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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 221-1998
April 16, 1998

INQUIRY RE: A decision by the College of Physicians and Surgeons of British Columbia to refuse the Canadian Broadcasting Corporation's (CBC) request for access to records associated with the conduct of a physician

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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 August 29, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant, the Canadian Broadcasting Corporation (CBC), of a decision by the College of Physicians and Surgeons of British Columbia (the College) to refuse access to records associated with a conduct review involving one of its members (the third-party physician).

2. Documentation of the inquiry process

On December 3, 1996 the applicant, represented by a reporter, Paisley Woodward, asked the College of Physicians and Surgeons for the following records:

- any undertakings, whether voluntary or otherwise, ever entered into by [the third-party physician] with the College, or imposed by the College on him;
- any letters of caution or any other documents in which a caution or concern was expressed by the College to [the third-party physician] concerning his practice;
- any and all decisions relating to any disciplinary proceedings ever taken against [the third-party physician] regarding his practice;
- the results and/or outcome of any conduct review of [the third-party physician] ever undertaken.

In her application, Ms Woodward asked the College to apply section 25 of the Act to the records to compel disclosure in the public interest.

On December 13, 1996 the College disclosed three resolutions, a media release, a notification, and, in the covering letter to another CBC reporter, Margot Harper, a list of the third-party physician's practice intentions on returning to his practice. The College understood that these items were satisfactory to the CBC and closed its file on the same day. On January 14, 1997 Ms Woodward re-submitted her request to the College and again cited section 25 of the Act in support of her request.

The College responded on February 17, 1997 by referring to the previous disclosures and, in addition, disclosing two more resolutions and two more notifications. The College informed the reporter that it was withholding any remaining records under sections 12.1 (now section 12(3)), 13, 14, 15, and 22 of the Act. The College justified the withholding of the records in this way:

> In general, the type of information you have requested (namely, any undertakings, letters of concern, and results of any conduct reviews of [the third-party physician]) relates to personal information about both the physician and individual complainants that the College is required to protect under section 22 of the Act. The College cannot release details about complaints which have not resulted in disciplinary action, or such other action of public record, except to the parties directly involved. Likewise, the College cannot state whether or not complaints have been received about an individual physician, or the number of those complaints unless those complaints have resulted in formal matters of record. As you may be aware, the College receives many complaints and concerns each year of a diverse nature involving various physicians. These complaints may be significant and result in disciplinary action, in which case they become formal matters of record and are made public in accordance with the College's responsibility. Alternatively, the complaints may be trivial or unfounded and, accordingly, are not a reflection of a physician's practice and, in fairness to various parties, are not publicized.

On March 21, 1997 my Office received the CBC's request, dated March 11, 1997, for a review of the College's decision not to release information sought in the CBC's December 3, 1996 request. In its application, the CBC stated that it is clearly in the public interest that the College disclose whether or not a doctor has ever been the subject of a conduct review and what undertakings may have governed his or her practice as a physician. The reporter stated that she was not interested in identifying information about any complainant(s).

During mediation, the College clarified that it had no records that fell into the category of "letters of caution" (the second bullet in the above list). It also clarified that it

had disclosed all records reflecting decisions relating to disciplinary proceedings against the third-party physician (the third bullet above).

The College also acknowledged during mediation that it had *in camera* material from a conduct review regarding the third-party physician (the fourth bullet). The College withdrew the application of sections 13 and 14 from these records but continued the application of sections 12.1 (now 12(3)), 15, and 22. It would not disclose whether any undertaking(s) existed in relation to the third-party physician (the first bullet).

On May 26, 1997 the reporter informed my Office that she wished the matter to proceed to an inquiry. The Office issued a Notice of Written Inquiry, to take place on June 19, 1997, to three parties: the College as the public body, the CBC as the applicant, and the third-party physician. The Office also invited the participation of the following intervenors: the BC Medical Association (which declined), the Canadian Medical Protective Association, the Law Society of British Columbia, and, later, the Freedom of Information and Protection of Privacy Association (FIPA).

After the Office had issued the notice of inquiry, the parties consented to an extension of the inquiry deadline to July 25, 1997. I later adjourned the inquiry in order to consider a request for permission to intervene from a lawyer representing a former patient of the third-party physician. On August 18, 1997 I refused to grant the application for intervenor status. By notice dated August 20, 1997, the parties were advised that I would reconvene the inquiry on August 29, 1997.

3. Issue under review and the burden of proof

This inquiry examines the College's application of sections 12(3), 15(1), 22, and 25 to the records in dispute. The relevant sections read as follows:

Cabinet and local public body confidences

12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

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,

(d) reveal the identity of a confidential source of law enforcement information,

....

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.

(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,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

...

(d) the personal information relates to employment, occupational or educational history,

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

....

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

(a) the third party has, in writing, consented to or requested the disclosure,

(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,

....

(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Information must be disclosed if in the public interest

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

(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 on the parties in an inquiry. Under section 57(1), it is up to the College to prove that the CBC has no right of access to records withheld under sections 12(3) and 15(1).

Under section 57(2) of the Act, if the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant (in this case the CBC) to prove that disclosure of the information would not be an unreasonable invasion of the third-party physician's personal privacy.

To the extent that the applicant relies on section 25 of the Act to say that the College is required to disclose the information in the public interest, the burden of proof is on the applicant to demonstrate that section 25 applies to the information. (See Order No. 165-1997, May 20, 1997; Order No. 182-1977, August 13, 1997; and Order No. 206-1997, December 18, 1997).

4. The records in dispute

The records in dispute consist of any documents in the possession of the College pertaining to any voluntary undertakings entered into by the third-party physician and the results or outcomes of any conduct reviews. There are 25 pages of such records, which are described further below.

5. The CBC's case

The following is a succinct statement of the CBC's case for access to information about the third-party physician:

> Because of the repeated appearances of [the third-party physician] before the College for conduct reviews, because of the conditions placed on his practice and disciplinary action taken against him, it is important that the public be aware of complaints against him and that the public have an opportunity to scrutinize the actions which the College has taken to protect public safety, a duty acknowledged by the College. (Submission of the CBC, p. 4)

The CBC further claims that the College conducts about five to fifteen conduct reviews on average each year, when there is a valid basis for concern about a physician's practices. Its view is that the remedial character of conduct reviews should mean that information about a physician who has been the subject of a conduct review be made available to a patient or prospective patient of that physician, on request:

> With conduct reviews there is no concern that the public disclosure of the fact that a doctor has been through one would unfairly hurt his or her reputation, because the College doesn't hold them without a valid reason. The concern that a doctor's reputation might be unjustly ruined all because of a vindictive complaint doesn't apply here. (Affidavit of Paisley Woodward, paragraph 8)

I have discussed below the CBC's submissions on the detailed application of sections of the Act to the records in dispute.

6. The College of Physicians and Surgeons' case

The College submits that the records in dispute should not be disclosed, since they resulted from its complaint, investigative, and peer review processes. Both the *Medical Practitioners Act* (the MPA) and the Rules made under it recognize and establish "the public interest in fostering and protecting such processes...." (Submission of the College, paragraph 1) The College also submits that section 25 of the Act is not applicable to the records at issue and that there is no overriding public interest or risk of significant harm to the health or safety of the public.

Because of the voluminous character of the College's submissions, I have found it more appropriate to address them individually below.

7. The third-party physician's case

The third-party physician correctly submits that this request for review is limited to the request for disclosure of undertakings and the results or outcomes of any conduct reviews. (Submission of the Third-Party Physician, paragraph 5) In his view, these records are clearly confidential and should not be disclosed, "because they are communications which arise in confidence, (b) there is an overriding public interest in the promotion of peer review, and (c) the provisions of the *Medical Practitioners Act* and the *Freedom of Information and Protection of Privacy Act* protect the records from disclosure." (Submission of the Third-Party Physician, paragraph 6)

Except to the extent that they duplicate other submissions that are also against disclosure, I have discussed below the detailed submissions of the third-party physician with respect to the application of various sections of the Act. I have also carefully reviewed the *in camera* submissions and affidavit of the third-party physician.

8. The intervenors' cases

The Law Society of British Columbia

The Law Society's submission does not address the position of the parties in the inquiry. It consists of background information about the confidentiality and disclosure

policies of the Law Society in its complaints and discipline process, with particular references to its own conduct reviews.

The Law Society does not discuss complaints against lawyers publicly unless there is sufficient evidence of misconduct to warrant a formal disciplinary hearing. Otherwise, it fears that individuals would not make complaints. However, once the College's Discipline Committee starts a formal disciplinary hearing, the public may have access to the citation, formal disciplinary charges, hearing, and hearing panel reports. (Submission of the Law Society, p. 4)

The rules of the Law Society authorize the Secretary to disclose the existence of a complaint, its subject matter, and its status, if "(a) the identity of the lawyer has already been disclosed to the public, or (b) the complaint has become generally known to the public." (Submission of the Law Society, Rule 110(3), and Rule 453(2)) I note, as well, that the decisions of the Discipline Committee of the Law Society and its Conduct Review Subcommittee are treated confidentially "and shall not be disclosed except for the purpose of complying with the objects of the Act." (Rule 453)

Conduct reviews undertaken by the Law Society are kept confidential but are reported to the Discipline Committee. They are procedurally informal, as in the case of the College.

The Law Society will disclose to the public, at any time, the names of lawyers for whom the Discipline Committee has authorized a citation leading to a formal discipline hearing, any hearings completed, and any disciplinary actions and penalties that have been imposed. (Submission of the Law Society, p. 6)

The Law Society concludes that its complaint handling and disclosure policies "strike a fair balance in upholding the public interest and protecting the privacy and rights of individual lawyers." (Submission of the Law Society, p. 7)

The Freedom of Information and Protection of Privacy Association (FIPA)

In FIPA's view, the fundamental concerns in this regard are:

(a) disclosure of sufficient information to promote public safety, and in particular the safety of present and future patients of physicians; and

(b) disclosure of sufficient information concerning the handling of such allegations to enable the public to scrutinize the College's handling of sexual misconduct allegations and thereby make the College more accountable in accordance with the Act. (Submission of FIPA, paragraph 11)

FIPA thus argues that this review "addresses disclosure of sexual misconduct allegations which do not proceed to a formal inquiry." (Submission of FIPA, paragraph 6)

In terms of promoting public safety and identifying inappropriate behaviour on the part of physicians treating their patients, FIPA referred me to the June 1995 policies of the College entitled "Sexual Offences Which May Result in Disciplinary Action," and "Offences which May Result in Disciplinary Action." (Submission of FIPA, paragraphs 16 and 17) In FIPA's submission, there is a relatively small, but growing, number of sexual misconduct allegations against physicians in this province. (Submission of FIPA, paragraph 21)

FIPA's argument is that the public should have a right to know when there has been more than one complaint of sexual misconduct against a physician that proceeds to further action by the Sexual Misconduct Review Committee. (Submission of FIPA, paragraph 23)

FIPA maintains that with respect to such allegations, members of the public have a right to know and should be advised that the third-party physician is the subject of complaints, the number and general nature of complaints, and any warnings or cautions given by the College. It says that the public should be advised that the complaint has not been proven and that the "public should be empowered to independently assess whether or not the third-party physician is conducting himself or herself appropriately." It also argues that, for purposes of the Act, "the privacy interests of a physician diminish and the interest of public scrutiny and public safety increase as the number of *bona fide* complaints of sexual misconduct increase." (Submission of FIPA, paragraph 45)

The Canadian Medical Protective Association (the CMPA)

The CMPA is a mutual medical defence organization that assists members, i.e. physicians, in their interactions with the College. Its submission is "that the decision of the College not to disclose records relating to the results of conduct reviews conducted by the College or undertakings given by physicians to the College should not be overturned." One major reason is that the College "is best situated to make decisions on whether the benefits of disclosing information of this nature outweighs the very real privacy concerns of those individuals involved." (Submission of the CMPA, pp. 1-2) Since detailed reasons reflect positions already identified in the pages of this Order with the College, I am choosing not to repeat them.

9. Discussion

Information already disclosed about the physician's conduct

The CBC states that the third-party physician in this inquiry was suspended from practice for a period of time in 1994; his "unprofessional conduct of the most serious

nature" included embracing a patient. It subsequently learned from the College that the third-party physician:

> ...had been the subject of seventeen conduct reviews, six concerning allegations of hugging adults, four concerning allegations of hugging teenagers, two of staring, two concerning allegations of examination of teenagers without sufficient explanation, one of inadequate reporting, and one with respect to allegations of failure to disclose conditions of practice. (Submission of the CBC, pp. 1, 2; and affidavit of Paisley Woodward, paragraph 11, and exhibit F)

The CBC states that the College refuses to acknowledge whether or not any voluntary undertaking(s) exist in relation to the third-party physician. A receptionist for the College informed the reporter for the applicant, by telephone, that the third-party physician had had disciplinary action taken against him, "but she stated that she was unable to determine whether there were conditions attached to his practice." (Submission of the CBC, p. 2; and affidavit of Paisley Woodward, paragraph 15)

The CBC further obtained access to the conditions that the third-party physician accepted for his return to practice in 1995. (See Affidavit of Paisley Woodward, paragraph 4) Hence it now seeks the outcomes of conduct reviews and any voluntary undertakings associated with them.

In March 1997 the CBC broadcast a story concerning the third-party physician and his history of conduct reviews. The father of a patient of the third-party physician then informed the CBC "that until he had seen our story he was unaware that [the third-party physician] had been the subject of conduct reviews. He was also unaware that there were formal conditions placed on his medical practice." The CBC believes that the father subsequently complained to the College about the third-party physician's breach of two of the conditions of practice with respect to his son. (Affidavit of Paisley Woodward, paragraphs 13 and 14)

Several years ago the College prepared a one-page media release concerning the findings of its Inquiry Committee concerning the third-party physician. It specified the period of his suspension from practice, the amount of his fine and costs, and a one-sentence description of his "unprofessional conduct." (Affidavit of Paisley Woodward, exhibit B) This release was sent to general and specialized print, radio, and television outlets in the province. (See Submission of the College, paragraph 48) Thus the College has publicized the results of the disciplinary hearing that was conducted with respect to this physician.

For its part, the College states that it has released to the applicant:

> ...all documents which are matters of public record and which reflect the Third Party's registration status with the College, any disciplinary action taken against the Third Party, including the specifics of any charges and penalty, and the

conditions formally imposed on the Third Party's practice by the College at any period in time. (Submission of the College, paragraph 3)

Submissions in this case have indicated to me that the third-party physician and the conditions on his practice of medicine have received a considerable amount of publicity in the media during the last five years, including several direct interviews with the third-party. (See *in camera* Affidavit of the Third Party, Exhibit A)

It is thus arguable that the College and the media have indeed warned the public about certain practices of the third-party physician in question.

The Role of the College of Physicians and Surgeons in Complaint Handling

The duties and objectives of the College are provided for in section 3 of the *Medical Practitioners Act*. Under section 3(1), the College is charged with the duty "at all times" to both "serve and protect the public" and "exercise its powers and discharge its responsibilities under all enactments in the public interest." The objectives of the College, which are set out in section 3(2), include the following:

- to superintend the practice of the profession
- to govern members according to this Act and the rules
- to establish, monitor and enforce standards of education and qualifications for registration of members
- to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst members
- to establish and maintain a continuing competency program to promote high practice standards amongst members
- to establish a patient relations program to seek to prevent professional misconduct of a sexual nature
- to establish, monitor and enforce standards of professional ethics amongst members
- to inform individuals of their rights under this Act, and rules and the *Freedom of Information and Privacy Act*

The College submits that it is the role of the College to receive and address complaints in the public interest. All complaints, concerns, or questions regarding its members are initially referred to the College Registrar or designated Deputy Registrar who carry out a preliminary investigation. The Registrar or designated Deputy Registrar can then "(a) deal with minor complaints themselves, or (b) refer the complaint to the appropriate standing committee or (c) if required by degree of importance or urgency, promptly report the matter to the Executive Committee of the College for possible summary investigation pursuant to section 53(6) … of the *Medical Practitioners Act* and possible future disciplinary action." (Submission of the College, page 4). The College

advises that, on average, it investigates and addresses 1,300 complaints in the public interest annually.

Complaints which result in disciplinary action become formal matters of record and are made public in accordance with the College's policy and its responsibility to the public. Complaints which do not result in disciplinary action:

> … are addressed by the College in accordance with the procedures available pursuant to the MPA and the Rules. As is the case with all self-governing bodies, disciplinary proceedings form a small, although high profile portion of the College's mandate. The vast majority of complaints do not result in disciplinary action. Some complaints may be unfounded, others are unable to be substantiated and others are found to be amenable to correction or discussion through non-disciplinary means which are educational and remedial in nature and will address the concerns of the complainants and fulfill the public interest mandate. (Submission of the College, page 4)

A clear implication of the College's statement is that the behaviour of the third party physician in this inquiry, that resulted in seventeen conduct reviews, was not regarded as significant enough to result in disciplinary action. The distinction between complaints that result in disciplinary action and those that result only in conduct reviews is a critical consideration in this inquiry. The possibility also exists that what the College considers significant may differ from what the public may want to know when it comes to choosing a physician and/or continuing to see a particular physician against whom allegations of misbehaviour have been made. The Deputy Registrar who made the sexual misconduct report in the 1997 annual report of the College made two points in this regard:

> Although the figures [78 complaints against 55 MDs] have to be seen in the context of more than 25 million doctor and patient encounters each year, it is disappointing to see that the figures for allegations of a sexual nature have not decreased as much as one would wish....
>
> While the occasional offending doctor is a sexual addict, most seem to allow themselves to slide down the slippery slope from a professional relationship to a personal relationship, oblivious to the warnings signs. (1997 Annual Report of the College, pp. 24-26; Submission of FIPA, Exhibit G)

The College's Ethical Standards and Complaints Review Committee and the process of conduct reviews

A complaint of an ethical nature received by the College is investigated, and the materials gathered in the investigation stage are forwarded to either the Sexual Misconduct Review Committee (SMRC) or the Preliminary Review Committee (PRC).

The Committee determines the manner in which a complaint should be dealt with and may:

- dismiss the claim as frivolous
- consider the complaint completely answered by the physician's reply
- recommend to the Deputy Registrar that the complaint be dealt with informally
- recommend the matter be referred to the Ethical Standards and Conduct Review Committee
- recommend the appointment of an Inquiry Committee

The Ethical Standards and Conduct Review Committee ("the Conduct Review Committee") is made up of four senior elected physicians and two public representatives appointed by the Minister of Health. The composition, responsibilities, and procedures of the Committee are provided for in Rules 162 to 168 inclusive. The Committee's responsibilities are described in Rule 167:

> 167. The responsibility of the committee shall be:
>
> (a) to consider, investigate and adjudicate on matters of ethical standards, which may arise from complaints within the profession, or elsewhere relating to the ethical conduct of members of the college; and,
>
> (b) to perform a conduct review, when directed to do so by the preliminary review committee or the sexual misconduct review committee.

With respect to the application of section 12(3) of the Act, Rule 168 provides, in part, that any discussion with a complainant or a member complained against shall be *in camera*. Additionally, with respect to any matter resolved by the committee:

- it shall inform the complainant and the member complained against of its opinion
- it may make recommendations to a member with respect to the conduct of the member's practice
- it may, through the Registrar, cause its opinion or decision on a matter of general application to the profession to be communicated to members of the College without identifying any complainant or member of the College.

The express purposes of a conduct review are set out in Rule 169:

- to bring the complainant's concern to the attention of the physician under review
- to educate the physician under review as to proper practice
- to listen to the complainant and answer questions the complainant may have
- to allow the committee to decide if a matter of general application should be communicated to members of the College

- to deter this and other physicians from repeating the conduct that led to the complaint

The Conduct Review Committee summons a physician to respond to a complaint. Failure to attend would result in disciplinary action for failing to co-operate. Failure to comply with a request for information by the Committee is "deemed to be unprofessional conduct." (Submission of the Third-Party Physician, paragraph 12) A physician's participation in the conduct review is thus not voluntary. Conduct reviews are approximately 30 to 45 minutes in length. Rule 171 provides that discussions in a conduct review with the complainant or the third-party physician complained against are to be *in camera*. The complainant has the right to be present, with or without "another person or persons for the purpose of providing support to the Complainant." (Rule 171(b)). The third-party physician is entitled to have counsel present, but counsel does not participate in the meeting in any way.

The types of complaints dealt with by the Conduct Review Committee include "lack of social skills (i.e., rudeness and abruptness), failure to provide a chaperone, seeing patients on a social basis, and hugging and/or kissing patients." (Submission of the Third-Party Physician, paragraph 15) According to the College:

> The subject of conduct reviews is frequently conduct where the physician's personality, practice style or lack of awareness of patient sensitivities has led to concerns. This may include poor communication with patients which is either too abrupt, too friendly or includes inappropriate subjects for discussion. It may also include failure to offer gowns, failure to offer an adequate explanation regarding an examination, or having physician contact with a patient which is inappropriate but cannot be determined to be sexually motivated or improperly motivated. (Submission of the College, paragraph 31)

Under Rule 171, the Conduct Review Committee shall inform the complainant and the third-party physician complained against of its opinion and may:

- make recommendations, set expectations and issue a warning to the member with respect to the conduct of the member
- cause its opinion or decision on a matter of general application to the profession to be communicated to the members of the College without identifying the complainant or member physician
- refer the matter back to the council with a recommendation for appointment of an inquiry committee, if warranted by the unforeseen emergence of new information.

Conduct reviews were established as a result of recommendations made in the 1992 report to the College entitled Crossing the Boundaries: The Report of the

Committee on Physician Sexual Misconduct (1992). Recommendation No. 59 of that Report provided in part:

> The other tool we recommend the College use as an instrument of informal resolution is a meeting which we will refer to as a 'conduct review.' The Conduct Review Committee … should include one lay member of Council and one College member who practices in the same area of specialty as the physician who is the subject of the review. A physician member of Council should be included as well. It is important to include the lay member for two reasons:
>
> (a) the committee will benefit from having the perspective of a non-physician in the assessment of the situation, the physician's conduct and the impact on the patient; and
>
> (b) the complainant, and the public generally, are likely to have more confidence in a process which is not managed entirely by physicians.
>
> … The primary focus should always be on education and prevention. Minutes should be kept and a report of the committee's conclusions put in writing and given to the physician and patient. Because this report will remain on the physician's College file, he or she must given the opportunity to respond to it, in writing. If the physician responds, that response will also be kept on file ….
>
> Because evidence is not taken under oath and there is no opportunity for cross-examination, and also because the focus should be on remedial action, no disciplinary action should be permitted to be taken against the physician as a result of the conduct review. In cases where the allegation is serious and appears that it may be true, it will be frustrating if the College is unable to take action. But in cases where the complainant is unwilling to participate in a formal hearing, the alternative may be to do nothing at all. If complainants who would otherwise be unwilling to come forward at all will at least agree to this informal process, the College has the opportunity to bring the allegation to the attention of the physician, hear the physician's response, and issue any appropriate warnings.

The College's practice with respect to conduct reviews appears to follow the 1992 recommendations quite closely. It is noteworthy that these recommendations did not include publicizing conduct reviews.

The College explains in its submissions that a "conduct review is one of the peer review procedures used by the College in certain circumstances. The main purpose of a conduct review is prevention of similar complaints in future and to improve the quality of the professional standards of medical practice in British Columbia. It does not necessarily equate to any finding of fault." (Submission of the College, paragraph 15) Both the College and the third-party physician emphasize the fact that the process is not

an adjudicative one and thus does not provide for the usual procedural safeguards associated with an adjudication. They also emphasize the confidential nature of the proceedings:

> No procedural protections are afforded the physician who is the subject of a conduct review. The Conduct Review Committee cannot and does not find facts. Given the forum, the physician accepts, for the purposes of the review, most of the truth of the complaint, even in cases where there is significant disagreement on the facts. This is because the complaint and the physician's reply are addressed in a non-adversarial manner. The physician has no right to cross examine the complainant, nor to call evidence in his defence, and the testimony of the participants is not taken under oath.
>
> The physician agrees to participate in the conduct review process on the understanding that the process will be strictly confidential, given he is foregoing many procedural rights that protect his legal interests. A physician generally, and the Third Party in particular, approaches the conduct review as a peer review, and does not contest the allegations made or the summaries provided by the complainants. The peer review process mandates that the physician assume the truth of the allegations, and not approach the review as an adversarial process. In exchange, the physician is diverted out of the disciplinary process, and participates in an educational and remedial meeting that inquires into the nature of the physician's conduct; it is an educational process. Given this, the physician leaves unanswered allegations that may be untrue, and thus the potential for prejudice to his interests is great. (Submission of the Third-Party Physician, paragraphs 16 and 17.)

Similar submissions were made by the CMPA, which argues that conduct review proceedings "are replete with confidential, personal information in respect of both the complainant and the physician. Such information often relates to issues of medical care of patients, the physician's response to such care and details of how the physician conducts his or her practice. The information which is imparted is not tested by cross-examination or otherwise subject to the usual rules respecting admissibility of evidence." (Submission of the CMPA, page 5).

In my view, the fact that a conduct review does not result in a finding of fault is a highly relevant factor to be taken into account favouring the non-disclosure of the records in dispute in this inquiry.

From the College's perspective, peer review proceedings must be confidential to be workable. Because it is a confidential process which facilitates co-operation and full participation by physicians and a willingness on the part of the third-party physician to accept advice, and which is undertaken without the procedural protections associated

with, for example, a disciplinary inquiry, disclosure of information relating to the conduct review process to the public would essentially "destroy" the peer review process. (Submission of the College, paragraphs 37 and 38)

In 1993, the Ethical Standards and Conduct Review Committee addressed 72 complaints against 55 physicians and in 1994 the same number of complaints against 44 physicians. (Submission of the College, paragraphs 11 to 13) In 1994 this Committee carried out 25 conduct reviews concerning 21 physicians; in 1995, 28 conduct reviews concerned 10 physicians; and in 1996, 13 conduct reviews dealt with 8 physicians. (Submission of the College, paragraph 16) Thus it is evident, based on these data, that the third-party physician in this inquiry has been involved in a statistically-significant number of 17 conduct reviews. Assuming for the moment that his conduct reviews occurred in the three calendar years, 1994 to 1996, his total of 17 comprised about 25 percent of the total number of 66 during those years.

FIPA submits that the argument that physicians will be less willing to cooperate in the complaint and conduct review process "is without merit or foundation. Surely the over 8,000 physicians in this province who have not been the subject of legitimate and multiple complaints of sexual misconduct, would welcome the 'glare of public scrutiny' being focused on this very small minority who have the potential to bring the profession into disrepute." (Submission of FIPA, paragraph 51)

The College submits in response to FIPA that it is inappropriate and discriminatory to distinguish, as FIPA has done, among various forms of physician misconduct, claiming that there is no "substantive argument which can be made on the basis of public interest." (Reply Submission of the College, paragraph 15)

In terms of evaluating the importance of conduct reviews, the following judgment of the CMPA is relevant: "A conduct review is not a proceeding that deals with the most significant or serious complaints that are deserving of disciplinary action." Further, conduct reviews "tend to deal with less significant complaints regarding a physician's conduct...." (Submission of the CMPA, pp. 4, 7)

In light of what is known about the allegations made against the third-party physician in this inquiry, and the insignificant number of disciplinary proceedings that the College brings to completion each year (less than ten in recent years), the Conduct Review Committee and the College clearly made a judgment that the various allegations against the third-party physician in this inquiry did not merit full disciplinary proceedings.

The Nature of Voluntary Undertakings by Physicians

The College states that undertakings by physicians contain personal information concerning a member's practice or personal circumstances. They are entered into on a voluntary basis in a variety of circumstances. The College accepts undertakings where it

determines that they are appropriate in the circumstances. (Submission of the College, paragraph 39)

> Undertakings provided by a member to the College are the result of mutual agreement between the College and the member. They rest upon the physician's willingness to cooperate and accept restrictions on practice. They are obtained in limited circumstances and are monitored by the College in the public interest. Undertakings are most frequently obtained by the College where there are medical problems experienced by the physician, sometimes substance abuse or stress related, which are either self-reported, reported as a result of intervention by colleagues or pursuant to the mandatory reporting provisions of the MPA. Such cases do lend themselves to disciplinary proceedings for the purpose of imposing conditions on practice. Physicians provide voluntary undertakings to withdraw from practice or to limit their practice (e.g. by relinquishing prescribing privileges if there is substance abuse problems). The College monitors compliance with the undertakings through a variety of means, including notifying the Medical Services Plan, hospitals in British Columbia, Bureau of Drug Surveillance, colleagues, etc. Undertakings, in appropriate circumstances, allow the College to deal expeditiously with physicians in the public interest. They facilitate a process which encourages physicians in personal difficulties to accept assistance and cooperate in addressing difficulties which, if unadvised, could pose a risk to public safety or interest.

In a limited number of instances, the College may accept voluntary undertakings while a physician is under investigation or awaiting a disciplinary proceeding. These instances are uncommon as the College, since July, 1993, has had the legislative power to impose interim conditions or interim suspension pursuant to section 59 [formerly s. 50.6] of the MPA. In imposing such conditions the College must be able to convince the courts that sufficient threat to public interest or safety exists to justify them. Where, on the basis of legal advice, the College concludes that it cannot demonstrate such a threat or risk, but where it wishes, pending completion of an investigation or disciplinary hearing to take precautionary measures, it may be able to do so only with the cooperation of the physician, i.e. by obtaining voluntary undertakings. If such undertakings are obtained, there is monitoring by the College to ensure compliance. The public interest is addressed through the monitoring process. To address the examples used by the Applicant, if the physician has undertaken not to conduct a particular type of procedure, the College is in a position to monitor this undertaking by reviewing appointment books, informing clinic personnel, notifying MSP, and requiring the presence of a chaperone and patient signatures confirming same. (Submission of the College, paragraphs 40 and 41)

The College opposes the disclosure of voluntary undertakings as contrary to the public interest and the third-party physician's expectations of confidentiality. The College also says that undertakings most frequently relate to a physician's health or practice. Disclosure of the undertaking could have the same punitive effect as sanctions imposed after a formal disciplinary hearing, which would deter physician cooperation in the early establishment of precautionary measures. (Submission of the College, paragraph 42) The third-party physician adds that an undertaking "may only become a matter of public record once it is incorporated into a formal resolution by Council. Until that time, the agreement remains private":

> The voluntary undertaking is an agreement between the College and the physician that the physician will abide by certain restrictions on his practice. The undertaking may be used during an investigation of a complaint if the College has a concern about an aspect or aspects of the physician's practice. The undertaking may only become a matter of public record once it is incorporated into a formal resolution by Council. Until that time, the agreement remains private. Public disclosure would lead to an unfair assessment of the physician's practice by the public because the undertaking would be published without background as to why the physician has agreed to enter into the undertaking, and a context in which to place the undertaking. Further, because the physician enters an undertaking on the understanding that it will remain confidential, no such undertaking should be disclosed to the public. (Submission of the Third-Party Physician, paragraph 28)

The CBC contends that the disclosure of voluntary undertakings would have the effect, in the public interest, of ensuring "that the undertakings are not breached" and would reinforce confidence among members of the public that the College is properly carrying out its complex mandate to serve and protect the public. (Reply Submission of the CBC, p. 5) The College submits that "[i]nformation regarding conditions or restrictions on the third party's practice has been disclosed to the public and the third party's practice has been and continues to be the subject of ongoing monitoring and review by the College." (Reply Submission of the College, paragraph 5)

My conclusion on the appropriateness of disclosing any undertakings that exist in the circumstances of this inquiry will depend upon my detailed review of the records in dispute and the application of the relevant sections of the Act.

The Accountability of the College under the Act

The College submits that it is already accountable to the Ombudsman and the Legislature, which should be the forum for any concerns about its fulfillment of its mandate to protect the public interest:

> It is not, with respect, appropriate to challenge the College's Rules, policies and procedures regarding its peer review processes and disclosure of same through the vehicle of the [*Freedom of Information and Protection of Privacy*] *Act*, the purpose of which is not to fundamentally change the nature and function of the processes of self-governing bodies. (Submission of the College, paragraph 55)

The most appropriate and clear-cut response to this assertion, in my view, is to quote section 2 of the Act:

> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
> ...
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.

The purpose of the Act and the role of the Information and Privacy Commissioner could not be stated in a more straightforward manner. As a public body under the Act, and subject to its governing legislation, the College is not the final arbiter of an applicant's entitlement to information in College records at issue in an inquiry like this one. (Submission of the College, paragraph 61; and Submission of FIPA, paragraph 25 to 29; see also the Reply Submission of the CBC, pp. 6, 7, 8, 9) Even if, as the College claims, it is "in the best position to determine whether documents should be disclosed in the public interest," that is not what the Act ultimately stipulates. (Submission of the College, paragraph 100)

The College submits that it is the application of various sections of the Act "to specific facts which is the subject of review in this inquiry, not the College's processes and the general nature of public interest...." It does admit that "it is certainly within the Commissioner's jurisdiction to review what information the College discloses under the Act...." (Reply Submission of the College, paragraphs 7, 15) As the CBC states, the "very fact that the College is subject to the Act suggests that the legislators thought it appropriate that the College not be the sole arbiter on the question of confidentiality of documents." (Reply Submission of the CBC, p. 10) The College is not the final arbiter on these matters, and it is definitely not "outside" my jurisdiction as the Commissioner to review the College's decision. (Reply Submission of the College, paragraph 7)

I do hold the view that the initial decisions on disclosure of records of any public body, especially a self-governing one, are worthy of significant deference. I also agree that public scrutiny of the College "does not necessitate the disclosure of highly personal information obtained through the peer review process." (Submission of the College, paragraph 68) The CBC submits that the College's argument that "the peer review function would be destroyed is not a reasonable conclusion given the power of the College to compel the cooperation of its members." (Reply Submission of the College, paragraph 5)

It seems highly relevant to quote the duties and objects of the College as set out in section 3 of the *Medical Practitioners Act*:

> 3(1) It is the duty of the college at all times
>
> (a) to serve and protect the public,
>
> (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

Protection of the public interest is thus a central obligation of the College under the *Medical Practitioners Act*

The President of the College stated in its 1997 Annual Report, p. 7, that the College has "developed a more sensitive and open system" with respect to support for complainants of sexual abuse, but added: "However, the charging standard remains firmly in the hands of the College. We have had many outside pressures over the past several years that seek to criticize and control our processes in these disciplinary matters." The President concluded his written report with a reference to "the increasing intrusion of the *Freedom of Information and Protection of Privacy Act*," in particular its "interference with the actual regulatory functions of the College." (1997 Annual Report, p. 9. FIPA included this report in its submissions to me in this inquiry.) The full statement is as follows:

> The increasing intrusion of the *Freedom of Information and Protection of Privacy Act* has resulted in considerable cost to the College and necessitated the creation of a separate department. More serious, however, is the interference with the actual regulatory functions of the College. The difficulty experienced with peer review occurs when physician responses and expert opinions are carefully couched or are refused because of the possible public disclosure. It is becoming increasingly difficult for the College to obtain authored expert opinions because of this concern.

I continue to quote the President, because his points are directly related to the kind of judgment the Act requires me to make in the present inquiry:

> Very serious problems exist with this legislation, however well intentioned it seemed initially. Peer review by Colleges and hospitals, in order to be effective, must be candid, no-holds-barred self-evaluation and criticism. Documentation has to be protected from indiscriminate disclosure.... I think it is important that the legislature revisits the application of this Act to self-regulatory bodies, particularly when it can be demonstrated that it interferes with processes that protect the public and serve the public interest. We have to be able to do our job.

This particular inquiry brings a critical focus to the College's various disciplinary processes. A member of the public may well ask whether the protection of the public interest is not too important to be left solely to the discretion of the College itself. It seems clear that the College wishes to be the ultimate arbiter of what is in the public interest when it comes to monitoring the behaviour of its members. For the present at least, the Act provides another check on this important role.

I can perhaps be forgiven for including as well, from the College's 1997 Annual Report, the following statements by the Registrar of the College, T. F. Handley, since it may help readers of this Order to understand the perspective of the leadership of the College when it comes to public scrutiny of its activities:

> My report deals with two issues that have been most outstanding for me. The first issue concerns the application of the Freedom of Information and Protection of Privacy Act (FIPPA) to professional regulatory bodies, which has had an incredible impact on the College. In terms of the ratio between costs and benefits arising from the College's involvement, this legislation must surely be one of the most extravagant attempts to achieve an ideal....
>
> There is increasing interference with investigative processes... The integrity of peer review processes is endangered by the potential for their reports to be obtained and used for civil litigation purposes. Concern over protection of expert opinions is causing increasing reluctance to provide them.
>
> On the benefits side, these appear to have been minimal. The additional information made available, relative to what would have been otherwise been directly or indirectly available, is usually small, and it is often difficult to see how it could be of much real benefit to anybody. This legislation is due for review by the provincial government later this year. We will be making extensive submissions outlining our concerns. I hope good sense will prevail.

Such remarks illustrate the propensity of the College to serve as both judge and jury with respect to the interests of the general public, if a conflict seems to exist with the interests of the College's members. The CBC's response is that the existence of the Act indicates the intent of the Legislature "that the College's own opinion of the efficiency of its

regulation is not sufficient to remove it from public scrutiny." The judgment of the College cannot "replace the provisions" of the Act. (Reply Submission of the CBC, pp. 5, 8)

The evidence also quoted above suggests a somewhat contradictory approach of the College to the Act in the course of very lengthy submissions in this inquiry, since at the end of its reply submission the College does acknowledge with "respect to its accountability," that the purpose of the Act "is to ensure accountability of the College and other organizations within the parameters of the Act." (Reply Submission of the College, paragraph 18) I agree.

It is also relevant to the accountability of the College to quote the position of the CMPA, which represents physicians in their dealings with the College and the courts: "[w]here appropriate, as determined by the College in its discretion and given its expertise, the College gives publicity to its affairs. This accomplishes the goal sought by the Act in appropriate cases." (Submission of the CMPA, p. 10) The Act ultimately subjects the initial decisions of the College to review by the Information and Privacy Commissioner, as in the present inquiry.

The Need for Publicity in the College's Various Disciplinary and Monitoring Processes

The crux of this inquiry concerns the CBC's right to obtain the results of specific conduct reviews, at least in certain circumstances. The College submits that:

> ... the existence of complaints or of non-disciplinary action taken by the College in response to such complaints, including the convening of a conduct review, cannot be taken as a reflection of a physician's current or overall practice, or as an indication of ongoing concerns. (Submission of the College, paragraph 22)

I accept the College's important submission that conduct reviews are non-adversarial in nature, and that "the Committee is not in a position to reconcile [conflicting] accounts or make a definitive finding with respect to the matter in issue. Rather its focus is on avoiding the recurrence of a complaint, regardless of whether the merits of the complaint are capable of being determined." (Submission of the College, paragraph 32) The Committee holding a conduct review may recommend further action or review by the College, although I was given no data on how often this has occurred in the recent past. (Submission of the College, paragraph 35) But given the low annual incidence of formal disciplinary inquiries, it seems evident that conduct reviews rarely have that result.

The College fears that disclosure of certain information, such as in this inquiry, may have the paradoxical result of damaging the public interest, "if the result is to impede the College's ability to improve the standards of competence and of ethical conduct of medical practice in British Columbia." (Submission of the College, paragraph 43) Disclosure in its view could further "result in unfair prejudice to the member" and

discourage such processes by the College. (Submission of the College, paragraph 44) I agree with the College that the practice of a physician who has undergone a conduct review may suffer, but that resulting publicity depends, in my view, entirely upon the character or results of the particular conduct review or, in this case, series of reviews. (Submission of the College, paragraph 45)

I reject the following contention of the College, admittedly made in connection with a wide-ranging discussion of section 25 of the Act:

> With respect, in this case, the Office of the Information & Privacy Commissioner is not in possession of, nor does it have the necessary expertise to weigh all of the information required to make a determination of what is in the public interest. That is a determination which should be made only by the self-governing body responsible for ensuring the public interest with respect to the practice of medicine in the province of British Columbia. (Reply Submission of the College, page 3)

With equal respect, that statement flies directly in the face of explicit legislative intent in expanding the scope of the Act in 1993 to include self-governing professions.

The debate over disclosure of records in this inquiry appears to conflict with the following statement by the College:

> There is no question that patients have the right to be assured, to the maximum extent achievable, that they are not at risk in attending a physician in British Columbia. (Submission of the College, paragraph 50)

I agree fully with the College with respect to the following:

> The determination of what information should be made public requires an appropriate balance to be struck between the rights of the public to know, to the extent necessary to ensure their protection, and the rights of the physician to a fair level of protection of privacy and due process according to the specific circumstances of each case. (Submission of the College, paragraph 51)

That is essentially the approach that I am required to take in reaching my decision. My role under the Act is to act as a check on the balance that the College strikes in a particular case, as I proceed to do below by applying the Act.

It is noteworthy that Crossing the Boundaries, the Report of the Committee on Physician Sexual Misconduct, which urged the use of conduct reviews, found it appropriate to protect the privacy of both physician and patient and only circulate summaries of cases that are resolved informally to members of the College "without identifying those involved." (Crossing the Boundaries, p. 105, as quoted in submission in

this inquiry) This report, of course, was largely written and published before the Act had become a reality in this province, but its existence was part of an effort to secure a more public process.

One consideration in the present inquiry is whether the large number of complaints and conduct reviews against this particular physician may trigger a greater demand for public disclosure of various findings, such as the results of conduct reviews, than is normally the case. The position of FIPA is "that in the circumstances of this case where a physician has been the subject of 17 conduct reviews, the third-party physician has greatly diminished privacy rights regarding information related to sexual misconduct allegations against him." FIPA further submits that this particular physician has been found guilty of "the most serious form of unprofessional conduct" and lists the subjects of the conduct reviews that he has undergone. (Submission of FIPA, paragraph 47)

FIPA pointed further to the recommendation in Crossing the Boundaries, p. 117, which states:

> In cases which have already come to public attention, we recommend that the College be quick to restore public confidence in its ability to perform its disciplinary function by clearly detailing its own response to the matter. If the charges are not proved, this must also be publicized. (Submission of FIPA, paragraph 49)

FIPA submits that "restoration of public confidence and the public interest in disclosure for the purpose of promoting public safety clearly outweighs the privacy rights of the third-party physician in these circumstances."

Although the College now follows a more public way of processing the results of complaint handling against physicians in this province than existed previously, it seems likely that public pressure for even more scrutiny, as illustrated by certain submissions in this inquiry, will continue.

The Right of the Public to Monitor the Behaviour of Physicians

FIPA made an argument to the effect that members of the general public "are in as good a position as the College, if not a better position, to monitor the third-party physician's behaviour," in the case of physicians who are the subject of multiple legitimate sexual misconduct complaints. (Submission of FIPA, paragraph 55)

FIPA further argues that the public has the right to know the following about physicians who are the subject of more than one bona fide complaint of sexual misconduct.

(1) the physician who is the subject of complaints;
(2) the number of complaints;

(3) the general nature of the complaints;
(4) any warnings or caution given by the College (Submission of FIPA, paragraph 56)

It can be said, in response to FIPA's list, that the College has disclosed information responsive to items 1 to 3, and information has also been released, with respect to item 4, that emanated from the formal disciplinary process. I would add that one obvious consequence of FIPA's position is that the media would serve as judge and jury in respect of complaints that are the subject of conduct reviews.

It is evident from various submissions, exhibits, and affidavits in this inquiry that the third-party physician in this inquiry has had a lot of publicity during the past several years for both his misbehaviour and alleged misbehaviour with patients. As noted above, it is known that he was suspended from practice by the College in 1994 and the reason for it; it is also known that he has been the subject of seventeen conduct reviews, which is a very large number against one physician. The CBC, the applicant in this case, at least knows what the conduct reviews were about. In my view, whatever the actual merits of the complaints that did lead to conduct reviews, no one could describe the nature of the alleged misbehaviour as trivial.

The fundamental question in this inquiry is what personal information does the general public have a right to know about the behaviour of this physician and, in particular, what voluntary undertakings he may have entered into with the College in order to continue practicing medicine, as he is doing, and what the results or outcomes have been of the conduct reviews involving him. The operational focus is to scrutinize the College's handling of information about this particular physician. What records of the College does the public have a right to access? Precise answers to such queries depend in this instance upon the application of the general purposes and specific sections of the Act to the records and information in dispute, as I now proceed to do.

Section 12: Cabinet and local public body confidences

The College submits that disclosure of the documents pertaining to any conduct review in the form of minutes and correspondence would reveal the substance of deliberations of a committee which is authorized to hold its meetings *in camera*. Relying on one of my earlier orders, Order No. 48-1995, July 7, 1995, the College says that the documents in issue record information including "recorded information that reveals the oral arguments, pro and con for a particular action or inaction or the policy considerations, whether written or oral, that motivated a particular decision." The College further argues that the records at issue set out the positions of the complainant, the member, and the discussion and conclusion of the Conduct Review Committee, and that such records should be protected under section 12(3)(b) of the Act.

With respect to section 12(3)(b), the CBC argues that it "is not applying for release of the substance of the deliberations of a meeting but rather for the results of any conduct reviews, any undertakings and any letters of cautions or any other documents in which a caution or concern was expressed by the College to [the third-party physician] concerning his practice." (Submission of the College, p. 4; see also the Submission of FIPA, paragraph 38)

The College submits that disclosure of the records in dispute would reveal the substance of deliberations of a committee which is authorized to hold its meetings *in camera*. (Submission of the College, paragraph 69; and Order No. 48-1995, July 7, 1995) I agree with the College's position. Rule 171 which is made under authority of the *Medical Practitioners Act*, requires conduct reviews to be held *in camera*. Having reviewed the records in dispute, I agree with the College that it may refuse to disclose these records under section 12(3)(b) of the Act. The results of conduct reviews, as reflected in these records are part of the "substance of deliberations" of a committee of the College that is authorized to hold meetings in the absence of the public.

Section 15: Disclosure harmful to law enforcement

(a): harm a law enforcement matter,

The CBC submits that the records in dispute do not fall within this exception and the definition of law enforcement in Schedule 1 of the Act, because "[c]onduct reviews are separate and distinct from disciplinary hearings. The purpose of conduct reviews is educational and remedial and they do not have the sanction or penalty in the manner contemplated by the Act." (Submission of the CBC, p. 6; Reply Submission of the CBC, pp. 10-11; see also the Submission of FIPA, paragraphs 39 and 40)

The College submits that it has a law enforcement mandate under the *Medical Practitioners Act*, and I find this point incontrovertible. (Submission of the College, paragraphs 73 to 77) Conduct reviews are clearly an inseparable part of this law enforcement process.

I find that disclosure of the records in dispute in this inquiry could reasonably be expected to harm a law enforcement matter as defined in this subsection. (Submission of the College, paragraphs 83 and 84; Reply Submission of the CBC, pp. 10-11)

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

The College is well aware that I have given a restrictive application to this subsection but it raises the issue of procedures, such as peer review, that are allegedly unique to self-governing bodies. With respect to the application of this subsection, I do not agree that conduct reviews and voluntary undertakings "are law enforcement

procedures and techniques employed by the College in its law enforcement mandate." (Submission of the College, paragraphs 85 and 86)

(d): reveal the identity of a confidential source of law enforcement information,

I find that providing information with an expectation of confidentiality during conduct reviews does trigger the possibility of reliance on this subsection. Although a physician in a conduct review knows the identity of the complainant, such personal information should not be disclosed to the applicant. (Submission of the College, paragraph 89) The identity of the complainant can be shielded from outside applicants under the Act by applying section 22, if the criteria in this section are met.

Section 22: Disclosure harmful to personal privacy

The College says that in considering whether disclosure of the records in dispute constitutes an unreasonable invasion of a third party's personal privacy, I should have regard to the following relevant circumstances: the information is highly personal and, if disclosed, has serious potential for irrevocable harm (including financial) to a member and a member's reputation; there is a public interest in ensuring that self-regulating professions be able to conduct complaint investigations and disciplinary proceedings within a zone of confidentiality (subject only to the obligation to provide an applicant with his or her own information); conduct reviews and voluntary undertakings are informal processes and no allegations have been "proven"; the member has not been the subject of a formal legal process, and there has been no finding with respect to unprofessional conduct; both third-party complainants and third-party physicians participate in conduct reviews in the expectation and understanding that they will be confidential; and third-party physicians provide voluntary undertakings on the basis that they will also be kept confidential. Also the College Rules require such proceedings to be carried out *in camera*. (Submission of the College, paragraphs 92 to 96)

The College emphasizes the importance of the confidential nature of the proceedings:

> Physicians who participate in the College's processes do so in the expectation that all information will be maintained in confidence. Confidentiality in such proceedings is crucial to the College's review process and its ability to fulfill its law enforcement and public interest mandate. It would be unfair and prejudicial to all parties involved in that process to now require disclosure of information pertaining to a conduct review. It would damage confidence in the College's processes if proceedings stated to be *in camera*, in confidence and for educational and remedial purposes, were subsequently to be subject to disclosure. (Submission of the College, paragraph 96)

It is the College's view that "[i]nformation pertaining to a member's practice, any voluntary undertakings provided with respect to this practice, or any remedial or peer review processes taken with respect to the member and the member's practice should be maintained in confidence." (Submission of the College, paragraph 91)

The CBC identifies sections 22(2)(b), (e), and (h) as relevant circumstances favouring disclosure of the records in dispute, since it "would promote public health and safety by protecting potential patients against the improper conduct" of the third-party physician:

> It is further the submission of the Applicant that the revelation of any personal information would not be an unreasonable invasion of the privacy of [the third-party physician] as the number of conduct reviews and disciplinary hearings to which he has been subject suggests that his own conduct is unreasonable and that in the interests of public safety his actions should be made known. (Submission of the CBC, p. 9)

Moreover, the CBC points out that the standard under section 22(2)(e) and (h) is "unfair:" "Should [the applicant] be exposed to financial harm or to damage to his reputation, it is the submission of the Applicant that he has brought such damage upon himself by his actions and that in the interests of public safety, it is important the information relevant to his conduct be revealed." (Submission of the CBC, p. 9) The College's response is that the "existence or number of conduct reviews does not constitute a fair basis for determining whether to expose a physician to financial or other harm or damage to reputation." (Reply Submission of the College, paragraph 9)

The reply submission of the third-party physician argues that the information sought by the applicant falls squarely within sections 22(3)(a), (b), and (d) of the Act. (Reply Submission of the Third Party, paragraph 24)

Based on these submissions, I find that sections 22(3)(b) and (d) are not relevant to this inquiry, because the records in dispute were not compiled as part of an investigation into a possible violation of law, nor does the information relate to employment or occupational history as I have construed those terms in previous Orders. Based on my review of the records in dispute, I also find that the personal information of the third-party physician in dispute does not relate "to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" within what I take to be the plain language meaning of those words.

The CBC further submits that the information requested about the third-party physician should be disclosed on the basis of section 22(4)(b). (Submission of the CBC, pp. 9-10) My view is that this subsection is an inappropriate vehicle for promoting disclosure in the circumstances of this particular inquiry.

I have no difficulty agreeing with the College that the records in dispute contain highly personal and sensitive information concerning both the physician and complainants, the disclosure of which would be an unreasonable invasion of their privacy. (Submission of the College, paragraphs 90 and 91) The College's view is that the "substance of any complaint and of meetings at which that complaint was reviewed should be maintained in confidence." (Submission of the College, paragraph 95)

On the basis of section 22(1) of the Act, therefore, I find that disclosure of the records in dispute would be an unreasonable invasion of the third-party physician's personal privacy. It is my view that taking into account all of the relevant circumstances as I am directed to do under section 22(2) of the Act and, in particular, those circumstances relied on by the College, I find that disclosure of the records in dispute would be an unreasonable invasion of the third-party physician's personal privacy. I therefore conclude that the College is required to refuse to disclose the records in dispute under section 22(1) of the Act.

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

The CBC seeks to rely on this section to obtain disclosure and submits that the College has failed to consider it properly:

> It may be that in certain cases, the threshold for disclosure is not met solely by a complaint being filed against a physician. However, the applicant submits that in this particular case, that threshold has been met....

It is the applicant's submission that it is clearly in the public interest that this information be disclosed in order that patients and doctors can make an informed decision with respect to being treated by, and referrals to, the third-party physician. (Submission of the CBC, pp. 12, 13; and Reply Submission of the CBC, paragraph 12)

The College submits that it has met its obligation to consider section 25 by determining that the records in dispute should not be disclosed. (Submission of the College, paragraph 99)

The reply submission of CBC counters as follows:

> It is evident from the number of conduct reviews made of [the third-party physician's] conduct that the record which is considered 'public' does not properly reveal the concerns of the College and that an insight into the results of the conduct reviews and the undertakings will give the public a better appreciation of 1) the conduct of [the third-party physician]; and 2) the degree to which the College is effective in self governing, both of which are in the public interest. (Reply Submission of the CBC, p. 2)

On the basis of the College's own submissions, the CBC suggests that "the conduct review is capable of being a measure for assessing physicians and implementing protective measures away from public scrutiny which has been deemed by the legislature to be in the public interest, and to protect physicians from public scrutiny to the possible detriment of their potential patients." (Reply Submission of the CBC, pp. 2-3)

I accept the submission of the College that it considered section 25 and determined that disclosure was not required. (Reply Submission of the College, paragraphs 2-6) I also accept that section 25 does not require the College to disclose the records in dispute.

Section 2(b) of the Canadian Charter of Rights and Freedoms:

> Everyone has the following fundamental freedoms:
> ...
> (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communications;
> ....

The CBC's contention is that "freedom of information is an element of freedom of expression and the press and is protected by section 2(b) of the *Charter* which may only be limited by such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Submission of the CBC, p. 14)

In this inquiry, the CBC relies on the *Charter* as an interpretive tool and to say that the College must specify which subsections it is relying on to limit disclosure. I do not require a *Charter* argument to expect such specificity. (Submission of the CBC, pp. 15-17) To the extent the CBC argues that the provisions in the Act must be interpreted to reflect *Charter* values and that the College's interpretation and application of sections 12, 15, and 22 does not account for those values, I recognize that, like the courts, statutory decision makers have a general duty to interpret statutes in light of *Charter* values where there is some ambiguity with respect to the meaning or scope of statutory provision. While the importance of freedom of the press and expression as protected in section 2(b) of the *Charter* should not be understated, it must be remembered that it is not an absolute value but is subject to reasonable limits. The Act strikes a balance between rights of access to information and rights to privacy. Even if I assumed that the *Charter* protects a general right to access information, I do not find the CBC's arguments to be persuasive. I would add that I found the College's arguments under section 12(3), 15, and 22 to be sufficiently specific so that the CBC understood the case it had to meet.

10. Review of the records in dispute

Although I have decided not to order disclosure of any of the records in dispute, it may serve a public purpose to describe their contents in a general manner, except to the

extent that such a description would disclose the existence of a record or records in dispute or its contents.

The College has presented me with 25 pages of records in dispute in this inquiry. All of them concern the third-party physician in this case. The first page is entitled "outcome of conduct reviews" and lists the "minutes" of 17 Conduct Review Committee meetings involving the third-party physician; all of them except one, occur on the same weekday in 1995; one occurs in 1996. Each involves a different complainant.

Each minute of a conduct review contains one or two pages in total. Each minute presents a problem, a discussion, and a series of recommendations. They give the opinions of the Conduct Review Committee, in some cases strong opinions, and what it recommended to the third-party physician and any reporting to the complainant in the form of a letter (such letters were not produced for me as being relevant to the access request). Sometimes the minute concludes without any thing that could be called an opinion, but simply a statement of conflicting interpretations of what may have occurred. The usual statement of the complaint and the third-party physician's response gives a sense of what the problem was alleged to be in a particular situation.

The minutes seem to imply that very few of the complainants attended the Conduct Review meeting itself, so one can only assume that the minutes summarize the original letter of complaint to the College. Perhaps for that reason, the minutes are relatively barebones except for making a very precise statement of the allegation and the third-party physician's response.

In conclusion, and despite any sympathy that I may have for the position of the CBC, I nevertheless find that the records in dispute are explicitly protected from disclosure on the basis of sections 12(3)(b), 15(1)(a), and 22(1) of the Act.

11. Order

I find that the College of Physicians and Surgeons was authorized to withhold the records in dispute under sections 12(3) and 15 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the College of Physicians and Surgeons to refuse access to the records in dispute that have been withheld under sections 12(3) and 15.

I also find that the College of Physicians and Surgeons was required to withhold third-party personal information in the records in dispute under section 22 of the Act. Under section 58(2)(c) of the Act, I require the College of Physicians and Surgeons to refuse access to the third-party personal information in the records in dispute under section 22.

I also find that the College of Physicians and Surgeons has acted properly in refusing to apply section 25 of the Act pursuant to the applicant's request. I make no

order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the records is warranted under the Act.

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David H. Flaherty
Commissioner

April 16, 1998