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

Order 02-35

COLLEGE OF OPTICIANS OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
July 16, 2002

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Summary: The applicant, a College registrant, sought access to "an independent record" that the applicant referred to as having been "commissioned" regarding the functions of a College employee and the employee's "discharge of those functions." The College described any such record as a personnel evaluation. The applicant said the requested record was relevant to a judicial review the applicant contemplated against the College regarding disciplinary proceedings initiated by the College against the applicant. The applicant also said it would be in the public interest to disclose the record in order to subject the College's activities to public scrutiny. The applicant also sought ancillary records relating to any such record. The College refused, under s. 8(2)(b), to either confirm or deny the existence of requested records. Since disclosure of the existence of a routine personnel evaluation of a College employee would not unreasonably invade the employee's personal privacy, the College is not authorized to refuse to confirm or deny the existence of the requested record. The issue of whether personal information in any such record must be withheld under s. 22 is not presented in this proceeding.

Key Words: refuse to confirm or deny – existence of a record – records containing third party personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(b), 22(1), 22(2), 22(3).

Authorities Considered: B.C.: Order No. 110-1996, [1996] B.C.I.P.D. No. 36; Order No. 260-1998, [1998] B.C.I.P.D. No. 55; Order No. 316-1999, [1999] B.C.I.P.D. No. 29; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-11, [2002] B.C.I.P.C.D. No. 11. **Ont.:** Order P-213, [1991] O.I.P.C. No. 3; Order P-808, [1994] O.I.P.C. No. 429; Order M-737, [1996] O.I.P.C. No. 114; Order PO-1768, [2000] O.I.P.C. No. 60.

Cases Considered: *College of Opticians of British Columbia* v. *Moss*, [2001] B.C.J. No. 528 (S.C.); *Fulton* v. *College of Opticians of British Columbia*, Supreme Court of British Columbia (May 29, 1998, Vancouver Registry No. A981334).

1.0 INTRODUCTION

[1] The applicant in this case, who is an optician and ophthalmic assistant, is a registrant of the College of Opticians of British Columbia ("College"). She is subject to the regulatory and disciplinary authority conferred on the College by the *Health Professions Act* ("HPA"), the Opticians Regulation, B.C. Reg. 487/94 ("Opticians Regulation"), and the College of Opticians of British Columbia Bylaws ("College Bylaws"). The College had investigated the applicant's conduct in performing services for a patient that the applicant allegedly was not authorized to perform. The College issued two citations against the applicant under the HPA, the Opticians Regulation and the College Bylaws.

[2] The applicant disputed the allegations. She argued that everything she did at the clinic in which she works was supervised by a medical practitioner. This meant, the applicant says, that her actions were authorized under s. 14 of the HPA, which meant the College of Physicians and Surgeons of British Columbia was the authority with jurisdiction over her actions. According to the applicant, this deprived the College of jurisdiction over the matter. The applicant also argued that the College's investigation violated the requirements of natural justice and procedural fairness, as well as specific provisions of the HPA. The applicant's lawyers put the College on notice that a petition for judicial review was being prepared in relation to the College's actions.

[3] In order to support the contemplated petition for judicial review, the applicant's lawyers made a request to the College, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to what the lawyers understood to be an "independent record", commissioned by the College, dealing with the functions of a College employee and the employee's discharge of those functions. The access request was made in the following terms:

> We understand that an independent record was commissioned on the … [employee's] functions and … [the employee's] discharge of those functions. We also understand that the College, and possibly the Ministry of Health, has received and reviewed that record. We believe that the record may bear on the judicial review we are seeking and affect the determination of our client's rights in that review. We also believe it would be in the public interest to disclose the record, so that the College's activities are open to public scrutiny. Accordingly, pursuant to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, we request a copy of the record and all records relating thereto. Such records would include, but not be limited to, the following topics: the record's terms of reference; the task force, committee or other person or body who conducted the review that

> led to the record; and any notes or minutes of meetings in relation to that review or to the record, including meetings of the College's Board of Directors or any of its committees.

[4] This request was also addressed to what is now the Ministry of Health Services, which later told the applicant that, despite a "thorough search", the Ministry was unable to locate any responsive records. The applicant takes no issue with the Ministry's response.

[5] In its response to the applicant, the College characterized her request as a request for access to records relating to an "alleged 'independent record of the Employee's functions and her discharge of those functions'". The College went on to say that it "neither confirms nor denies the existence of the records sought". This prompted the applicant to seek a review, under Part 5 of the Act, of the College's decision. In the request for review, the applicant's lawyers noted that the College had not, in its response, said on what basis it justified its refusal to confirm or deny the existence of responsive records.

[6] Because the request for review did not settle in mediation by this Office, I held a written inquiry under Part 5 of the Act.

[7] Nothing in this decision can be interpreted as confirming or denying the existence of any record requested by the applicant.

2.0 ISSUE

[8] According to the Notice of Written Inquiry issued by this Office, the only issue to be considered is whether the College is authorized by s. 8(2)(b) of the Act to neither confirm or deny the existence of the requested records. The College acknowledges that previous decisions have established that it bears the burden of proof under s. 8(2). See, for example, Order No. 260-1998, [1998] B.C.I.P.D. No. 55, and Order No. 316-1999, [1999] B.C.I.P.D. No. 29.

[9] Both the applicant's request and initial submission in the inquiry, however, mention disclosure of any responsive records in the public interest. In the applicant's initial submission, it is explicitly argued, at para. 41(b), that disclosure is desirable in the public interest. At para. 38 of the applicant's initial submission, the applicant argues that certain British Columbia court decisions support the conclusion that any responsive records should be disclosed "anyway under s. 25 of the Act". The College did not address the public interest disclosure argument in its submissions. After the inquiry closed, I gave the College an opportunity to address s. 25 and it did so. Previous decisions have established that the applicant bears the burden of establishing that s. 25(1) requires disclosure of records despite any other provision of the Act.

3.0 DISCUSSION

[10] **3.1 Preliminary Issues** – I will first deal with a number of preliminary issues that arose during the course of the inquiry.

Is the inquiry moot?

[11] After the parties' initial and reply submissions were received, I sought further representations on a number of issues. I also asked the parties to update me on any developments relevant to the judicial review proceedings the applicant contemplated at the time of the access request. The College told me that it had, since the close of submissions, cancelled the citation against the applicant. According to the College, its action renders the inquiry moot. It argued that continuation of the inquiry process serves no purpose to the applicant, while increasing costs to the College.

[12] The applicant argues that it is irrelevant that there is now no live issue between the College and the applicant. The applicant points out that the Act does not require an applicant to give any reason for making an access request. The applicant says that, in any case, I have the discretion to proceed with the inquiry.

[13] I agree with the applicant on this point. The fact that the prospect of judicial review proceedings between the parties has disappeared does not render any rights under the Act moot. Although the applicant may have had the now resolved dispute in mind in making the request, the validity of that request and the applicant's right to a review of the College's decision, do not stand or fall on the existence of that dispute.

Allegation of bias

[14] The applicant's reply submission for the first time alleged that the College's employee was biased, or in a conflict of interest, in making the decision respecting the applicant's access request. The applicant argued that, because the employee is the subject of any responsive records sought by the applicant, the employee should not have participated in the decision. According to the applicant, any such participation tainted the decision-making process, such that I should order disclosure of any responsive records.

[15] I invited the College to make representations on the bias allegation and it did so. The College argues that the applicant's allegation appears to be based on s. 39 of a set of bylaws that has not yet come into force. The College says the provincial Cabinet has not yet approved that new set of bylaws under the *Health Professions Act*. In any case, the College argues, its employee did not make the decision respecting the applicant's access request. It says the decision was made by the Chair of the College's Board of Directors. The College says the employee only signed the response to the request on behalf of the Chair, who lives outside of the lower mainland, where the College's offices are located. The College concludes by saying that an affidavit sworn on behalf of the applicant in relation to the bias allegation is of no assistance.

[16] The responsibilities of public bodies under the Act include applying provisions that reflect public body and third-party interests. The College was required to apply the Act's provisions to this access request, including provisions that might reflect the interests of the College's employee. In light of the College's explanation of how its decision respecting the applicant's access request was made, I am satisfied that any involvement of the College's employee in the College's response to the access request was not untoward.

Disclosure in the public interest

[17] The applicant argues that any responsive record should be disclosed in the public interest. The applicant's public interest disclosure submissions echo similar arguments in other cases. The applicant appeals, in essence, to the public interest in openness and accountability respecting the College's activities and the activities of its employees. Section 2(1) of the Act expressly acknowledges that one of the Act's purposes is to "make public bodies more accountable to the public" by giving "the public a right of access to records". Section 25(1)(b) of the Act acknowledges the public interest in the compulsory, immediate disclosure of information – without an access request and despite any of the Act's exceptions to the right of access – where it is "clearly in the public interest" to disclose information.

[18] As I have indicated in other cases, it is not enough that a matter is of interest to the public in order to trigger s. 25(1)(b). Certainly, assuming only for the purposes of discussion that responsive records exist in this case, nothing in the material before me suggests that the necessary public interest in compulsory disclosure without delay exists here. Among other things, I am not persuaded that s. 25(1) is triggered on the basis that it is desirable to subject the College's activities to scrutiny through the right of access to information under the Act. As I indicated in Order 02-11, [2002] B.C.I.P.C.D. No. 11, s. 25(1)(b) is more than merely an extension of the broad legislative goals of public body openness and accountability articulated in s. 2(1) of the Act. In this case, s. 25(1) does not require the College to disclose any responsive records that may or may not exist.

[19] **3.2 Refusal to Confirm or Deny Existence of a Record** – The parties have different perspectives on the principles that should be applied under s. 8(2)(b) of the Act, which reads as follows:

> (2) Despite subsection [8](1)(c)(i), the head of a public body may refuse in a response to confirm or deny the existence of
>
> …
>
> (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

Summary of the parties' arguments

[20] The applicant argues that the Act's objectives call for a restrictive interpretation of s. 8(2)(b) (para. 17, initial submission). The applicant also argues that, because any responsive records relate to the discharge of the employee's functions as a College employee and relate to the College's activities, the applicant is not seeking any "personal information" of a third party within the meaning of the Act (para. 18, initial submission).

[21] The applicant argues that various of my predecessor's decisions show that, in s. 8(2)(b) matters, it is necessary to consider whether there is any potential for harm to a "true third party" and to consider the relevant circumstances and any responsive records themselves when making that decision (para. 23, initial submission).

[22] The applicant also argues that the College's activities should be subject to public scrutiny, such that any responsive record regarding the employee's performance is "about those activities" and "not about personal information", and the College should not be able to deny the record's existence (para. 24, initial submission). The applicant says that, because the College employee is "a public officer who plays an important role in fulfilling the College's objects", and has extensive investigative powers such as inspection, search and seizure of records, the employee should not be seen as a true third party for the purposes of the Act's privacy protection provisions (para. 32, initial submission).

[23] The applicant goes on to argue that, even if any responsive record contains personal information, that information is, as contemplated by s. 22(2)(c) of the Act, relevant to a fair determination of the applicant's rights in judicial review proceedings and is in any case covered by s. 22(4)(e) of the Act, so that its disclosure cannot be an unreasonable invasion of the employee's personal privacy (para. 24, initial submission).

[24] Drawing on decisions under Ontario's *Freedom of Information and Protection of Privacy Act – e.g.*, Ontario Order P-808, [1994] O.I.P.C. No. 429 – the applicant argues that a two-stage analysis is appropriate. The applicant argues that a public body must, before being able to invoke s. 8(2)(b), establish that

1. disclosure of the information would unreasonably invade a third party's personal privacy; and

2. disclosure of the fact that a record exists would in itself convey information to the applicant and that disclosure of such information would unreasonably invade the third party's personal privacy.

[25] The applicant contends that, because the College employee is not a true third party under the Act, the first branch of this test has not been met, such that disclosure of any responsive record would not unreasonably invade third-party personal privacy (para. 33, initial submission). Even if there were an invasion of personal privacy, the applicant says, it would not be an unreasonable invasion of personal privacy, since the record would, if it exists, be relevant to a fair determination of the applicant's rights in

the judicial review proceedings (para. 33, initial submission). Further, the applicant argues, it is reasonable for a public officer such as the College employee to be subject to public scrutiny, so as to subject the College to public scrutiny (para. 33, initial submission). Last, the applicant says that, because the applicant has not been given access to any evidence submitted on the second branch of the test, the applicant makes no arguments on that point (para. 33, initial submission).

[26] The applicant also refers to two British Columbia court cases in which a College employee – it is not clear whether the same individual is involved here – has been criticized for failing to provide individuals with information and for misinforming individuals. The applicant refers to *Fulton* v. *College of Opticians for British Columbia* (May 29, 1998), (Vancouver No. A981334), and *College of Opticians of British Columbia* v. *Moss*, [2001] B.C.J. No. 528 (S.C.). According to the applicant, these decisions "inform the scope of the College's disclosure obligations" (para. 37, initial submission).

[27] As regards the appropriate remedy in this case, the applicant says that, if I am satisfied the College was not entitled to rely on s. 8(2)(b), I should preclude the College from applying s. 22.

[28] For its part, the College characterizes the applicant's access request as solely relating to "alleged documents that concern the employment of a third party", "including alleged personnel evaluations" (para. 12, initial submission). I note here that this characterization turns on interpreting the applicant's access request, which referred to an alleged record respecting the employee's functions and discharge of those functions, as encompassing "alleged personnel evaluations" or documents that concern "the employment of a third party". The characterization of any responsive record as a personnel evaluation runs throughout the College's submissions in this inquiry.

[29] The College relies on Order No. 110-1996, [1996] B.C.I.P.D. No. 36, and Order No. 260-1998. It says Order No. 110-1996 "outlines a very similar situation", because the applicant in that case "sought records relating to the employment of an employee of the public body", the applicant had sought the records for a collateral purpose (for use in other proceedings) and the public body relied on s. 8(2)(b). According to the College, at para. 30 of its initial submission, the applicant's request in this case

> … is even more intrusive into the third party's personal information as the Request Letter seeks not only to obtain records relating to the employment history of the third party, but also alleged personnel evaluations of the third party.

[30] The College argues that Order No. 110-1996 and Order No. 260-1998 support its position. In Order No. 260-1998, Commissioner Flaherty agreed, at p. 9, that the factors set out in ss. 22(2) and 22(3) of the Act "inform the interpretation of what constitutes an unreasonable invasion of a third party's personal privacy for the purposes of section 8(2)(b) of the Act".

[31] At para. 20 of its reply submission, the College argues that I should not adopt the Ontario approach mentioned above. It argues that Ontario Order P-808, on which the applicant relies, "represents a high water mark for disclosure in the Ontario legislative scheme" and that it conflicts with the British Columbia cases.

[32] Last, the College contends that, if I find s. 8(2)(b) does not apply, I cannot order any responsive records to be disclosed despite s. 22, as the applicant asks. It says the only relief I can give if I find the College is not authorized to invoke s. 8(2)(b) is to order the College to confirm the existence of records that fall within the applicant's access request.

Applicable principles

[33] Consistent with previous British Columbia decisions regarding s. 8(2)(b), the following principles apply in s. 8(2)(b) cases:

1. A public body that seeks to rely on s. 8(2)(b) must do two things. First, it must establish that disclosure of the mere existence or non-existence of the requested records would convey third-party personal information to the applicant and the disclosure of the existence of that information would itself be an unreasonable invasion of that third party's personal privacy. (See Order No. 316-1999 and Order 02-01, [2002] B.C.I.P.C.D. No. 1.)

2. Sections 22(2) and 22(3) of the Act are relevant in determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b). (See Order No. 260-1998 and Order 02-01.) In my view, s. 22(4) may also be relevant in determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b). (I disagree, however, with the applicant's argument that s. 22(4)(e) applies here.)

[34] As this summary indicated, the Ontario cases do not, in my view, apply to the s. 8(2)(b) analysis. The Ontario decisions have consistently held that, in addition to deciding if confirmation of a record's existence would convey information that would be an unjustified invasion of privacy, the decision-maker should also decide if disclosure of the information in the records themselves would be an unjustified invasion of privacy. See, for example, Order P-213, [1991] O.I.P.C. No. 3, a decision of Assistant Commissioner Tom Wright. See, also, Order PO-1768, [2000] O.I.P.C. No. 60, a decision of Assistant Commissioner Tom Mitchinson.

[35] The second part of this analysis does not apply in British Columbia. The relevant section of the Ontario *Freedom of Information and Protection of Privacy Act* is s. 21(5), which reads as follows:

> A head may refuse to confirm or deny the existence of a record if *disclosure of the record* would constitute an unjustified invasion of personal privacy. [emphasis added]

[36] As the emphasized words indicate, the authority to refuse to confirm or deny a record's existence turns on the determination that "disclosure of the record" itself would be an unjustified invasion of personal privacy. Under our Act, by contrast, s. 8(2)(b) authorizes the head of a public body to refuse to confirm or deny the existence of a record containing third-party personal information if "disclosure of the existence of the information" would unreasonably invade the third-party's personal privacy. Our Act focusses on the impact of disclosure of the existence of information, while the Ontario Act looks at the consequences of disclosure of the requested record itself.

[37] The applicant relies on Order No. 316-1999. Although my predecessor there referred with approval to Ontario Order M-737, [1996] O.I.P.C. No. 114, he went on to apply the two-part test set out above and not the test found in Order M-737.

[38] I will add a few words of caution about the application of s. 22 principles to cases under s. 8(2)(b). On its face, s. 8(2)(b) invites application of the principles found in s. 22. Both provisions, after all, speak to "an unreasonable invasion" of a third party's "personal privacy". As is indicated below, however, in the discussion of relevant circumstances contemplated by s. 22(2), there are differences between the sections.

[39] First, the privacy analysis under s. 8(2)(b) deals with the impact of disclosure of the existence of personal information. Section 22(2) focusses, by contrast, on the impact of disclosure of the personal information itself, not the fact that it exists. The s. 22(2) analysis may, under s. 22(2)(a), entail an assessment, in a case where disclosure of the personal information itself is in issue, of whether disclosure is desirable in order to subject a public body's activities to public scrutiny. But disclosure of the fact that personal information exists does not necessarily raise the same public scrutiny issues under s. 22(2)(a). The s. 22 analysis looks to the impact of disclosure of the personal information itself, while the s. 8(2)(b) analysis in a sense will, in many cases, not mirror the in-depth examination under s. 22.

[40] A second difference between ss. 8(2)(b) and 22, of course, is the fact that the first section is discretionary and the second is mandatory. If s. 22(1) applies to personal information, a public body must refuse to disclose it. Under s. 8(2)(b), however, a public body has the discretion to confirm the existence of personal information even if the public body has decided that the confirmation would unreasonably invade a third party's personal privacy. In light of my conclusion in this case, it is not necessary to consider at this time what factors should guide the exercise of discretion conferred under s. 8(2)(b).

Can the College rely on s. 8(2)(b)?

[41] I have decided, for the following reasons, that the College cannot rely on s. 8(2)(b) in the circumstances of this case. As I affirm below, this does not mean the College must, if a responsive record exists, disclose that record. Indeed, any responsive record of the described kind would almost certainly contain information that is subject to the presumed unreasonable invasions of personal privacy raised under ss. 22(3)(d) and (g) of the Act. The applicant would bear the burden of establishing that the third party's

personal information can be disclosed, despite those provisions, without unreasonably invading third-party personal privacy.

[42] Before turning to the necessary s. 22 analysis, I will first reject the applicant's argument that no "true" third party is involved here. I do not accept the contention that, because the individual involved here is a College employee, no personal information or privacy interests are involved. Nor is it tenable to suggest that, because any responsive record somehow relates, the applicant says, to the College's activities, there is no personal information involved. These submissions are at odds with the Act's provisions (including s. 22) and with previous decisions under the Act.

[43] I have already indicated that s. 22 will assist the s. 8(2)(b) analysis. The portions of s. 22 that are relevant here read as follows:

> **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,
>
> …
>
> (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
>
> …
>
> (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, … .

[44] As I noted above, the College argues that any requested records would "concern the employment of a third party" and relies on Order No. 110-1996 and Order No. 260-1998 as guiding the outcome here. In Order No. 110-1996, Commissioner Flaherty dealt with a request for "a record containing information about a female employee" of the public body. He did not describe what kind of record, or information, was in issue. He did, however, characterize the public body's reliance on s. 8(2)(b) as a refusal "to disclose the extent of any personal information it may have about the employment history of the third party".

[45] This suggests that the access request there was for any and all personnel or employment-related records of an individual, an interpretation that is supported by the following passage from p. 8 of that order:

> The Vancouver School Board essentially refuses to disclose the extent of any personal information it may have about the employment history of the third party on the grounds that it would be an unreasonable invasion of her privacy under section 22(3)(d) of the Act, referring to Order No. 81-1996, January 1, 1996; Order No. 70-1995, December 14, 1995; and Order No. 62-1995, November 2, 1995. (Submission of the Vancouver School Board, pp. 12, 13)
>
> I find that the Vancouver School Board may refuse in its response to the applicant to confirm or deny the existence of a record containing personal information of a third party, because disclosure of the existence of the information would be an unreasonable invasion of that party's privacy.

[46] In this case, by contrast, the applicant requested a specific record that the applicant understood to exist. The applicant did not seek disclosure of, in effect, the entire personnel file of the College employee, as appears to have been the case in Order No. 110-1996.

[47] In Order No. 260-1998, the applicant sought, among other things, information relating to professional liability insurance coverage maintained by lawyers through the Law Society of British Columbia. The Law Society refused, under s. 8(2)(b), to confirm or deny the existence of any related records. It argued that the fact that its insurance department had a file for a specific lawyer is in itself "very sensitive information". It noted that lawyers are required to record any circumstances that might give rise to an insurance claim, even if no claim is made.

[48] My predecessor accepted that the public would nonetheless see the existence of a file for a possible claim "as a negative reflection on a lawyer's competence" (p. 9). Commissioner Flaherty accepted that s. 22(3)(d) was relevant. He also accepted that ss. 22(2)(e)-(h) supported application of s. 8(2)(b). In Order 02-01, I also accepted the Law Society's application of s. 8(2)(b) to the existence of complaint information that did not result in the Law Society issuing a citation against a lawyer.

[49] The situation here differs from those in Order No. 110-1996, Order No. 260-1998 and Order 02-01. The second and third cases accepted that public knowledge of the existence of an insurance claim, a lawyer's report to the Law Society of a possible claim or a lawyer's history of complaints that did not result in citations would negatively and inappropriately injure the lawyer's reputation. It is not clear what personal information was in issue in Order No. 110-1996, but it appears the applicant was seeking sensitive personnel information created other than in the ordinary course.

[50] In this case, the request is for what the College has described in various places as a personnel evaluation. A personnel evaluation would be the kind of record one would expect to exist in many, if not most, employees' personnel files. This would certainly be true, one would think, in the case of a College employee who has statutory responsibilities and powers. Nothing before me suggests that any such evaluation would be anything other than a routine evaluation in the ordinary course of good human resources practices in any organization.

[51] In this light, if the College were to confirm that a personnel evaluation exists, the information so conveyed would not reflect negatively on the College employee at all. It would confirm only that the College has done what many observers would expect it to do, as a statutorily-empowered regulatory body, *i.e.*, to periodically review the performance of one of its employees, who has statutory investigative powers and an important role in the College's discharge of its functions.

[52] One might be tempted to question whether, in this case, disclosure of the existence of such an evaluation would invade the employee's personal privacy at all. In light of the language of s. 22(3)(d), however, I accept that confirmation that a personnel evaluation exists would disclose personal information of an employee that "relates to employment … history" within the meaning of s. 22(3)(d). As I discuss below, the mere fact that a routine personnel evaluation has been done, or exists, in a given case is, in the ordinary course, hardly stigmatizing information. It is, strictly speaking, information that "relates to employment … history", since it confirms that an employee has, as part of her or his employment history, had a personnel evaluation done and that the evaluation exists. It follows, in light of the phrase "relates to employment … history" that confirmation of the existence of such an evaluation, technically, falls under s. 22(3)(d).

[53] I do not, however, accept the College's argument that disclosure of information that confirms the existence of such a record would trigger s. 22(3)(g). That provision applies only where the personal information "consists of" a personnel evaluation. The information that would be conveyed if the College were to confirm the existence of an evaluation is not personal information that itself "consists of" personal information in any actual personnel evaluation, be it good, bad or both. Section 22(3)(g) does not apply.

[54] Section 22(2) requires me to consider all relevant circumstances in deciding whether, despite the presumption under s. 22(3)(d), the information can be disclosed without unreasonably invading the College employee's personal privacy. The applicant argues that the circumstances in both s. 22(2)(a) (public scrutiny of the College's

activities) and s. 22(2)(c) (information relevant to a fair determination of the applicant's rights) favour disclosure. The College did not, in its response to the applicant's request, give any reasons for its decision. It did not, among other things, indicate that it had considered all relevant circumstances, including those set out in s. 22(2). Similarly, the College has not attempted, in its initial or reply submissions, to address the relevant circumstances at all as contemplated by s. 22(2). I will now turn to consider the relevant circumstances that the applicant advances and other possibly applicable considerations under s. 22(2).

Public scrutiny of the College's activities

[55] The applicant argues that, because the College's activities should be subject to public scrutiny, the disclosure of any record that responds to the access request is desirable for that purpose. I suppose one could argue that, if the College were to confirm that it has performed an ordinary-course evaluation of the employee's performance, the information so conveyed would give some assurance that the College is conducting itself appropriately. But I think such an argument carries relatively little weight in the s. 22 analysis specific to this context.

Fair determination of the applicant's rights

[56] At para. 24 of the applicant's initial submission, it is argued that the requested record is relevant to a fair determination of the applicant's rights in the judicial review proceedings that, at the time, were still contemplated. I accept that, at the time, the College's citation against the applicant brought her legal rights into play, but I cannot accept that the requested record is relevant to a fair determination of those legal rights based only on the applicant's bare assertion of relevance.

Unfair exposure to harm or unfair damage to reputation

[57] I have already indicated that, if any responsive record exists, a simple confirmation of its existence would not reflect negatively on the third party. As I said earlier, disclosure of its existence would merely confirm that the College has undertaken an ordinary-course personnel evaluation for its employee. In this light, I do not consider that confirmation of the existence of such a record would unfairly expose the third party to financial or other harm (s. 22(2)(e)) or unfairly damage the third party's reputation (s. 22(2)(h)). These factors do not support a refusal to confirm or deny the existence of any responsive record.

Inaccurate or unreliable information

[58] Similarly, I do not consider that confirmation of the existence of any responsive record would convey inaccurate or unreliable information about the third party. Such a confirmation would merely confirm that a routine personnel evaluation has or has not been done. This factor does not support a refusal to confirm or deny the existence of any responsive record.

Other factors

[59] I consider it is relevant, for the reasons given above, that the record that is said to exist here is of a routine, or ordinary-course, kind. The fact that a personnel evaluation has been performed for an employee – in circumstances that suggest it is nothing more than in accordance with routine good business practice – is not something a reasonable person would find controversial or stigmatizing. The nature of the information conveyed by confirmation of such a record's existence is relevant, in my view, in determining whether disclosure would be an unreasonable invasion of personal privacy. In my view, this factor supports the conclusion that the College cannot rely on s. 8(2)(b).

Privacy issues relating to record's contents are not in issue here

[60] I have already noted that this case does not raise any s. 22 personal privacy issues associated with disclosure of any responsive record. I will emphasize here, however, that nothing in this order can be taken as commenting on whether the College must withhold any responsive record under s. 22 of the Act. Without deciding the issue in any way, I note in passing that some, if not most, of the contents of such a record would almost certainly fall under s. 22(3)(d) of the Act. This would mean that disclosure of the third-party personal information in such a record would be presumed to be an unreasonable invasion of the third party's personal privacy. Assuming the College decided it must withhold such information in any responsive record, the onus would lie on the applicant to establish that the information could be disclosed without unreasonably invading the personal privacy of the third party. Many previous decisions regarding s. 22 speak to the task this presents for an applicant.

4.0 CONCLUSION

[61] For the reasons given above, I find that the College is not authorized by s. 8(2)(b) to refuse to confirm or deny the existence of any requested record and, under s. 58(3)(a) of the Act, I require the College to perform its duty under s. 8 of the Act in responding to the applicant. As a condition under s. 58(4) of the Act, I require the College to, within 35 days after the date of this order (as the term "days" is defined in the Act), provide the applicant with a response under s. 8 of the Act that reflects my finding in this case.

July 16, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia