Quality Assurance Committee.

[52] However, there is another element that must be met because s. 26.2(1)(a) is expressly about records or information that a "registrant" provides to a quality assurance committee or an assessor under the quality assurance program. The HPA provides the following two definitions of "registrant":

> 1 In this Act
>
> "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;
>
> 26 In this Part [s. 26.2(1) is in this Part] :
>
> "registrant" includes a former registrant, and a certified non-registrant or former certified non-registrant to whom this Part applies;

[53] The College's submissions and evidence do not explain who drafted or provided the minutes or how the minutes qualify as a record or information that a "registrant" provided to the College's Quality Assurance Committee or an assessor. The College also did not say anything specific about the meaning of "registrant" in s. 26.2(1)(a).

[54] Although the College's submissions do not specifically address how the meeting minute excerpts in their entirety qualify as records provided by a registrant, I am able to see that these records contain some information that was provided by a "registrant". I conclude that everyone who is referred to as "Dr." in the minutes is a physician and registered as a member of the College and, thus, is a "registrant" as defined in the HPA. On that basis I can see that some of the excerpts reveal information that physicians provided to the Medical Practice Assessment Committee and the Physicians Practice Enhancement Panel. For instance, some of the information is what the applicant, who is a physician, said to the Medical Practice Assessment Committee. Other information is what the

peer physician assessor said in his assessment. Some information is what individual physicians said during a meeting. Therefore, I find that all of the information just described reveals information a "registrant" provided to the Quality Assurance Committee.

[55] I note that some of the information in the minutes is attributed to the "committee", rather than a discrete individual. It is the committee's observations, concerns and directions regarding what steps should be taken and what should be communicated to the applicant. In my view, this is information created by the committee, not information provided to the committee. Further, I am not persuaded that the committee as a collective entity meets the definition of a "registrant". The Director's evidence is that the Quality Assurance Committee is not exclusively comprised of physicians, but includes members of the public. There was no evidence provided about the composition of the Medical Practice Assessment Committee and the Physicians Practice Enhancement Panel for the actual meetings at issue in order for me to conclude that the meeting participants were all "registrants". For those reasons, I am not persuaded that what the committee said as a whole is information that a "registrant" provided to a quality assurance committee or an assessor, and I find s. 26.2(1)(a) does not apply to that information.

[56] I also find that s. 26.2(1)(a) does not apply to information that lists what documents were presumably considered during the meetings[34] or the headings and footers of the meeting minutes. The College says nothing about how such information qualifies as a record or information that a registrant provided to a quality assurance committee or an assessor. Without some information or explanation about this, I fail to see how disclosing a list of documents or the meeting minute headings and footers would reveal records or information a registrant provided to a quality assurance committee or an assessor.

[57] In support of its submission that s. 26.2(1) applies to all quality assurance records, the College says that it treats quality assurance records and information as confidential. It also says that s. 1-19(3) of its bylaws states that the Quality Assurance Committee "will meet in camera and the committee's activities, including all correspondence and documentation, will be maintained in confidence, subject to sections 26.2(2) to (6) of the Act."[35] While I have considered this evidence about how the College understands and interprets its obligations under the HPA, I am not bound by the College's interpretation.

[58] The fact that the College has enacted this bylaw does not persuade me that s. 26.2(1)(a) applies to *all* quality assurance records, regardless of whether or not it was a "registrant" who provided the record or information. It may be that

[34] The actual documents presumably considered by the committee or panel members were not included in the records at issue.
[35] Director's affidavit at para. 15.

the College believes that all Quality Assurance Committee documents should be kept confidential; however, I cannot ignore the specific wording of s. 26.2(1)(a) which unambiguously restricts this provision to records or information provided by a "registrant", which is a defined term in the HPA.

[59] The College also submits that the judicial review decision of Order F18-02 affirms that s. 26.2(1) cloaks quality assurance records with complete confidentiality and excludes them altogether from the right of access under FIPPA.[36] I do not draw the same conclusion from the Court's decision and its reasons. The Court's decision was about the meaning of the phrase "to another committee or person" in s. 26.2(1), and its reasons relate to the interpretation of that phrase. In particular, the Court did not consider or examine the meaning of "records or information that a registrant provides" in s. 26.2(1)(a), which is the issue here. I am not persuaded that what the Court said means that in this case the College is excused from having to prove that the records or information were provided by a "registrant" to a quality assurance committee or an assessor under the quality assurance program.

[60] Peer Practice Assessment form with Confidential Comments – This two-page form was completed by an assessor. It is accompanied by a third page with the assessor's remarks, titled "Confidential Comments".[37]

[61] The Director's evidence explains the process by which an assessor's assessment makes its way to a quality assurance committee. I can also see in the meeting minute excerpts that this assessment and the Confidential Comments page were discussed at the Medical Practice Assessment Committee meetings. Therefore, I conclude that this is a record and/or information that was provided to the College's Quality Assurance Committee.

[62] The College does not talk about whether the assessor is a "registrant." However, the Director's evidence and the other records in dispute indicate that assessors are "physicians" and "peer physicians." The other records also refer to this particular assessor as "Dr." Therefore, I am satisfied that the assessor who completed this form and provided the Confidential Comments was a physician who meets the definitions of "registrant" in the HPA. For those reasons, I am satisfied that these three pages are records and/or information that a registrant provided to a quality assurance committee under a quality assurance program.

[63] In deciding that s. 26.2(1)(a) applies, I considered what the applicant said about waiver. The applicant argued that the College disclosed records to him in the past, so that "waives secrecy" over the information the College is refusing to disclose under s. 26.2(1).[38] I am not persuaded by this argument because the

[36] College's April 12, 2019 submission at para. 12.
[37] Pages 506, 522 and 523 of the records.
[38] Applicant's response at p. 9 and Appendices E, F and G.

records and information at issue here are not the same as those earlier records. The records previously disclosed to the applicant predate s. 26.2(1) coming into force.[39] Further, s. 26.2(1) imposes a statutory obligation which is not negated by whether a college complied with s. 26.2(1) in the past.

[64] File Face Sheets and File Tracking Sheet – These records appear to be forms generated by a computerized case management system, and they contain administrative clerical-type information about the College's files and administrative procedures. The file face sheets are titled "COMPA Assessments," and there is one page for each of the two assessments of the applicant.[40] The file tracking sheet is titled "Assessment File Tracking Sheet" and is a three-page form providing a chronology of administrative processes.[41]

[65] The College did not provide any information specific to these records, such as who created or provided the information they contain and how they are used and by whom. However, I can see that some of the information on these pages would likely have been provided to the Quality Assurance Committee by the assessors. For instance, I find that the assessors' comments about what they observed during their assessments, how they graded the applicant, and the dates they visited and interviewed the applicant is information they provided to the Quality Assurance Committee. As stated above, the assessors are physicians and they meet the definition of registrant. Therefore, I find that s. 26.2(1) applies to this information.

[66] There is also information in the Assessment File Tracking Sheet that reveals what the applicant said during the assessment of his practice. I find that to be information that reveals information a registrant (i.e., the applicant) provided to the Quality Assurance Committee.

[67] However, absent any explanation from the College about the specifics of these pages, there is insufficient evidence for me to conclude that the balance of the information was provided by a registrant to the Quality Assurance Committee or an assessor. The balance of the information is about what letters were sent, and when, telephone calls received, etc., and I conclude it is administrative process and tracking information generated by College staff. I find that the College has not established that s. 26.2 (1)(a) applies to that information.

Summary, s. 26.2(1)

[68] The College has proven that s. 26.2(1)(a) applies to all of the Peer Practice Assessment form with Confidential Comments and to parts of the other

[39] The records disclosed to the applicant are dated 2002 and 2003. Section 26.2(1) came into force by way of B.C. Reg. 373/2007, deposited November 23, 2007.
[40] Pages 501-502 of the records.
[41] Pages 701-702 of the records.

Assessment Records. For clarity, I have applied orange highlighting to the information that I find s. 26.2(1)(a) applies to in a copy of the records provided to the College along with this order.

Section 22 of FIPPA

[69] Section 22(1) says that the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Since s. 22 is a mandatory exception, I have considered whether it applies to any of the information I found could not be withheld under s. 26.2(1)(a) of the HPA. Numerous OIPC orders have considered the application of s. 22 and I adopt those principles without repeating them here.

[70] Some of the information that I found s. 26.2(1)(a) does not apply to is personal information. That is because it is about identifiable individuals and it is not contact information.[42] Most of this personal information is innocuous detail about what individuals said and did during the routine performance of their work duties, and disclosing it would clearly not be an unreasonable invasion of their personal privacy.[43]

[71] However, a small amount of the personal information relates to a critique of how someone performed their duties. This type of personal information falls squarely into the category of personal information that previous orders have said is protected by s. 22(3)(d).[44] Section 22(3)(d) says that a disclosure of personal information is presumed to be an unreasonable invasion of third party personal privacy if the personal information relates to employment, occupational or educational history. I can see no circumstances in this case that would rebut the s. 22(3)(d) presumption. Further, the applicant indicated at the outset of the inquiry that he is not interested in third party personal information. For all of these reasons, I find the College is required to refuse to disclose that information under s. 22(1) of FIPPA. For clarity, I have applied green highlighting to that information in a copy of the records provided to the College along with this order.

CONCLUSION

[72] For the reasons above, I make the following order under s. 58(2) of FIPPA:

1. I confirm the College's decision to refuse the applicant access to information under s. 14 of FIPPA.

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[42] See Schedule 1 for the definitions of personal information and contact information.
[43] It is not clear if these individuals are employees of a public body.
[44] See, for example, Order F05-14, 2005 CanLII (11965 (BC IPC) at para. 21.

2. The College is required under s. 26.2(1) of the HPA to refuse to disclose to the applicant the information highlighted in orange in a copy of the records provided to the College along with this order.

3. The College is required under s. 22(1) of FIPPA to refuse to disclose to the applicant the information highlighted in green in a copy of the records provided to the College along with this order.

4. The College is required to give the applicant access to the information in the records that is not highlighted. The College must give the applicant access to that information and concurrently provide a copy to the OIPC registrar of inquiries along with its cover letter to the applicant.

[73] Pursuant to s. 59(1) of FIPPA, the College is required to comply with this order by June 11, 2020 which is 30 days after being given a copy of this order. Taking notice of the Province's present state of emergency in the province, I retain conduct of this matter in case the College needs to seek an extension of the time for compliance.

April 29, 2020

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File: F17-70921