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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 226-1998
April 22, 1998**

INQUIRY RE: An applicant's request to the College of Physicians and Surgeons of British Columbia for records about her deceased husband

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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 December 9, 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 of a decision by the College of Physicians and Surgeons of British Columbia (the College) to sever information from the minutes of the College's Quality of Medical Performance Committee meetings.

2. Documentation of the inquiry process

On April 23, 1997 the applicant submitted a request under the Act to the College for a copy of all minutes of the meetings of the College's Quality of Medical Performance Committee concerning a complaint she had made about the medical services provided by a member of the College (the third party) to her deceased husband.

On June 2, 1997 the College responded to her request by confirming that it was refusing access to all of the requested records under sections 15(2)(b) and 22(1) of the Act.

On June 5, 1997 the applicant submitted a request for review to my Office of the College's decision to deny her access to the records. During the mediation process, the College confirmed that it was also applying sections 12(3) and 22(2)(e), (f), and (h), and 22(3)(b) of the Act to the records. The College agreed, however, to disclose a severed version of the minutes to the applicant. The severed version contained personal information of the third party, so the College sent a notice to the third party requesting

that he consent to the disclosure or make written representations as to why the disclosure should not be made.

On August 18, 1997 the solicitor for the third party made a request for review to my Office of the College's decision to disclose the severed version of the minutes to the applicant. With the consent of all parties, the deadline for the inquiry process was extended to December 2, 1997. I granted a further extension to December 9, 1997 in response to the request of the applicant. I am dealing with both requests for review in this inquiry.

3. Issue under review and the burden of proof

The College is prepared to disclose only a severed version of the minutes, whereas the applicant is seeking access to the entire minutes. The third party opposes disclosure of any information in the minutes.

The issue under review is the College's application of sections 12(3), 15(2)(b), and 22(1), 22(2) (e), (f), and (h), and 22(3)(b) of the Act to all minutes of the meetings of the College's Quality of Medical Performance Committee concerning a complaint the applicant had made about the medical services provided by the third party to her deceased husband.

The relevant sections of the Act are 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(2) The head of a public body may refuse to disclose information to an applicant if the information
- ...
- (b) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record, or
-

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,
 - ...
 - (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,
 -

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under

section 12(3) or 15(2)(b), it is up to the public body, in this case the College, to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

4. The records in dispute

The records in dispute consist of three pages of minutes for three separate meetings of the College's Quality of Medical Performance Committee related to the applicant's complaint about the medical services provided by the third party to the applicant's deceased husband. The College has prepared a severed version of these pages for disclosure to the applicant.

5. The applicant's case

The widow of a patient has begun a legal action in the Supreme Court of British Columbia concerning the death of her husband. She believes that the third party physician is responsible for her husband's death. She states that she is having problems obtaining access to minutes of the College's Quality of Medical Performance Committee. She essentially wants to know why her husband died: "If my husband's death was caused in part by the negligence of the Third Party, I want the Third Party to pay me damages for my loss." (Reply Submission of the Applicant, paragraph 1)

The applicant is not interested in the personal life of the third party, nor how much he knows about medicine: "All I want to know is the details of the treatment he afforded my husband and where he and members of the Committee feel that the quality of that treatment was negligent." (Reply Submission of the Applicant, paragraph 2)

The applicant claims that she has no intention of using the records in dispute in civil litigation and that they are not admissible as evidence in a court proceeding in any event. (Reply Submission of the Applicant, paragraph 3) She does hope to use the minutes to negotiate a settlement of her lawsuit, "if those Minutes indeed indicate that the Third Party was negligent and that the negligence caused the death of my husband." She seeks to avoid the "great expense and difficulty" of retaining a medical expert to review the treatment of her husband and to testify in court. (Reply Submission of the Applicant, paragraph 4)

The applicant believes that the public has a right to know about the quality of medical care it is receiving. She has found that legal assistance is not available for persons with modest incomes to sue for possible negligence by a physician like the third party. Lawyers that she has approached to represent her on a contingency fee basis allegedly concluded that it was not financially worthwhile for them to be involved,

because doctors are vigorously defended against negligence claims. (Reply Submission, paragraph 5 and 6)

Although the applicant has received a one-page letter from the College, dated June 1, 1996 she submits that it did not include the “complete, detailed factual basis” of the Committee’s decision.

6. The College of Physicians and Surgeons’ case

The College is opposed to the disclosure of the records in dispute, because they originated from its complaints investigation and review processes. Since I have recently released Order No. 221-1998, April 16, 1998 with a comparable focus, I will not describe the College’s submissions in great detail. See “the College’s mandate, and the Quality of Medical Performance Complaints Review Process,” (Submission of the College, paragraphs 10 to 22)

The applicant filed a complaint with the College concerning the death of her husband. The Quality of Medical Performance Committee (the Committee) reviewed the matter, including a meeting with the physician in question (the third party): “At the conclusion of its review, the Committee expressed criticism with respect to certain aspects of the medical care provided by the Third Party, and provided advice with respect to future practice.” It also wrote a four-paragraph letter to the applicant/complainant about its findings. (Submission of the College, paragraphs 7 and 8) The applicant now seeks the actual minutes of the Committee’s meetings.

The College submits that the Committee’s primary review function is educational and remedial, although when it “finds cause for serious ongoing concern, it may recommend to the Council of the College further investigation, assessment, or disciplinary action.” (Submission of the College, paragraphs 18 and 19) The College submits that the “parties involved in the complaint process, namely the complainant and member, are fully informed of the Committee’s opinion, the basis of that opinion, and of any recommendations or criticisms of the Committee.” (Submission of the College, paragraph 21) But, according to the College, “it is not contemplated that the College’s complete complaint investigation material, including all Minutes of committees involved in that process be released.” (Submission of the College, paragraph 22)

The College submits that there is a public interest “in maintaining the efficacy of the College’s investigative and complaint review functions. This outweighs the Applicant’s interest in obtaining the specific documents in issue.” (Submission of the College, paragraph 25) Disclosure could harm the peer review process together with the College’s educational and remedial objectives. (Submission of the College, paragraph 26) The College also fears that disclosure could “result in unfair prejudice to the member” (Submission of the College, paragraph 27)

The College's rationale for non-disclosure is essentially repetitive of submissions made in Order No. 221-1998, which do not need repeating here because I have generally accepted their applicability to College records in dispute in cases like this one. I have also reviewed *in camera* submissions and affidavits from the College.

7. The third party's case

The third party objects to the disclosure of the minutes of the Committee on the basis of sections 12(3), 15, and 22 of the Act. I have addressed below his specific arguments on the application of these sections.

The third party points out that a physician is essentially required to appear before this Committee of the College in response to a complaint and is afforded no procedural protections, such as the ability to challenge the facts or the findings that the Committee determines. (Submission of the Third Party, paragraphs 10 and 13) In his view, assuring confidentiality for the information arising out of a meeting before the Committee is thus essential. (Submission of the Third Party, paragraph 14) Section 70(8) of the *Medical Practitioners Act* (the MPA) provides that none of the Committee's members, nor its experts, can be compelled to give evidence in a court proceeding concerning any knowledge gained from a Committee meeting: "Therefore, a defendant physician would not be able to challenge the opinions expressed or the findings made by the Committee or the expert if the such Minutes were to be introduced as evidence in such proceedings." (Submission of the Third Party, paragraph 19) As noted below, these considerations must be weighed in the decision by the College on the disclosure of the records in dispute.

8. Discussion

I wish to indicate my personal sympathy with the goals of the applicant in this case, who finds it hard to understand why she should not be given complete access to the records of the College's committee with respect to the treatment of her husband. I can only indicate to her that my hands are tied by the actual language and requirements of the Act when it comes to the disclosure of records of this sort. The applicant only asks for justice. As I have said before, the Act does not constitute the Commissioner as a court of equity for such purposes.

The College's view on these matters is that the "course of the civil action involving the Applicant and the Third Party" offers "an opportunity for both parties to fully canvass the relevant issues through the use of examination for discovery and examination and cross-examination at trial. In the civil action both parties also have access to the medical chart and to experts who may comment on the medical issues in the case. These are procedures available to both parties pursuant to the common law and Rules of Court." (Reply Submission of the College, paragraph 7)

Section 12(3)(b): 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 ... 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.

Both the College and the third party physician argue that the records in dispute may be withheld by the College under section 12(3)(b) of the Act. Section 12(3)(b) provides that the “head of a local public body may refuse to disclose to an applicant information that would reveal...the substance of deliberations of a meeting of... 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.”

“Local public body” is defined in Schedule 1 of the Act to include a governing body of a profession. By Schedule 3, the College is brought under coverage of the Act. (Submission of the Third Party, paragraph 40) The minutes of the Quality of Medical Performance Committee reveal the “substance of deliberations” of the meetings of the committee as I have identified them in Order No. 48-1995, July 7, 1995 (Submission of the College, paragraphs 23 to 32; and Reply Submission of the College, paragraphs 9 to 11)

The Quality of Medical Performance Committee is a standing committee of the College, which has been established under section 26 of the MPA. The Committee is comprised of six elected physicians and two public representatives appointed by the Ministry of Health. The composition, responsibilities, and procedures of the Committee are set out in Rules 139 to 145 of the Act. These rules are authorized by the MPA. (Submission of the College, paragraph 16)

Both the College and the third party physician point out that Rule 145(b) requires that the discussions in Committee meetings with the complainant and/or the physician whose conduct is being considered “shall be *in camera*.” The third party also points to section 70(7) of the MPA which provides that:

Subject to the *Ombudsman Act*, each person employed in the administration of sections 51 to 66 including a person conducting an inquiry or investigation, must preserve confidentiality with respect to all matters or things that come to the person’s knowledge or in to the person’s possession in the course of the person’s duties except:

- (a) as may be required in connection with the administration of sections 51 to 66 and any rules relating to those sections, or
- (b) as may be authorized by the executive committee if it considers disclosure to be in the public interest.

Sections 51 to 66 deal with the complaint process and the College’s investigative powers. The Quality of Medical Performance Committee was appointed for the better administration of sections 51 to 66, as is clear from Rule 140. (Submission of the Third

Party, paragraph 7) The Committee's mandate is to consider, investigate, report, and advise upon, and, in appropriate cases, to resolve questions or complaints relating to the quality of medical performance of members of College. It seems clear from section 70(7) of the Act that the Committee minutes are to be kept confidential, subject to any exception provided for in the rules relating to the complaint and investigation process. The applicable rule here does not provide an exception but rather reinforces the confidential nature of the proceedings by specifying that "[a]ny discussion with a complainant or a member complained against shall be in camera."

Having reviewed the records in dispute, I agree with the third party that the College may refuse to disclose them under section 12(3)(b) of the Act. In my judgment, the application of this subsection should be the primary decision that the College has to make with respect to the disclosure of the type of records in dispute in this inquiry. See also Order No. 214-1998, February 10, 1998.

I agree with the College that "the issue [in this inquiry] is access to the deliberations and ongoing reviews of the Committee charged with the responsibility of reviewing the quality of medical performance of physicians in the province." (Reply Submission of the College, paragraph 13)

... the College's concern is to encourage uninhibited full discussion by its members without collateral concerns regarding potential civil liability so that the College may fulfill its broader mandate, namely, to serve and protect the public and exercise its powers and responsibilities in the public interest. (Reply Submission of the College, paragraph 14)

Section 22: Disclosure harmful to personal privacy

I have found that the College has the discretion to withhold the records in dispute under section 12(3)(b) of the Act. The College has exercised its discretion in favour of disclosing some of the information in the records and has notified the third party of its intention to disclose part of the records. However, the third party has objected to the disclosure of any of the records and relies on section 22 of the Act. I must now consider the records with a view to determining whether any or all of the information contained in them can be disclosed by the College, or whether such disclosure would constitute an unreasonable invasion of the personal privacy of the third-party physician, such that the College is required to withhold them.

With respect to the application of sections 22(2)(b), (e), (f), and (g) to the records in dispute, the applicant submits that she is not seeking the personal information of the third party but information about his treatment of her deceased husband. Further, even if disclosure of the third party's personal information may expose him to financial or other harm, or damage his reputation, it would not do so unfairly. Finally, she submits that

there is no evidence that the Committee received the information in dispute in confidence or that it was compiled as part of an investigation into a possible violation of law.

The third party submits that disclosure of the records in dispute would be an unreasonable invasion of his personal privacy for the following reasons. He relies in particular on sections 22(2)(e), (f), (g), and (h), and 22(3)(a) and (d) of the Act. The third party also makes the highly relevant points that the minutes contain no “facts,” because the Committee is not able to find facts, and the minutes therefore “consist almost entirely of the personal information of the Third Party.” (Reply Submission of the Third Party, paragraph 8)

Section 22(2)(e): the third party will be exposed unfairly to financial or other harm

The third party submits that disclosure of the minutes themselves will cause him harm unfairly, because the applicant has commenced a civil lawsuit against him for the care of her deceased husband. The minutes contain opinions on this matter:

However, the conclusions and the thought process of the Committee were not and could not have been challenged by the Third Party. The Third Party was not afforded any right to have counsel present, to cross-examine the expert or to challenge the findings of the Committee or the expert; the College assured the Third Party that the meeting was to be an educational one. (Submission of the Third Party, paragraph 25)

I agree with the third party that the risk of unfairly exposing him to financial harm is a relevant circumstance that the head of the College must consider in deciding on disclosure of the minutes in dispute to the applicant.

Section 22(2)(f): the personal information has been supplied in confidence

I have reviewed *in camera* evidence from the third party that he participated in the meetings before the Committee of the College with the expectation that any information supplied would be kept in confidence. This is also in accordance with the rules of the college under the MPA. I agree with the submissions of the third party on this subsection and find that the supplying of information in confidence is a relevant circumstance that the head of the College must consider in deciding on disclosure of the minutes in dispute to the applicant. (Submission of the Third Party, paragraphs 27 to 31)

Section 22(2)(g): the personal information is likely to be inaccurate or unreliable

The third party submits that the minutes are inaccurate and unreliable. My reading of the *in camera* affidavit of the third party suggests that this is a relevant circumstance that the head of the College must consider in deciding on disclosure of the minutes in dispute to the applicant. (Submission of the Third Party, paragraphs 32 and 33; and the Affidavit of the Third Party, paragraphs 12 to 15)

Section 22(2)(h): the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

On the basis of my reading of the *in camera* affidavit of the third party, I agree that the risk of unfair damage to his reputation is a relevant circumstance that the head of the College must consider in deciding on disclosure of the minutes in dispute to the applicant. (Affidavit of the Third Party, paragraph 10)

Section 22(3)(a): the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation

On the basis of the *in camera* affidavit of the third party, I agree that certain specific portions of the minutes, as indicated in the affidavit, must be presumed to be an unreasonable invasion of the third party's personal privacy and withheld by the College. (Affidavit of the Third Party, paragraph 16)

Section 22(3)(d): the personal information relates to employment, occupational or educational history

The third party submits that the records in dispute contain some information about his professional history with respect to his treatment of the applicant's deceased husband over time and that the Committee's opinions about his performance constitute a performance appraisal in the sense that one was withheld from disclosure in Order No. 97-1996, April 18, 1997, p. 5. (Submission of the Third Party, paragraphs 34 to 37)

I find that at most a few sentences of the records in dispute could be construed as concerning the employment and occupational history of the third party and thus must be withheld by the College.

Section 22(3)(g): the personal information consists of personal recommendations or evaluations, character references of personnel evaluations about the third party

The third party submits that the records in dispute "are replete with evaluations of the Third Party and of the quality of care he provided to the Deceased." (Submission of the Third Party, paragraph 38) I find that the information in the records in dispute does not fall within the explicit language of this subsection as I have construed it in previous Orders.

With respect to the application of section 22 of the Act, I find that disclosure of the personal information of the third party would be an unreasonable invasion of his privacy. I agree with the submission of the College that the applicant has failed to meet her burden of proof that disclosure of the minutes in dispute would not be an unreasonable invasion of the third party's privacy. (Reply Submission of the College, paragraph 1)

Section 15(2)(b): disclosure could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased in the record....

I have found that the College of Physicians and Surgeons was authorized to withhold the Committee minutes under section 12(3) of the Act, and required to withhold the minutes under section 22 of the Act. Therefore, it is not necessary for me to consider the parties' arguments in respect of the application of section 15(2)(b) of the Act to the minutes.

9. Order

I find that the College of Physicians and Surgeons of British Columbia was authorized to withhold the records under section 12(3) of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the College to withhold the records under section 12(3).

I also find that the College of Physicians and Surgeons of British Columbia was required to withhold the records under section 22 of the Act. Under section 58(2)(c) of the Act, I require the College to withhold the records under section 22.

David H. Flaherty
Commissioner

April 22, 1998