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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 116-1996
August 26, 1996

INQUIRY RE: A request for review of the College of Physicians and Surgeons of B.C.'s decision to refuse access to records containing information about the accreditation of Everywoman's Health Centre

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 6, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by the applicant, Ted Gerk, for a review of a decision of the College of Physicians and Surgeons of B.C. (the public body) to withhold all but one record from a number of records concerning the accreditation of the Everywoman's Health Centre (the Centre).

2. Documentation of the inquiry process

On November 29, 1995 the applicant submitted a request to the College for copies of any and all correspondence received by it from the Everywoman's Health Centre for the years 1990 to 1995, including replies sent to Everywoman's Health Centre by the College. On January 30, 1996 the College responded to the applicant's request by advising him that, other than a single record, it was denying access to the remaining records. The applicant wrote to my Office on February 6, 1996 to request a review of the College's decision. On April 15, 1996 a Notice of Written Inquiry was sent to the applicant, the College, and Everywoman's Health Centre (the third party).

3. Issues under review at the inquiry and the burden of proof

The issues under review in this inquiry are whether sections 13(1), 15(1)(a) and (c), 19(1)(a) and (b), 21(1), and 22(1) and (3) allow or require the College to withhold information in the records covered by the request. The applicant also raised the application of section 25. The sections read as follows:

Policy advice or recommendations

13(1) 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.

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,....

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiation position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

....

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

...

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

...

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

...

(i) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the application for the benefit, or

(j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3)(c).

....

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

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

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

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

Section 57 of the Act establishes the burden of proof. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, the College has to prove that, under sections 13, 15, 19, and 21, the applicant has no right of access to the records in dispute.

Under section 57(2) of the Act, if the records in dispute contain personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy under section 22. In this case, therefore, the applicant has to prove that disclosure of the information in dispute will not unreasonably invade the personal privacy of third parties.

4. The records in dispute

The records in dispute consist of correspondence between the College and Everywoman's Health Centre from 1990 to 1995 concerning the accreditation of the Everywoman's Health Centre. They are described further below.

5. The applicant's case

The applicant is working from the presumption, supported in his view by newspaper articles, that the College has had a "long history of being extremely 'closed' regarding releasing identities of those involved in disciplinary action."

> If the material in question involves incidents or details of individuals and their actions that could jeopardize a patient's health, then I would argue for some type of disclosure .... there has been little information regarding the accreditation and licensing of health facilities that the College is responsible for regulating.

The applicant ultimately relies on section 25 of the Act as a reason for disclosure:

> The facility involved and the services it provides detail a major public policy in British Columbia. Given the fact that the facility in question was allowed to operate initially without accreditation and inspection, and that the facility publicly took issue with the College over the regulations that exist to ensure public safety, it is a matter of the public interest to learn if any further such incidents took place, the nature of these and the conclusions and disciplinary action taken by the College.

The applicant also seeks to rely on sections 22(2)(a) and 22(4)(b), (f), (i), and (j) for purposes of disclosure.

The applicant emphasizes his concern that the College is not regulating the Centre "with the aggressiveness required" on a matter of public policy, abortion, that is extremely controversial: "Indeed, the Act is perhaps the only way the public has an opportunity to ensure the College takes a pro-active approach to the regulation of such facilities. It is a question of scrutinizing the scrutineers." (Reply Submission of the Applicant, pp. 4, 5)

6. The College of Physicians and Surgeons of British Columbia's case

The College's duties and objects are set out in section 2.1 of the *Medical Practitioners Act*. The most relevant sections are:

> (d) to establish, monitor and enforce standards of practice and reduce incompetent, impaired or unethical practice amongst members;
>
> (e) to establish and maintain a continuing competency program to promote high practice standards amongst members;

Since the mid-1980s, the College has accredited and inspected twenty-eight non-hospital medical and surgical facilities in the province in a process set out under certain rules (the Rules) made under the *Medical Practitioners Act*. Each such facility has to comply with a detailed protocol designed and enforced by the Non-Hospital Medical/Surgical Facilities Committee (the Accreditation Committee). No physician can practice in such a facility unless it holds a certificate of approval issued by the College. (Submission of the College, paragraphs 3-6)

Accreditation of facilities is based upon on-site inspection by peers and other knowledgeable individuals appointed by the College for the purpose of ensuring compliance with very detailed guidelines and requirements. The requirements include review of the physical plant, appropriate staffing for the procedures performed, a review of the qualifications of physicians using the facility, safety considerations, appropriateness of equipment, review of the procedures performed in such facilities, the appropriateness of such procedures for the type of facility, anesthetic regulations, and numerous other factors. (Submission of the College, paragraph 8)

The College notes that section 61(3) of the *Medical Practitioners Act* creates "an expectation that any documents provided to the College for the purposes of administration of the various provisions of the Act, will be maintained in confidence and will not be disclosed, except as required in College proceedings or as authorized by the Executive Committee in the public interest." Public disclosure of such information could result in less relevant information becoming available to the College with a potential for adverse impact on, or reduction in, the quality of care. (Submission of the College, paragraphs 23, 24)

> In considering the release of documents pertaining to accredited facilities, the College must balance the importance of accountability to the public with the potential harm which production of accreditation information, on demand, to any party requesting it, could pose to the accreditation procedure. There is no

question that the procedures of the College and its requirements for accreditation are appropriately the subject of scrutiny. However, there is the potential for demands by individuals, with personal agendas, to interfere with the overriding public interest in a frank and candid accreditation process. (Submission of the College, paragraph 25; see also p. 16)

I have presented below the more specific arguments that the College made on the basis of actual provisions of the Act.

7. The submission of Everywoman's Health Centre

The Centre submitted a copy of the letter it wrote to the College on January 19, 1996. It emphasizes that it has always discussed and exchanged information with the College "in strict confidence due to the safety and security risk of such information falling into the hands of those who oppose the provision of abortion services. We can also reasonably expect, given their vigilance in opposing our organization, that such information will be used to identify ways in which our organization is most vulnerable."

8. Discussion

One of the presumed goals of the applicant in this case is to receive systematic information about how the accreditation of the Everywoman's Health Centre has taken place. The College has provided him and me with a thorough, general account of that process in its submission. It is very useful information for the public and for the applicant. (Submission of the College, paragraphs 3-14) This information is also available in the Manual For the Accreditation of Non-Hospital Medical/Surgical Facilities (revised November 1995) that is also publicly available. (Affidavit of M. VanAndel, Exhibit A)

In terms of the goal of openness under the Act, the College emphasizes that "any information which indicated that the practice of an accredited facility posed any risk of harm to public health or safety, would result in review by the College and, if not addressed to the College's satisfaction, would result in action by the College to revoke or restrict the accreditation of that facility. Any action which resulted in revocation of accreditation or restrictions on accreditation would be made public." (Reply Submission of the College, p. 2)

However, there is a public interest in learning more about the process of accreditation of non-hospital facilities, which I respond to in my Order below.

Section 57 of the Evidence Act

The College pointed out that section 57 of the *Evidence Act* was amended in 1995 to ensure the continued protection from disclosure of records and information arising out of peer review and quality assurance activities in hospitals, despite the access to information provisions of the *Freedom of Information and Protection of Privacy Act*. It seeks to argue that the same concerns should be weighed with respect to non-hospital facilities because they are directly analogous, since the same need exists for frank and open discourse and reporting with respect to

such reviews. (Submission of the College, paragraphs 16-19) I note that there is no statutory provision to this effect for non-hospital facilities at present, and that accreditation is not a peer review process.

Section 61(3) of the Medical Practitioners Act

The College raised the issue of whether section 61(3) of the *Medical Practitioners Act* applies to the accreditation process. It requires those "employed in the administration of sections 48 to 57" to preserve confidentiality, except as may be required in connection with the administration of section 48 to 57, or where the Executive Committee of the College authorizes disclosure in the public interest. Thus this confidentiality provision does not provide total protection, since the College could disclose where it considers it to be in the public interest, and it only applies in the administration of the sections specified. These sections apply mainly to the investigation and inquiry functions of the College:

Section 48 - investigation of skill and knowledge to practice medicine of a member. This includes requiring College access to clinical records either in the course of a specific investigation or for the purpose of sampling/monitoring standards of practice of members.

Section 49 - where a member resumes practice after practicing in another province, there is a requirement of a certificate of good standing from the other jurisdiction(s).

Section 50 - use of inquiry committee; summary investigations; power to reprimand.

Section 50.1, 50.2 - inspectors and their powers - Without a court order they can "investigate, inquire into, inspect, observe or examine" the premises, equipment and materials used by a member to practice medicine and the records of the member relating to his or her practice.

Section 50.3 - search and seizure powers under court order - To get a court order, there must be reasonable grounds for believing that evidence may be found

(a) that a person who is not a member contravened the Act or rules

(b) that a person who is a member contravened the Act or rules, failed to comply with limits or conditions imposed under the Act or rules, acted in a manner that constitutes professional misconduct, is not competent or is suffering from illness or alcohol/drug addiction that impairs ability to practice medicine.

Section 50.4 - rules for detention of things seized under court order.

Section 50.5 - prohibition against obstructing inspection or search.

Section 50.6 - power to suspend member prior to inquiry.

Section 51 - powers to inquiry committee to suspend and powers of College Council to impose discipline after a finding of guilt.

Section 53 - power of Council to order costs against a member.

Section 54 - must have Council's direction to reinstate a member who has been erased from the register.

Section 55, 56 - duty of members to report on members believed to be suffering from illness/addiction, etc., which impairs ability to practice, and inquiry process.

Section 56.1 - duty of members to report on members believed to have engaged in sexual misconduct.

Section 57 - appointment of Commissioner instead of an inquiry committee.

These sections appear to be applicable to investigations of individual members of the College in respect of their competence to practice or their ethical behaviour. However, the search powers (with court order) could be interpreted to include searching the premises of Everywoman's Health Centre to ensure it is complying with the conditions of certification. But because this could only be used where there was some evidence of non-compliance, I think it may be somewhat exaggerated to say that they apply to the accreditation process. The inspection powers, and the powers under section 48 to investigate care and skill, seem to apply only in respect of the conduct of members. The College can invoke these powers in respect of the physicians who work at the Centre, but not in respect of the Centre itself.

Thus, I disagree with the College's argument that section 61(3) provides protection for records in respect of the accreditation process.

Section 13(1): policy advice or recommendations

The College argues that disclosure of correspondence with a medical/surgical facility will "contain advice or recommendations provided by the [Accreditation] Committee to the Executive Committee or Council of the College regarding the operation and requirements of such facilities and subsequently relayed to the facility in issue." Disclosure of such would "have serious adverse consequences on the College's ability to attract assessors and to engage in ... peer review activities ...." (Submission of the College, p. 10) I note below that the Accreditation Committee in fact gives direct advice to non-hospital facilities.

My sense is that the College is confused in its application of this section, which is intended to protect, in a limited way, advice or recommendations made "by or for" a public body such as the College and intended to be acted upon, or at least considered, by the body itself. It is not intended to cover cases such as this, where advice or recommendations are given to an outside body by a Committee, such as the one that does the accreditation of medical/surgical facilities for the College. In my further view, it is artificial to regard the Accreditation Committee's advice as actually coming from the Executive Committee or Council itself unless that were demonstrably evident from a review of the records (which it is not). Another flaw in the College's effort to use section 13(1) in this inquiry is that the Accreditation Committee itself

has the power to make decisions to approve non-hospital medical/surgical facilities. Its decision refusing approval may then be appealed to the Council (see Rule 107).

Section 15(1)(a): harm a law enforcement matter

The College states that it has a law enforcement mandate under the *Medical Practitioners Act* to enforce the accreditation process and that it meets the test set out in Order No. 36-1995, March 31, 1995: "It is submitted that the reluctance expressed by the [Everywoman's Health] Centre regarding the continued provision of confidential information will be shared by other facilities and will erode the College's ability to fulfill its accreditation mandate to its fullest potential." (Submission of the College, p. 10)

I read Order No. 36-1995 differently from the College. It is not enough to have a law enforcement mandate to claim this exemption. As I wrote in that Order, a law enforcement investigation has to be actually underway: "I do not read the law enforcement exceptions in the Act as applying to information compiled in anticipation of an investigation which could lead to a sanction or penalty being imposed .... Until such time as the information becomes part of such an investigation, the law enforcement exceptions do not apply to it." (pp. 13, 14)

On the basis of my examination of the records in dispute, I do not find any evidence of an actual law enforcement investigation in the sense of section 15(1)(a) and Schedule 1 of the Act. I cannot equate an initial or repeated accreditation process with law enforcement in the context of this inquiry.

Section 15(1)(c): harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement

The College uses the following techniques and procedures in its enforcement of accreditation requirements and in taking disciplinary actions against physicians employed at a facility: on-site visits and investigations; interviews and discussions; reports; "and reviewing the implications of an involvement in adverse outcomes." It believes that these should be recognized under section 15(1)(c) in order not to harm the effectiveness of such procedures in promoting a frank and open process. (Submission of the College, pp. 11-12)

I remain of the view that the intent of this section is not to protect commonly-known investigative techniques, such as those used by the College in its particular listing. (See Order No. 50-1995, September 13, 1995, pp. 6, 7) It is hard to imagine any "law enforcement" activity that would not involve reliance on at least some of this above list. I note, moreover, that the records in dispute contain no detailed reports of site visits or investigations by the College, and that the normal process of accreditation is not definable as a law enforcement activity under Schedule 1 of the Act.

Section 19(1)(a) and (b): disclosure harmful to individual or public safety

The College has relied on concerns expressed by the Centre in a letter to the College dated January 19, 1996 (which I have discussed elsewhere):

> The College concluded that it should act prudently with respect to the disclosure of any information which could result in possible harm to an accredited facility, staff employed by that facility or members of the public who access the services of that facility.... It is a matter of public record that there have been threats to individuals and that there has been physical harm to individuals involved with abortion clinics. The recent shooting of a gynecologist who was involved in providing abortion services serves to highlight the potential harm to individuals or to public safety.... the College has no information that the Applicant personally may cause concern with respect to harm. However, there is concern that information of any nature relating to the operation of abortion facilities may become available to others who conceivably present an increased risk. (Submission of the College, p. 13)

The application of this section 19 test depends on the actual nature of the records in dispute. I agree with the College that there are a few items in the records in dispute, such as applications for certain privileges by named individuals and a floor layout plan of the facility, that should be protected under section 19, because their disclosure would pose a threat to the health or safety of individuals. I have marked these materials for non-disclosure to the applicant.

Section 21(1): disclosure harmful to business interests of a third party

The College is of the view that the records in dispute meet the three-part test set out in this section of the Act.

With respect to the first part of the test, the College states:

> Documentation forwarded to the College by facilities may include information on the services provided at the facility, the qualifications and training of the staff, mechanisms for audits to monitor performance of staff members, and technologies and procedures used at the facility, information with respect to patients, screening of patients, responses to situations arising at the facility, discussions with respect to surgical procedures and costs, the development of quality assurance programs, the contractual and financial relationship between physicians and facilities, and the use of equipment, anesthesis and medication at those facilities. (Submission of the College, p. 13)

The College submits that such information falls under the rubric of commercial, financial, scientific, or technical information. While most of the College's list does not fit such terminology, I agree that some of the records in dispute would indeed fall into this broad category. I base this conclusion on my review of the actual contents of the records.

To meet the second part of the test, the College argues that the Centre supplied material to it in confidence: "The College considers the assurance of confidentiality to be fundamental to any accreditation, peer review and quality assurance process." The Centre makes the same claim in its letter of January 19, 1996. Although the evidence is not as explicit as I would like, I am

persuaded that it was the intention of the two parties to exchange information on a confidential basis for the purposes of accreditation.

Finally, the College argues that disclosure of the information provided by the Centre could result in harm to the business interests of the facilities and result in similar information no longer being supplied to it, which would clearly not be in the public interest since it would impede the current free exchange of information between the College and accredited non-hospital facilities. (Submission of the College, pp. 14, 15) There is nothing in the records in dispute that could possibly impact negatively on the business interests of the Centre, at least in the language of section 21(1)(c)(i). This argument is also not persuasive because a facility has to supply information requested by the College or it will not be accredited. Physicians themselves cannot practice in a non-hospital facility that is not accredited. In addition, there is no evidence in the submissions of the College that disclosure would harm the business interests of the Centre in the sense of section 21(1)(c)(i) or (iii). The College has not met the third part of the section 21 test.

I find that section 21 of the Act does not prohibit the disclosure of the records in dispute.

Section 22: Disclosure harmful to personal privacy

The College seeks to apply this section to prevent the disclosure of personal information supplied by physicians employed at medical/surgical facilities on the grounds that it would be an unreasonable invasion of their privacy. This may include the qualifications and privileges held by a particular physician and the names of references.

The situation is moot in the present inquiry because the applicant states that he does not wish to receive identifiable information about anyone at the Centre. He would be quite satisfied to receive the correspondence in dispute with the identities of individuals severed. As I note below, there is in fact very little personal information in the records in dispute other than the names of those who initiate or respond to correspondence. What other limited personal information exists is highly sensitive for the individuals involved on either side and thus is protected from disclosure under section 22 of the Act.

Section 22(4): a disclosure of personal information is not an unreasonable invasion of a third party's personal information

The applicant also seeks to rely on section 22(4)(b), (f), (i), and (j) for purposes of disclosure of personal information in the records in dispute (though he claims elsewhere not to want personal information). But he advances no detailed arguments in support of his contentions. The College states that there is no evidence or facts in the records in dispute to support the applicant's attempted reliance on these four subsections. I fully agree with its position. (Reply Submission of the College, p. 4)

Section 25: Information must be disclosed if in the public interest

The College opposes the applicant's attempted reliance on this section, because there is no information in dispute which indicates or relates to the criteria set out in section 25(1)(a), or that meets the threshold test set out in section 25(1)(b). The applicant "has adduced no evidence of any risk or harm, nor has he adduced any evidence to indicate that disclosure would clearly be in the public interest." Further, disclosure cannot be justified solely on the basis of one individual, which is how the applicant has presented himself in the present inquiry. (See Order No. 4-1994, March 1, 1994, p. 9) (Reply Submission of the College, p. 3) I agree with the College's refutation of the section 25 argument.

Review of the records in dispute

It is important to be aware of what kinds of records are at stake in this inquiry. The applicant emphasizes that he does not know what the material in dispute consists of and relies on my judgment to rule on the practicalities of what can and should be released in the circumstances of this specific request.

The records in dispute comprise approximately 18 letters from the Centre to the College and 23 from the College to the Centre over a five and a half year period. This includes duplicate copies of a few letters. I have roughly categorized the subject matter of this correspondence as follows:

1. Making arrangements for site visits by the College's accreditation committee: 5 items

2. Centre requests to the College for specific arrangements or approvals with respect to staffing and equipment: 8 items
3. College requests to the Centre for information, or supplying information, related to accreditation and its compliance with the rules for accreditation: 11 items

4. Centre supplying information to the College for accreditation purposes, including personal information about physicians, equipment purchases, and protocols in place: 6 items

5. College granting of accreditation or approving equipment plans: 6 items

6. College approval or denial of consents for physician privileges: 2 items

Based on a detailed review of these materials, I am confident that their contents reflect exactly what a reasonable person would expect to find in the written evidence of an accreditation process (excluding an accreditation report). For example, in these mostly routine records there is absolutely no discussion of patients or the outcome of procedures in specific cases. Thus, I find that most of these routine records should be disclosed to the applicant.

9. Order

I find that the head of the College of Physicians and Surgeons of B. C. is authorized under section 19(1) of the Act, and required under section 22, to refuse access to parts of the records in dispute. I also find that the head of the College of Physicians and Surgeons is not authorized or required to refuse access to other parts of the records under sections 13, 15, or 21 of the Act. Under section 58(2)(a), I require the head of the College of Physicians and Surgeons of B. C. to give the applicant access to those parts of the records that I have marked for release.

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David H. Flaherty
Commissioner

August 26, 1996