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

Order F05-18

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

Justine Austin-Olsen, Adjudicator
June 29, 2005

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Summary: The applicant requested copies of a letter sent to a psychologist by the Inquiry Committee of the College of Psychologists of B.C. and the psychologist's reply to that letter. The letter was sent and the reply made pursuant to an investigation following a complaint about the conduct of the psychologist to the College. Although the records contain some personal information of the applicant, this is incidental to what is in substance personal information of the psychologist relating to her occupational history. As such, under s. 22(3)(d), there is a presumption that disclosure of the records would constitute an unreasonable invasion of the psychologist's personal privacy. The applicant provided no evidence to rebut this presumption. The College is therefore required by s. 22(1) to withhold the records.

Key Words: self-regulating professions—complaint investigations—harm to law enforcement—chilling effect—investigative technique—personal information—investigation into possible violation of law—occupational history—subjecting activities of public body to scrutiny—supplied in confidence—unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(a) and (c), 15(2)(b), 22(1), 22(2)(f) and (h), 22(3)(b) and (d), *Health Professions Act* ss. 19(1), 33(5) and 34(1)(b).

Authorities Considered: B.C.: Order No. 39-1995, [1995] B.C.I.P.C.D. No.12; Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-20, [2002] B.C.I.P.C.D. No. 20; Order 03-24, [2003] B.C.I.P.I.D. No. 24; Order F05-13, [2005] B.C.I.P.C.D. No. 14.

1.0 INTRODUCTION

[1] Between August 2002 and October 2003, the applicant made requests for records under the *Freedom of Information and Protection of Privacy Act* ("Act") from the College of Psychologists of British Columbia ("College"). Among other things, the applicant requested copies of correspondence between the College and one of its registrants, a psychologist about whom the applicant had filed a complaint.

[2] In response to the applicant's request, the College disclosed a number of records, some of which were severed pursuant to ss. 15 and 22 of the Act. Further records were released to the applicant in the course of mediation. However, two records remained in issue, and therefore a written inquiry was held under Part 5 of the Act. As the delegate of the Information and Privacy Commissioner ("Commissioner") under s. 49 of the Act, I have dealt with this inquiry by making all findings of fact and law and any necessary order under s. 58 of the Act.

2.0 ISSUES

[3] The issues in this inquiry are:

a) Whether the College is authorized by s. 15 of the Act to sever record 111 and withhold record 114 in its entirety; and

b) Whether the College is required by s. 22(1) of the Act to sever record 111 and withhold record 114 in its entirety.

[4] Section 57(1) of the Act provides that the College bears the burden of proof in this inquiry with respect to the application of ss. 15(1)(a) and (c) and s. 15(2)(b) of the Act. With respect to s. 22 of the Act, s. 57(2) provides that the applicant bears the burden of proving that disclosure of personal information contained in records 111 and 114 would not be an unreasonable invasion of the third party psychologist's personal privacy.

Preliminary objection on scope of inquiry

[5] The issue in this inquiry that was identified in the Notice of Written Inquiry is whether the College is required by s. 22 of the Act to refuse to provide access to records. The Portfolio Officer's Fact Report further elaborates the issue as relating to the College's application of s. 22 of the Act to two records numbered 111 and 114. Record 111 is a letter from the College to the psychologist that contains the questions asked by the College's Inquiry Committee in the course of conducting an investigation following a complaint made by the applicant. Record 114 is a letter from the psychologist with the answers to the questions posed to her by the Inquiry Committee. The applicant, the College, and the third party psychologist ("psychologist") about whom the applicant had complained, all made submissions in this matter.

[6] After the parties in this inquiry filed reply submissions, the College filed an objection to the applicant's reply submissions on the grounds that it raised new facts and issues. The College stated that it had prepared and delivered its initial submissions on the basis of the issue set out in the Notice of Written Inquiry and the Portfolio Officer's Fact Report. The College took the position that submissions should be "confined to the issues as framed by the initiating documents" and set out in its objection letter the specific parts of the applicant's reply that, in its view, should be disregarded. This effectively consisted of almost all of the applicant's reply submission. Not surprisingly, the applicant objected to the College's position and requested that the entire of her reply submission be considered in the course of this inquiry.

[7] It is clear from reading the submissions of the applicant and her response to the College's objection that she feels greatly aggrieved. She has included a great deal of information that, while certainly important to her, is not relevant to the legal question of whether the College properly applied the provisions of the Act to the records in dispute in this inquiry. Without being unsympathetic to the applicant's feelings in this regard, I cannot consider them in making a decision in this case. Similarly, I cannot consider the applicant's requests made in her submissions, and in correspondence to this Office related to this inquiry, for additional records and information from the College.

[8] The College on p. 3 of its initial submission defines the issues in this inquiry as the applicability of ss. 22(1), 22(2)(f) and (h), 22(3)(b), and ss. 15(1)(a) and (c) of the Act to records 111 and 114. On p. 11 of its initial submission the College also refers to s. 15(2)(b) of the Act. Sections 15(1)(c) and 15(2)(b) were not relied on by the College when it initially advised the applicant it was severing record 111 and withholding record 114 from her, but were raised for the first time in this inquiry.

[9] The applicant in her reply submission does in a fashion attempt to address the submissions of the College on the issue of "law enforcement", and so I consider that she had an opportunity respond to the College's arguments on the applicability of s. 15 of the Act. As such, I will consider any relevant submissions the applicant, the College, and the psychologist have made with regard to the application of s. 22 and ss. 15(1)(a) and (c), and s. 15(2)(b) of the Act to records 111 and 114 as described above. I will not consider any facts or issues included in the submissions of any party that go beyond this as they are either not relevant or are beyond the scope of this inquiry.

3.0 DISCUSSION

[10] **3.1 Section 15 of the Act** – The College submits that it was authorized to sever record 111 and withhold record 114 in its entirety pursuant to ss. 15(1)(a) and (c) of the Act, which provide:

> 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,

[11] Schedule 1 to the Act defines the term "law enforcement" as follows:

> **"law enforcement"** means
>
> …
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> …

[12] The College submits that investigations undertaken by the Inquiry Committee in response to complaints by the public constitute "investigations that lead or could lead to penalty or sanction being imposed". The College refers in its submissions to various sections of the *Health Professions Act*, and the Bylaws of the College in support of its submission. The College says at p. 9 of its initial submission that it is clear:

> …from the statutory scheme in which the Inquiry Committee operates and from the factual context of the Applicant's request in this case that the Inquiry Committee deals with law enforcement matters within the definition of the Act and specifically did so in investigating the matter giving rise to the information request under inquiry.

[13] I am satisfied that the Inquiry Committee does have a broad statutory mandate to investigate registrants of the College both in response to complaints that are made by the public or on its own motion under the *Health Professions Act*. Based on its investigation, among other things the Inquiry Committee may choose to take no further action, it may take action necessary to resolve matters between the complainant and the registrant, it may reprimand or take remedial action by consent of the registrant, or, if the registrant does not consent to the reprimand or remedial action, it may direct that a citation be issued and the matter referred to the College's Disciplinary Committee.

[14] The Disciplinary Committee may conduct a hearing and as a result may, among other things, impose a fine, or suspend or cancel the registration of a registrant. Because investigations conducted by the Inquiry Committee could lead to a hearing by the Disciplinary Committee and the imposition of a penalty or sanction of this nature, I am satisfied that complaint investigations by the Inquiry Committee such as the one undertaken in this case qualify as "investigations that lead or could lead to a penalty or sanction being imposed" and as such, are a "law enforcement" matter under the Act. This is consistent with the Commissioner's decision in Order 03-24[1], and the finding made by the adjudicator in Order F05-13[2]. I am also satisfied that records 111 and 114 were records generated in the course of an investigation of the psychologist that was conducted by the Inquiry Committee.

[1] Order 03-24, [2003] B.C.I.P.I.D. No. 24.
[2] Order F05-13, [2005] B.C.I.P.D. No. 14.

[15] **3.2 Sections 15(1)(a) and (c) and Section 15(2)(b) of the Act** – The submissions of the College on the application of these sections of the Act are so intertwined that I must deal with them as a whole.

[16] Although I am satisfied that the College has demonstrated records 111 and 114 were generated as part of a "law enforcement" matter, that is, an investigation of the psychologist by the Inquiry Committee, I am not satisfied that the College has met its burden of proving in this inquiry that there would be a reasonable expectation of harm to a law enforcement matter or to the effectiveness of investigative techniques used if records 111 and 114 were disclosed to the applicant.

[17] On pp. 9 and 10 if its initial submission the College refers to paras. 6, 8 and 9 of the affidavit of Dr. Andrea Kowaz, the Registrar of the College, as

> …confirm[ation] that disclosure can be reasonably expected to harm a law enforcement matter or harm the effectiveness of techniques and procedures currently used in law enforcement in that the effectiveness of the complaint investigation process is heavily dependent on the ability of registrants of the College to make full, frank and candid responses to matters under investigation, usually their professional conduct toward a client. The expectation of confidentiality underlies that willingness to do so.

[18] Dr. Kowaz deposes that registrants are required by the College's *Code of Conduct* to participate in and respond to Inquiry Committee investigations. The thrust of what Dr. Kowaz deposes to in paras. 6, 8, and 9 of her affidavit appears to be that the Inquiry Committee must be able to hold all proceedings in confidence in order for the complaint process to work effectively. Dr. Kowaz states that disclosure of records 111 and 114 would impair the ability of members of the Inquiry Committee to engage in unfettered discussion about their colleagues, and reveal *in camera* deliberations, which she says would result in a chilling effect on the conduct of Inquiry Committee proceedings.

[19] The information contained in these paragraphs of Dr. Kowaz's affidavit is more in the nature of opinion and argument, not evidence, and essentially expand on the argument of the College reproduced above. Much of this, in my view, has no relevance to the applicability of s. 15(1)(a) or (c) generally, and, in particular, it does not provide evidence of how the disclosure of records 111 and 114 in this case would result in a reasonable expectation of harm to the Inquiry Committee's complaint investigation or compromise the effectiveness of investigative techniques.

[20] The College must do more than assert what amounts to a general "chilling effect" argument in order to foreclose access under s. 15(1)(a) to any records generated during an investigation conducted by the Inquiry Committee. The Commissioner's statements on this issue in Order 00-11[3] are clear:

[3] Order 00-11, [2000] B.C.I.P.C.D. No. 13 at p. 8.

> The thrust of the College's case is that disclosure of the information to which it has applied s. 15(1)(a) is likely to have a chilling effect. It will discourage doctors from participating in the College's complaints review and investigation process, since information they provide in confidence will be disclosed. Since confidentiality is at the core of the system, disclosure will harm that system and thus a law enforcement matter.
>
> In my view, the College's argument amounts to an assertion that disclosure of *any* of this information – and the College did attempt to expand its application of s. 15(1)(a) to everything in dispute here – will harm a law enforcement matter. This verges, in my view, on a claim that s. 15(1)(a), as regards the College's activities, is a class exemption for information relating to the College's consideration or investigation of a complaint under the MPA. I disagree. In each case, the College must prove a reasonable expectation of harm to a specific law enforcement matter.

[21] With respect to s. 15(1)(c), the "investigative technique" that the College suggests is at issue is that the Inquiry Committee puts the substance of the complaint investigation to the registrant and asks the registrant to provide any information he or she believes should be considered, as it is required to do under s. 33(5) of the *Health Professions Act*. As noted in Order No. 39-1995,[4] "public bodies cannot use this exception to withhold records under section 15(1)(c) for commonly-known investigative techniques." This is particularly so where the "investigative technique" in question is in fact one mandated by statute. It is the technique, and not necessarily the substance of the information generated by the technique, that is at the core of what is being protected by s. 15(1)(c) of the Act.[5]

[22] The remainder of the College's submission on this issue essentially summarizes the arguments made in paras. 6, 8 and 9 of Dr. Kowaz's affidavit. The College goes on to assert on pp. 10-11 of its initial submission that although "the Applicant's three complaints have been concluded and it could be argued that Section 15(1)(a) no longer has application…the College ought to be able to rely upon Section 15(1)(c) as well". The College then goes on to say, at p. 11 of its submission:

> Both the Applicant's complaints and her information requests to the College under the Act were repeated, overlapping and erratic. That is why the College first sought to rely upon Section 15(1)(a). The Court proceedings underlying the treatment provided to the party to whom the Applicant is related can never be said to be concluded until that other related party achieves the age of majority. It is apparent from the wording and character of the Applicant's information request that she is seeking to litigate or reopen issues the subject of those court proceedings and it is precisely that law enforcement interest that will be impacted.

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[4] Order No. 39-1995, [1995] B.C.I.P.C.D. No.12 at p. 6.

[5] See Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23 at p. 6; and Order 00-08, [2000] B.C.I.P.C.D. No. 8 at para. 165.

[23] It is not entirely clear whether the College means this paragraph to constitute its argument about the applicability of s. 15(1)(c) or if it is expanding on its argument for the applicability of s. 15(1)(a). However, in either case, I find it unpersuasive.

[24] As is the case with the contents of Dr. Kowaz's affidavit, the point made by the College here has no relevance to s. 15(1)(c). There is no argument here, let alone evidence, about how disclosure of records 111 and 114 to the applicant would reasonably be expected to cause harm to the effectiveness of investigative techniques currently or likely to be used in law enforcement.

[25] Similarly, this point has no relevance to the analysis of s. 15(1)(a) in this case. The "law enforcement" matter earlier identified throughout the College's submissions was the complaint investigation process utilized by the Inquiry Committee. While the court proceedings involving the applicant in which the psychologist provided evidence form part of the factual history of how the applicant's complaint to the College developed, it is clearly a separate matter. The court proceedings were an adjudication of issues involving the applicant and the state. The Inquiry Committee proceedings involved a completely separate investigation following the applicant's complaint about the psychologist who gave evidence in the court proceedings. There is no evidence at all that disclosure of records created by the Inquiry Committee in investigating the applicant's complaint about the psychologist would reasonably be expected to harm the "law enforcement interest" that the College identifies as the subject of the court proceedings.

[26] The last point raised by the College in its submissions is that, since the *Health Professions Act* provides no statutory immunity from civil liability that may result from a registrant's compliance with its provisions, s. 15(2)(b) of the Act should authorize the College to withhold records 111 and 114. The College provided no evidence at all about what type of civil liability might attach to the author or a person paraphrased or quoted in records 111 and 114 if they were disclosed to the applicant or how it could even arise.

[27] I find that the College has failed to meet the burden of demonstrating that it is authorized to withhold records 111 and 114 under ss. 15(1)(a) or (c) or s. 15(2)(b) of the Act.

[28] **3.3 Section 22 of the Act** – The portions of s. 22 of the Act relevant in this case provide as follows:

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

[29] In Order 01-53[6] the Commissioner set out the manner in which s. 22 is to be applied in determining whether a public body is required to sever or withhold records on the basis that disclosure would constitute an unreasonable invasion of third party personal privacy. I have applied that same analytical framework in this case in coming to a decision about the applicability of s. 22 to records 111 and 114.

[30] As noted above, s. 57(2) of the Act provides that the applicant bears the burden of proving that disclosure of personal information in records 111 and 114 would not be an unreasonable invasion of the third party psychologist's personal privacy.

[31] **3.4 Do the Records in Dispute Contain Personal Information?** – The threshold question here is whether records 111 and 114 contain personal information and, if so, whose personal information it is.

[32] The College's submission on this issue is simply a statement that "[i]t is trite on a plain reading of the redacted portion of Record 111 and all of Record 114 that they contain 'personal information' within the meaning of the Act."

[33] The applicant in her reply submission at p. 8 states that "if any of [these] records speak of me or my child or alluded to me or my child in any way, then I should see them." I take this essentially to be an assertion that if the records are about the applicant or her child, then, in her view, they contain her personal information and she should have access to them on that basis.

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[6] Order 01-53, [2001] B.C.I.P.I.D. No. 56 at paras. 22-24.

[34] It is my view that both record 111 and record 114 are in substance the personal information of a third party, that is, the psychologist who was investigated by the Inquiry Committee following the applicant's complaint to the College. As I have noted above, record 111 is a letter from the College to the psychologist that contains the questions asked by the Inquiry Committee in the course of conducting its investigation. Record 114 is a letter from the psychologist with her answers to the questions posed by the Inquiry Committee. It is true that some of the information contained in these records is also the personal information of the applicant and of her child, in the sense that some of it is "about" one or both of them. However, the references to the applicant and her child are incidental to the focus of these records, which is the conduct of the psychologist acting in her professional capacity. It would be impossible in these circumstances to separate the incidental personal information of the applicant and her child from the personal information of the psychologist that is contained in these records.

[35] The only question that remains is whether disclosure of this personal information to the applicant would constitute an unreasonable invasion of the psychologist's personal privacy.

[36] **3.5 Presumption of Unreasonable Invasion of Privacy Under Section 22(3) of the Act.**

Section 22(3)(b) – personal information compiled and identifiable as part of an investigation into a possible violation of law

[37] With respect to the applicability of s. 22(3)(b) of the Act, the College submits (at p. 15):

> …[T]he information contained in the redacted portions of Record 111 and all of Record 114 was compiled and is identifiable as part of an investigation into a possible violation of the law within the meaning of Section 22(3)(b) of the Act and that it accordingly must refuse to disclose the information.

The College refers to para. 29 and 31 of Order 02-20[7] in support of this submission.

[38] Order 02-20 dealt with a request by an applicant for the names of individuals who had made complaints against lawyers to the Law Society. In considering the Law Society's submission that disclosure of the names of complainants would be presumed to be an unreasonable invasion of third party personal privacy under s. 22(3)(b) the Commissioner wrote:

> [29] A number of cases affirm that disciplinary proceedings instituted by a self regulating profession acting under statutory authority are law enforcement proceedings for the purposes of s. 15 of the Act. …I accept that, for the purposes of s. 22(3)(b), the Law Society's disciplinary investigations under the *Legal*

[7] Order 02-20, [2002] B.C.I.P.I.D. No. 20.

> *Profession Act* and the Law Society Rules are also investigations "into a possible violation of law" for the purposes of s. 22(3)(b).
>
> [30] The question remains whether the complainants' names were compiled as part of "an investigation into a possible violation of law" undertaken by the Law Society. …
>
> [31] I am satisfied, on the basis of Jean Whittow's evidence, that the name of an individual who complains to the Law Society is personal information compiled as part of an investigation into a possible violation of law. Jean Whittow's evidence supports the view that even the initial review of a complaint is part of an investigation for the purposes of this section. I accept that every complaint made to the Law Society is, to some extent, looked into and that the personal information supplied at the outset, as part of the complaint, is compiled as part of an "investigation". Accordingly, disclosure of the requested information is presumed to be an unreasonable invasion of third-party personal privacy under s. 22(3)(b).

[39] I do not read Order 02-20 as going any further than stating that disciplinary investigations conducted by self-regulating professions may constitute investigations into a possible violation of law. It does not create a class-based exception whereby any and all records of an arm of a public body empowered by statute to conduct disciplinary investigations are presumed to be exempt from disclosure. Even in circumstances where s. 22(3)(b) is found to apply, the presumed invasion of personal privacy thus raised is just that—a presumption that may be rebutted.

[40] That being said, I find sufficient evidence in the particular circumstances of this case that records 111 and 114 were "compiled and…identifiable as part of an investigation into a possible violation of law." The relevant evidence at para. 4 of Dr. Kowaz's affidavit is as follows:

> The Inquiry Committee of the College prepared the full version of Exhibit "A" [which includes records 111 and 114] and delivered it to the [psychologist] in the course of its statutory investigation into a complaint by the Applicant about the [psychologist] according to Section 33 of the *Health Professions Act*. Record 114 is the [pyschologist's] response, which the Inquiry Committee was statutorily obligated to consider under s. 33(6) of the *Health Professions Act*. In the course of its investigation, the Inquiry Committee was investigating alleged violations of the College's Bylaws, which Bylaws are authorized to be created by the *Health Professions Act* as is the College's *Code of Conduct*, the standard for professional conduct as a registered psychologist in British Columbia.

[41] Notwithstanding Dr. Kowaz's evidence as set out above, I should point out that the unsevered portion of record 111 that was provided to the applicant by the College reads in part:

> The Inquiry Committee has completed its review of the information available to date. Since the matter upon which the complaint is based occurred prior to January 1, 2002, it is…subject to the *Ethical Standards of Psychologists (1985)*

> rather than the more recent *Code of Conduct* adopted by the College of Psychologists of B.C. …

[42] Whether the investigation of the Inquiry Committee was based upon an alleged violation of the College's Bylaws and the *Code of Conduct*, or of the *Ethical Standards of Psychologists* (1985), all are authorized under statutory authority, that is, s. 19(1) of the *Health Professions Act*. Order 02-20 suggests this is sufficient to establish that there was "an investigation into a possible violation of law" within the meaning of s. 22(3)(b) of the Act. In addition to the evidence of Dr. Kowaz, it is apparent on the face of records 111 and 114 that they were "compiled and…identifiable" as part of that investigation. As such, I find that s. 22(3)(b) applies to records 111 and 114 and establishes that there would be a presumed invasion of the psychologist's personal privacy if those records were disclosed to the applicant.

Section 22(3)(d) – personal information relates to occupational history

[43] Under s. 22(3)(d) of the Act, there is a presumption that disclosure of personal information relating to employment, occupational or educational history would constitute an unreasonable invasion of third party personal privacy. While the College did not specifically cite s. 22(3)(d) in its submissions, this section creates a presumption which, if applicable and not rebutted by any other circumstances, would require the College to withhold the records. If the Act requires that records be withheld, then I am required to ensure compliance with this requirement regardless of any position on the matter taken by the College.

[44] In Order 02-01[8] the Commissioner examined the application of s. 22(3)(d) in the context of complaint investigations by self-regulating professions:

> [121] I consider that personal information arising from a disciplinary investigation by a regulatory body involving an individual subject to that body's authority is information that relates to the individual's occupational history. Where an individual who is investigated by a self-regulating body such as the Law Society is also employed by someone else, the information may also relate to the individual's employment history.
>
> [122] In arriving at this view, I have considered Order No. 221-1998, [1998] B.C.I.P.C.D. No. 14 where my predecessor expressly held, at p. 29, that information generated by the College of Physicians and Surgeons of British Columbia in the course of its statutory conduct reviews of a physician's practice was not information related to the physician's employment or occupational history under s. 22(3)(d). He found, instead, that the information was, for the purposes of s. 22(1), "highly personal and sensitive information concerning the physician" (p. 29). However, in Order No. 226-1998, [1998] B.C.I.P.C.D. No. 19 – a case involving a review by the College of Physicians and Surgeons of the quality of

[8] Order 02-01, [2002] B.C.I.P.C.D. No. 20.

> a physician's treatment of a patient – he held that some of the physician's information was covered by s. 22(3)(d). I prefer the approach taken in Order No. 226-1998, which is consistent with the one I took in Order 00-11, [2000] B.C.I.P.C.D. No. 13. That case also involved a practice quality review by the College of Physicians and Surgeons. That College review, like the one involved in Order No. 226-1998, was undertaken in response to a complaint to the College and was in the discharge of the College's statutory regulatory role under the *Medical Practitioners Act*.

[45] It is apparent to me from reviewing the records that s. 22(3)(d) of the Act applies to the records in this case. As noted, records 111 and 114 were generated in the course of an investigation of a complaint about the psychologist that was conducted by the Inquiry Committee. Record 111 identifies and questions specific conduct by the psychologist acting in her professional capacity, and record 114 is the psychologist's personal explanation of that conduct. These records contain the substance of the underlying factual material for the psychologist's disciplinary record.

[46] As such, I find that s. 22(3)(d) applies and creates a presumption that disclosure of records 111 and 114 would unreasonably invade the personal privacy of the psychologist.

[47] **3.6 Relevant Circumstances** – Section 22(2) of the Act contains a non-exhaustive lists of relevant circumstances that a public body must consider in determining whether or not disclosure of the personal information would constitute an unreasonable invasion of third party personal privacy. Where applicable, these circumstances may add further weight to a presumption against disclosure created by s. 22(3) of the Act, or may instead weigh against a finding that such a presumption applies.

Section 22(2)(a) of the Act - subjecting the activities of the public body to scrutiny

[48] The applicant makes general submissions that she complained to the College about the psychologist with respect to matters that are or should be a matter of public knowledge. The applicant's submissions generally amount to an argument that the circumstances in s. 22(2)(a) of the Act apply and weigh in favour of disclosure of the records because this would subject the activities of the public body to public scrutiny.

[49] What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy. While I agree with the applicant that the College, and any other self-regulating professional body, is kept accountable in part through public scrutiny of its activities, the records in dispute in this case are not ones that, if disclosed, would enhance this goal. Records 111 and 114 are more directly related to the conduct and, indirectly, the accountability of the psychologist, not the College, something which s. 22(2)(a) is not intended to address.

[50] I find that s. 22(2)(a) of the Act does not apply and has no weight in assessing whether disclosure of the records would constitute an unreasonable invasion of the psychologist's personal privacy.

Section 22(2)(f) of the Act – personal information supplied in confidence

[51] The College submits that the personal information contained in records 111 and 114 was supplied in confidence, which makes s. 22(2)(f) a relevant circumstance to consider. As noted throughout the submissions of the College, the proceedings of the Inquiry Committee are generally conducted *in camera*. The exception to this being, of course, where some form of disclosure of the process is otherwise required such as that provided for under s. 34(1)(b) of the *Health Professions Act*. Section 34(1)(b) of the *Health Professions Act* requires the Inquiry Committee to notify a complainant of its decision and provide the conclusions drawn in the investigation respecting the matters alleged in a complaint. Records 111 and 114 do not fall into this category, that is, the provisions of the *Health Professions Act* do not require the letters or their contents to be disclosed.

[52] The evidence of Dr. Kowaz at para. 5 of her affidavit is that it was always the intention of the Inquiry Committee that record 111 be sent to the psychologist in confidence. Consistent with this assertion, record 111 is addressed personally to the psychologist and marked "confidential." The psychologist in her submissions in this inquiry stated that she believes records 111 and 114 to be "privileged communications between the College of Psychologists and myself." While she has provided no basis for an assertion of a general legal privilege that would somehow apply to all her correspondence with the College, I infer from her statement that she intended her response to the Inquiry Committee (record 114) to be treated in a confidential manner. As such, I am satisfied that the personal information withheld from the applicant in records 111 and 114 was "supplied in confidence" as contemplated by s. 22(2)(f).

[53] I find that s. 22(2)(f) applies and weighs in favour of finding that disclosure of records 111 and 114 would constitute an unreasonable invasion of the psychologist's personal privacy.

Section 22(2)(h) of the Act - unfair damage to reputation

[54] On the applicability of the circumstances in s. 22(2)(h), the College, at p. 14 of its initial submission, "reiterates its submission on the expectation of confidentiality." It goes on to say that disclosure of complaint allegations and responses gives away the relationship between the psychologist and the professional regulator. The significance of this being, the College says:

> The psychologist needs to approach that relationship in a different manner and giving away that relationship and discussion undercuts the dignity of the psychologist/client relationship by revealing a side of the psychologist that the client would never ordinarily see. Once that relationship has been revealed, it might well be impossible for the psychologist to continue treatment with the client

> originating the complaint (which might be moot because that client does not wish further treatment) but just as important is the fact that once disclosed, there is absolutely no restriction on further dissemination. As a result, such disclosure might well unfairly damage the reputation of the Third Party.

[55] I do not find this reasoning persuasive or, for the most part, even relevant. As well, it is not obvious from reviewing records 111 and 114 that disclosure would "unfairly damage the reputation of any person referred to" in them. I find that s. 22(2)(h) of the Act does not apply and has no weight in assessing whether disclosure of the records would constitute an unreasonable invasion of the psychologist's personal privacy.

[56] **3.7 Conclusion on Application of s. 22(1) to Records 111 and 114** – For the reasons stated above, I am satisfied that records 111 and 114 contain personal information that relates to the occupational history of the psychologist. However, the question remains whether in this case the records can nevertheless be released to the applicant without unreasonably invading the psychologist's personal privacy. In my view, they cannot.

[57] The fact that the personal information in the records was "supplied in confidence" as contemplated by s. 22(2)(f) adds further weight to the presumption of unreasonable invasion of third party personal privacy that applies under s. 22(3)(d) and a finding that the records are required to be withheld under s. 22(1). While it is true that the applicant in this case knows the identity of the psychologist and knows that the Inquiry Committee conducted an investigation, it is not clear on the material before me in this inquiry that the applicant is aware of the scope of the investigation that was conducted. As the applicant herself notes, she made more than one complaint about the psychologist.

[58] As noted at the outset, the applicant's submissions in this inquiry were quite wide-ranging, at times going beyond the issues set for consideration. However, I find nothing in the applicant's submissions that would provide a sufficient basis to rebut the presumption of unreasonable invasion of third party privacy that applies in this case and would permit her to meet the burden of proof in this inquiry that is imposed upon her by s. 57(2) of the Act.

4.0 CONCLUSION

[59] For the reasons given above, under s. 58(2)(c) of the Act, I require the College to refuse access to the information it has withheld from the applicant under s. 22(1) of the Act.

June 29, 2005

ORIGINAL SIGNED BY

Justine Austin-Olsen
Adjudicator