OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-03

COLLEGE OF PHARMACISTS OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
January 24, 2002

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Summary: The applicant requested records relating to the College's accidental disclosure, in 1997, of prescription-related information of two hospital patients. The College initially failed to conduct a reasonable search for records, but corrected that failure by searching again for records during mediation. The College is authorized to withhold a legal opinion under s. 14. The College is required by s. 22(1) to withhold third party personal information.

Key Words: duty to assist – search for records – solicitor client privilege – exercise of discretion – personal privacy – unreasonable invasion – medical history – employment history – relevant circumstances – public scrutiny.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 14, 22(2)(a), 22(3)(a) and (d).

Authorities Considered: B.C.: Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40.

1.0 INTRODUCTION

[1] The access to information request underlying this decision stems from a 1997 incident in which the College of Pharmacists of British Columbia ("College") mistakenly disclosed to its roughly 3,000 pharmacist-members prescription-related information of two patients. The records in which the patient information was disclosed were sent to pharmacists for the purposes of ongoing professional education. Concerns about this disclosure of medical information of identifiable patients were quickly brought to the College's attention. It quickly wrote to its members and asked them to return their copies

of the information. It apologized to the patients involved and told them how the mistake was being handled.

[2] The applicant, a pharmacist and a member of the College, has clearly devoted considerable energy since the 1997 mishap to finding out what happened and why it happened. On December 18, 2000, he made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to records "pertaining to the accidental release of the Children's Hospital pharmacy records" of the two patients. The request specified a broad range of types of records covered by his request, including communications between the College and its legal counsel, between members of the College's governing council and the College's legal counsel, between members of the council and the registrar of the College, between the registrar and the patients involved in the mishap, and with the hospital involved in the incident. The request also covered "all notes from meetings" between the College's registrar and a variety of individuals or bodies, including patients, members of the College's council, the College's legal counsel and the hospital involved. In addition, the request specifically sought a copy of a February 26, 1999 letter written by the then president of the College. Last, the request asked for an "accounting of costs incurred in **not** [*sic*] retrieving the records" (original emphasis).

[3] On January 16, 2001, the College disclosed a number of records to the applicant in their entirety. Many of these were copies of letters that the applicant had sent to the College, to health officials and to others about the incident. The College also disclosed minutes from three meetings of its governing council. The College refused under s. 14 to disclose a letter sent by the College's legal counsel to its registrar. Under s. 22, the College severed personal information from two hospital pharmacy records pertaining to two patients. These records had been inappropriately disclosed to College members in the 1997 incident mentioned above. The College also severed third-party personal information from two letters the College's president had written on March 11, 1999. It withheld the names and addresses of the letters' recipients and the name of the hospital in which the patients involved had been treated. Also under s. 22 of the Act, the College withheld, in its entirety, a November 27, 1997 letter from its registrar, Linda Lytle, to a College employee. It also applied s. 22 in withholding all of a November 27, 1997 memorandum from Linda Lytle to all College employees.

[4] The College's January 16, 2001 decision letter also said that two of the responsive records "contain information that may affect the interests of another person", such that the College was giving them "an opportunity to make representations concerning disclosure." In a March 2, 2001 letter to the applicant, the College's registrar said the following:

> Following a verbal consultation with one of the third parties and considering the absence of a response from the other third party, I have decided not to release the two records. The information is excepted from disclosure under Section 22 of the Act.

> The records in question contain personal information, including patient names, patient identified numbers, medical diagnosis, physician names, medication records and pharmacist identification codes.

[5] The College's response prompted the applicant to request a review under Part 5 of the Act. His February 16, 2001 request for review related to the College's decision to refuse access to certain records and to sever information from others. The applicant also alleged that it is "clearly a conflict of interest" for the College's registrar to deal with his access request while "dealing with an investigation of which her actions are the subject." The applicant also contended that the College's response was "incomplete and inadequate", based on his knowledge that "at least nine items" were missing from the College's response to his request.

[6] During mediation by this Office under s. 55 of the Act, the College searched again for records and disclosed eight additional records in their entirety. It also disclosed severed versions of the records that the College had withheld entirely under s. 22 of the Act. Because the matter did not settle in mediation, however, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

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

1. Is the College's decision in relation to the applicant's access request invalid because of actual bias or a reasonable apprehension of bias on the part of the College's registrar?

2. Did the College conduct an adequate search for records as required by s. 6(1) of the Act?

3. Is the College authorized to refuse to disclose information under s. 14 of the Act?

4. Is the College required by s. 22(1) of the Act to refuse to disclose third-party personal information to the applicant?

[8] Consistent with Order No. 327-1999, [1999] B.C.I.P.C.D. No. 40, I consider that the applicant bears of the burden of establishing bias for the purposes of the first issue. By contrast, the College bears the burden of proof in relation to the s. 6(1) search issue and, under s. 57(1), the s. 14 issue. Under s. 57(2), the applicant bears the burden of establishing, for the purposes of s. 22(1), that disclosure of personal information would not unreasonably invade the privacy of third parties.

3.0 DISCUSSION

[9] **3.1 Mediation Material** – Both parties' submissions in this inquiry contain material that was either generated during the course of mediation by this Office or

material that discloses information relating to mediation by this Office. The College's submissions, for example, included several records that were created during mediation. I refer here to records found at Tabs H through L of the College's initial submission, as well as several records found under Tab M of its initial submission. Further, the first affidavit sworn by Linda Lytle, on behalf of the College, refers in a number of places to communications from this Office during mediation. The applicant's submissions also refer to mediation material or communications.

[10] This Office's published Policies and Procedures clearly state that such mediation-related information or material must not be provided to me in an inquiry without the consent of all parties. This statement is also found in the Notice of Written Inquiry that this Office sent to the parties. Neither party has consented to the other's use of mediation material. Accordingly, I have ignored all mediation-related records, and all information relating to or generated during the course of mediation by this Office, in arriving at my decision here. My decision is based only on the evidence and argument properly before me in this inquiry. This is an appropriate occasion to remind all inquiry participants – especially public bodies represented, as here, by legal counsel – to adhere to this rule regarding mediation material and information.

[11] **3.2 Bias Allegation** – The applicant argues, in essence, that the College's registrar, Linda Lytle, should not have decided the applicant's access request because she was somehow involved in, or connected with, the 1997 disclosure of patient information. Although the applicant refers to this as a "clear conflict of interest", he essentially argues that Linda Lytle is either actually biased, or that there is a reasonable apprehension of bias, on the basis of her alleged involvement in the 1997 incident. For its part, the College says this situation is indistinguishable from that in Order No. 327-1999. In that case, I decided that an individual is not disqualified from deciding whether to give access to records under the Act merely because he or she is also an employee of the public body to which the access request has been made.

[12] There is no doubt that Linda Lytle, as the College's registrar, had some involvement in dealing with the aftermath of the 1997 incident. There is no suggestion or evidence, however, that she was in any way personally implicated in the accidental release of patient information. Indeed, the material before me clearly shows that she was not involved. Rather, she was involved in trying to correct the situation, by recalling the records and by contacting the families of the patients involved. She also had related dealings with various other College employees, the College's lawyer, the hospital involved in the incident and a variety of organizations and individuals after the fact.

[13] Although this situation is not as close as the College contends to the circumstances before me in Order No. 327-1999, I am nonetheless not persuaded that Linda Lytle's involvement, as the College's registrar, in responding to the 1997 situation would lead a reasonable, fair-minded and informed person to have a reasoned suspicion

that Linda Lytle was not impartial in deciding the applicant's access request. I am, therefore, not persuaded that the decisions under review here are tainted by any actual or reasonable apprehension of bias.

[14] **3.3 Adequacy of the Search for Records** – Section 6(1) of the Act requires the College to "make every reasonable effort" to assist an applicant by responding "openly, accurately and completely" to an access request. Although the Act does not impose a standard of perfection, it is well established that, in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that were not searched, with reasons for not doing so. The evidence should also indicate how the searches were done and how much time public body staff spent searching for records.

[15] As I noted above, the College did not, at the time it first responded to the applicant, disclose all responsive records. The College acknowledges that it later discovered eight responsive records, which it has disclosed to the applicant. At paras. 25 and 26 of her affidavit, Linda Lytle deposed as follows regarding her search for responsive records:

> 25. When the incident first occurred in the fall of 1997, I started a College file in relation to it. I kept this file in my office since I was handling the matter. I placed all correspondence and other documentation pertaining to the incident into this file to the best of my ability. In addition to my file, many of these documents were duplicated and placed in other applicable College files. For example, Minutes of Council Meetings addressing this issue would be placed into the file in my office, but would also be placed into the general College file where all Council Minutes are normally stored. Because of the number of files in which the materials could be stored, some documents were not included in the file in my office.
>
> 26. In response to the initial FOI request (Exhibit "C"), I reviewed the file in my office and all other College files that I could think of at the time that might contain the relevant material. I extracted all of the information. At the time I sent Exhibit "D", I believed that I had identified, copied and provided all of the relevant College documents to the Applicant.

[16] As I noted above, the evidence indicates that, during mediation by this Office, Linda Lytle searched again for records and, having found further records, disclosed them (with the exception of records or information in dispute in this inquiry).

[17] At p. 4 of his initial submission, the applicant contends that other correspondence "from the other parties involved" in the 1997 incident ought to exist. He refers, among other things, to a 1997 letter from the College's then president, in which it was said the

College had "notified the manager of the hospital pharmacy from which the inadvertently [disclosed] records were obtained." He also contends that any legal advice the College obtained would, given the seriousness of the situation, likely have been in writing. On this basis, the applicant has concluded that the College must have, in its files, records both from the hospital and its legal counsel. He argues that, given the seriousness of the situation in 1997, it is "incredible" to suggest that the College did not communicate in writing in these respects.

[18] The applicant also argues that, because Linda Lytle reported to the College's governing council, on November 21, 1997, that approximately half of all College members had returned the patient profiles, "some kind of records must exist to allow Ms. Lytle to quote the statistic." The applicant says that, despite having specifically requested records that respond to this aspect of the matter, the College has not provided any records or explained its inability to do so. He makes a related point, at p. 4 of his initial submission, about his request for an accounting of the cost incurred in the attempted retrieval of the patient profiles, again pointing to governing council minutes of November 21, 1997, in which it is said "that approximately $5000 was utilized during the recovery" of the patient profiles.

[19] The College has provided me with evidence that it has identified all possibly relevant files and that it has, having searched those files a second time, found and disclosed all relevant records (subject only to its application of various exceptions under the Act to portions of some of those records). At para. 7 of her second affidavit, Linda Lytle deposed that there are no records dealing with cost estimates or the numbers of profiles returned by College members. She deposed that

> … the numerical and financial estimates were developed using visual estimation of the number of returned forms, along with general estimates of clerical staff time involved with receiving and processing the forms. When the forms retrieval process was halted, the returned forms were destroyed.

[20] This evidence explains to my satisfaction how there came to be references to the numbers of profiles returned, and cost estimates, in the sources the applicant cites.

[21] I am satisfied that, when it first searched for records, the College did not meet the standard required under s. 6(1) of the Act. Only its second search, during mediation of the applicant's request for review, discharged its s. 6(1) obligation. Because the College's efforts fell short in the first instance, I am driven to find that the College at that time failed to discharge its s. 6(1) obligation to conduct a reasonable search for records. In light of the second search, however, I am satisfied that the College later corrected the situation, so no order is called for under s. 58.

[22] **3.4 Solicitor Client Privilege** – The College has applied s. 14 of the Act to all of a letter sent to the College, addressed to the attention of Linda Lytle, by its legal counsel. Section 14 of the Act authorizes a public body to refuse to disclose information

that is subject to solicitor client privilege. Solicitor client privilege protects confidential communications between a lawyer and his or her client that are related to the seeking or giving of legal advice. It is clear from the material before me that the disputed letter was written by legal counsel to the College, that it was confidential and that it contains legal advice. That record is privileged and is therefore excepted from disclosure under s. 14 of the Act.

[23] There is no evidence before me to support any suggestion that the College has waived privilege or that it has failed to exercise, or improperly exercised, its discretion under s. 14 to release the record even though it is privileged. Accordingly, I find that the College is authorized by s. 14 to refuse to disclose this record.

[24] **3.5 Third Party Personal Privacy** – Under s. 22(1) of the Act, a public body is required to refuse to disclose information the disclosure of which would be an unreasonable invasion of personal privacy. I have described above the records from which personal information has been withheld under s. 22. The College puts the applicant to the burden of establishing his entitlement to any of the information withheld under s. 22. It says the information severed from the pharmacy records is covered by the presumed unreasonable invasion of personal privacy under s. 22(3)(a) of the Act, because the personal information "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation."

[25] The College then refers to s. 22(4) as the source of

> … a number of factors to consider to determine whether disclosure is <u>not</u> an unreasonable invasion of personal privacy. The only relevant provision is sub-section (a) which permits disclosure if the third party has consented. In this case, one third party did not consent, and Ms. Lytle did not receive a response from the other third party. We submit that the failure of the second third party to respond means that consent has not been given. Accordingly there is no basis upon which to conclude that disclosure is not an unreasonable invasion of a third party's personal privacy pursuant to this subsection.

[26] The College's reliance on s. 22(4) is misplaced. That section provides that certain disclosures of personal information are considered not to be unreasonable invasions of personal privacy. A public body must, in deciding whether personal information must be withheld, consider all relevant circumstances, including those set out in s. 22(2). As the College's initial submissions later appreciate, the relevant considerations are found in s. 22(2) of the Act, not s. 22(4).

[27] In relation to the pharmacy records, the applicant says it is obvious these are the same patient profiles that were disclosed in 1997 and that prompted him to pursue the issue with the College thereafter. He questions why the College relies on s. 22(3)(a) in withholding this information – ostensibly because, he says, the College has previously "insisted that these documents are not confidential." He argues that s. 22(2)(a) favours

giving him "access to all of the above documents" in order to subject the activities of the College to "public scrutiny".

[28] I see no support in the relevant circumstances as disclosed in the material before me – including as set out in s. 22(2) – that favours disclosing this third-party personal information to the applicant. Even if the applicant is correct in saying that these are the same patient profiles as those disclosed to him and other College members in 1997, it does not follow that he is entitled to receive, once again, sensitive third-party medical information. I find that the College is required to refuse to disclose the personal information that it has severed from these two records.

[29] As regards the two March 11, 1999 letters from the College's president, the applicant acknowledges that s. 22(3)(a) applies to the severed information, but claims that he is entitled to have access to the information in order to subject the College's activities to public scrutiny. For the reasons I have just given regarding the two patient profiles, I find that the College is required to refuse to disclose the personal information it has severed from these two letters.

[30] Although the College initially withheld all of the November 27, 1997 memorandum to one of its employees and all of the November 27, 1997 memorandum to all College employees, it later disclosed severed versions of these records. It withheld third-party personal information, including the identity of the employee to whom the first memorandum was sent and the identities of employees who had been involved in the 1997 disclosure. As regards the first of these records, it was clearly sent to the employee in connection with the College's investigation of what went wrong and that employee's role in the incident. The memorandum itself indicates that a copy was to be placed on the recipient employee's personnel file. I have no hesitation in finding that the personal information in the memorandum falls under the presumed unreasonable invasion of personal privacy created by s. 22(3)(d), since that information "relates to employment, occupational or educational history." I am also readily satisfied that none of the relevant circumstances – including subjecting the College's activities to public scrutiny – supports disclosure of that personal information to the applicant. To the extent that public scrutiny of the College's activities is a relevant consideration here, that objective has already been served by disclosure of the non-personal information in these records.

[31] The same conclusion applies to the November 27, 1997 memorandum to all College employees. That record contains information about identifiable College employees and it relates to their employment history. That personal information falls under the presumed unreasonable invasion of personal privacy created by s. 22(3)(d) and, for the reasons given above, none of the relevant circumstances favour disclosure of this third-party personal information to the applicant.

[32] I find that the College is required by s. 22 to refuse to disclose the third party personal information that it has severed and withheld from these records.

4.0 CONCLUSION

[33] For the reasons given above, I make the following orders:

1. Under s. 58(2)(b) of the Act, I confirm the College's decision that it is authorized to withhold the information that it withheld under s. 14 of the Act; and

2. Under s. 58(2)(c) of the Act, I require the College to refuse access to the personal information that it withheld under s. 22 of the Act.

As I noted above, no order is necessary under s. 58 regarding the s. 6(1) issue addressed above.

January 24, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia