Order F07-22

BRITISH COLUMBIA COLLEGE OF CHIROPRACTORS

Michael McEvoy, Adjudicator

November 14, 2007

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Summary: The applicant requested a copy of a letter a chiropractor sent to the College in response to the applicant's complaint about him. The College refused to disclose the letter because it said that doing so would be an unreasonable invasion of the chiropractor's personal privacy. The College is not required to refuse disclosure of the letter. It contains significant amounts of the applicant's own personal information to which she is entitled to have access. Nor would disclosure of the remainder of the letter unreasonably invade the personal privacy of the third party chiropractor. The applicant already clearly knows much of that information and its disclosure is desirable to subject the College to public scrutiny.

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

Authorities Considered: B.C.: Order 01-07, [2001] B.C.I.P.C.D. No. 7; Order 01-19, [2001] B.C.I.P.C.D. No. 20; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-20, [2002] B.C.I.P.C.D. No. 20; Order F03-24, [2003] B.C.I.P.C.D. No. 24; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order F06-11, [2006] B.C.I.P.C.D. No. 18.

Cases Considered: *Baker v. Canada*, [1999] 2 S.C.R. 817.

1.0 INTRODUCTION

[1] This case concerns a request by the applicant for a letter a chiropractor sent to the British Columbia College of Chiropractors ("College"). The letter was the chiropractor's response to a complaint the applicant made against him.

[2] The applicant had complained to the College about a form of treatment she received from the chiropractor for which she says she never gave consent. The College is a self-governing body under the *Chiropractors Act* and is responsible for regulating the chiropractic profession in British Columbia. The College investigated the matter by providing the chiropractor with a copy of the applicant's complaint letter and asking him for his response.[1] The chiropractor wrote the College a letter in answer to the complaint and enclosed the applicant's clinical records.[2] After considering the matter, the College dismissed the complaint and in a letter to the applicant explained that it did so because it did not find any misconduct or incompetence on the part of the chiropractor. The College did not explain the reasons for this conclusion. The letter concluded by characterizing the applicant's complaint as a request for compensation for injuries allegedly caused by chiropractic treatment. That being the case, the College said it had no authority to grant compensation and instead advised the applicant to consult a lawyer if she wished to pursue this remedy.[3]

[3] The applicant then wrote the College requesting a copy of the letter the chiropractor sent to College in response to her complaint. This letter, which is two and a half pages in length, constitutes the record in dispute in this inquiry.

[4] The College refused the applicant's request, stating that its policy was not to release these types of records and that its legal counsel had recommended against it.[4] The applicant requested a review of the decision from this Office. During the course of mediation, the College disclosed a copy of the fax cover page accompanying the chiropractor's letter to the College, as well as the applicant's clinical records, consisting of a patient intake form, a signed consent form, a chiropractic case history, and the chiropractor's written summary of each visit. The College also offered further details on the reasons for its decision to refuse to disclose the letter, in particular, stating that doing so would be an unreasonable invasion of the chiropractor's personal privacy. Specifically, the College relied on ss. 22(3)(b) and (d) of the *Freedom of Information and the Protection of Privacy Act* ("FIPPA") in support of its position.[5]

[5] The matter was not resolved through mediation so a written inquiry was held under Part 5 of FIPPA. This Office invited representations from the College, the applicant and the chiropractor. The College and the applicant both make submissions, while the chiropractor essentially relies on the "position taken by the [College] to be correct".[6]

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[1] College's submission, para. 19.
[2] College's submission, para. 20.
[3] College's submission, para. 21.
[4] College's submission, para. 23.
[5] Counsel for the College's letter to the applicant dated August 15, 2006.
[6] Chiropractor's e-mail to Office of the Information and Privacy Commissioner, August 17, 2006.

2.0 ISSUE

[6] The issue in this inquiry is whether the College is required by s. 22(1) of FIPPA to withhold the record requested by the applicant.

[7] Section 57(2) of FIPPA provides that the applicant bears the burden of proof in this inquiry that disclosure of third-party personal information contained in the letter would not be an unreasonable invasion of the chiropractor's personal privacy.

3.0 DISCUSSION

[8] **3.1 Section 22 of FIPPA**—The parts of FIPPA relevant in this case 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
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> (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,
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> …
>
> (f) the personal information has been supplied in confidence,
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (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,
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> …
>
> (d) the personal information relates to employment, occupational or educational history,

[9] In Order 01-53,[7] the Commissioner discussed the application of s. 22 and I have applied that decision and other decisions from this Office in this case.

[10] **3.2 Does the Record Contain Personal Information?**—In its submission the College sets out its argument as follows: [8]

> The focus of the Record is the conduct of [the chiropractor] acting in his capacity as a health-care professional. It presents [the chiropractor's] personal recollection and explanation of the conduct at issue in the Complaint.
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> In Order F05-18, Adjudicator Austin-Olsen ruled that a letter from a psychologist to the committee within her profession's regulatory body charged with the investigation of complaints was personal information. The Record is a letter from a health-care professional to the committee within his profession's regulatory body charged with the investigation of complaints, and logically, must also constitute personal information.
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> Further, in considering the letter at issue in Order F05-18, Adjudicator Austin-Olsen noted that it contained personal information about the applicant and her child, "in the sense that some of [the information was] 'about' one or both of them. Nevertheless, Adjudicator Austin-Olsen held that,
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> > 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.

[11] The College argues that the same reasoning applies to any incidental personal information about the applicant found in the disputed record.

[12] The applicant's submissions focus on the treatment she received from the chiropractor and the need for him to be held accountable.[9] It would be an understatement to say she is upset by the nature of that treatment. The applicant says in her request for review that she seeks assistance to obtain the chiropractor's letter to the College because it is "…not confidential; it's my report. I want it. I was not allowed to attend this [College] hearing so I need you to help me get his response."[10]

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[7] [2001] B.C.I.P.C.D. No. 56.
[8] College's submission, paras. 30, 31, and 32.
[9] Applicant's submission, p. 6.
[10] Applicant's request for review, p. 3.

[13] I begin with the observation that "personal information" is defined in Schedule 1 of FIPPA as "recorded information about an identifiable individual other than contact information".

[14] I consider the comments of Commissioner Loukidelis in Order 01-19[11] to be helpful in determining whose personal information is in issue when reviewing records. That case concerned an investigation into a workplace tragedy where the investigator took a number of witness statements. One of the questions before the Commissioner was whose personal information was contained within the statements, that of the witness himself or of those people mentioned by the witness. The Commissioner stated:

> A witness's statements about what she or he did - or when or how - are the personal information of that employee, even though they are factual observations about how that person performed his or her employment duties. Similarly, one employee's statements about the where, when and how of another employee's performance of her or his job constitutes the personal information of that other employee.[12]

[15] I have no difficulty finding here that the chiropractor's letter contains personal information about both the applicant and the chiropractor. The letter mainly concerns the chiropractor's response to the applicant's complaint that she did not consent to a treatment he administered. It contains statements about the applicant, the chiropractor's treatment of her, a recitation of things the chiropractor said to the applicant and what the applicant said to the chiropractor. The letter describes what the chiropractor did and how and when he did it as well as detailing the where, when and how of the applicant's actions.

[16] I do not agree with the College's assertion that the reasoning of Order F05-18, applies here. In Order F05-18, Adjudicator Austin-Olsen found that reference to the applicant's personal information was secondary to the focus of the disputed record. She also determined that the personal information of the applicant and her child could not be separated from that of the third party psychologist. The circumstances in this case are quite different. First, the applicant's personal information is a major focus of the record in dispute. Indeed, the record refers extensively to the applicant and what she said and did. Second, it is not necessary for me to make a finding with respect to the separation of personal information in the record in light of the conclusions I reach below.

[17] **3.3 Unreasonable Invasion of Privacy**—The College says that release of the record is presumed to be an unreasonable invasion of the chiropractor's privacy because, first, the record was compiled and is identifiable as part of an investigation into a possible violation of the law and, second,

[11] [2001] B.C.I.P.C.D. No. 20.
[12] [2001] B.C.I.P.C.D. No. 20, para. 27.

because it is personal information relating to the occupational history of the chiropractor.

Investigation into a possible violation of the law

[18] The College submits that:

> Disciplinary proceedings instituted by a self-regulating profession acting under statutory authority are "investigation[s] into a possible violation of law" for the purposes of s. 22(3)(b) of *FIPPA*.
>
> Chiropractic is a self-regulating profession in the Province of British Columbia, with the College as the governing body. As part of its regulatory role, the College is obliged to superintend the practice of its members in accordance with standards articulated in its *Rules* and *Professional Conduct Handbook*, and for that purpose, is statutorily authorized to create and administer disciplinary proceedings.
>
> Under the E&D[13] Committee's process, members who are under investigation following a complaint are provided with a copy of the complaint (or advised of the allegations in the complaint) and required to respond either to the allegations made in the complaint, or to specific questions from the Committee, or both.
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> Within the frame work for such proceedings created by the College Board pursuant to its statutory authority, the E&D Committee is charged with investigating and inquiring into the conduct of a member after receiving a written complaint about that member. The results of an E&D Committee investigation may be summary discipline administered by the Committee, or referral to the College Board for a hearing and possibly more significant discipline, including a fine, a suspension or even cancellation of the member's registration.
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> The Record was created in response to the College's investigation of the Complaint. Specifically, the Record is [the chiropractor's] response to a letter from the Investigating Member advising him that the E&D Committee required his written response to the Complaint.

[19] With respect to s. 22(3)(b), the College argues that the reasoning in Order F05-18 should similarly apply in this case.

[20] Order F05-18 and other orders of this Office have dealt with the question of whether complaint investigations by self-regulating bodies constitute

[13] The College refers here to its Ethics and Discipline Committee.

investigations into a possible violation of the law.[14] What I distill from these orders is that, in particular, I must satisfy myself that:

1. The body in question has the legal authority to investigate the matter complained of,

2. The investigation could result in a finding that a law has been breached, and

3. A sanction or penalty could result from a finding that a breach of the law has occurred.

[21] For the following reasons, I am satisfied that the College compiled the personal information as part of an investigation into a possible violation of the law and the personal information is identifiable as such, so that s. 22(3)(b) applies:

- The College has the legal authority to undertake the kind of investigation which occurred in this case. Section 7 of the *Chiropractors Act* permits the College, with Cabinet's approval, to establish rules to investigate complaints about College members. Under that authority, the College has established rules that govern such investigations.[15]

- Sections 3 and 7 of the *Chiropractors Act* also give authority to the College to set "laws" or standards that govern the conduct of chiropractors. The *Chiropractors Act,* in conjunction with the rules noted above, clearly envisions that an investigation into a complaint about a chiropractor could result in that member being found in breach of the College's "law" or standards.

- Finally, s. 7 of the *Chiropractors Act* establishes sanctions or penalties for violations of these laws. A chiropractor can be fined up to $10,000 and his or her registration suspended or cancelled in the most serious cases.

[22] In this case the College received the applicant's complaint and referred it to its Ethics and Discipline Committee ("EDC"). Under the College's rules the EDC is responsible for investigating and inquiring into the conduct of a member after receiving a written complaint about that member. The EDC can administer summary discipline or refer the matter to the College board for further hearing where more significant discipline of the kind noted above could potentially be imposed. Here, as part of its investigative and law enforcement mandate, the EDC sent the applicant's letter to the chiropractor for a response, following receipt of which, the EDC considered the matter and dismissed the complaint.

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[14] See, for example, an extensive discussion of this issue by Commissioner Loukidelis in Order 02-20, [2002] B.C.I.P.C.D. No. 20.

[15] Alderson affidavit No. 1, para. 5, exhibit B.

[23] I am therefore satisfied that the requested record was compiled as part of an investigation into a possible violation of the law.

Occupational history

[24] The next question is whether the letter contains information about the third-party chiropractor's personal "occupational history" within the meaning of s. 22(3)(d).

[25] In its submissions, the College sets out its position on this issue as follows:

> The Record is personal information arising from a disciplinary investigation by a regulatory body, the College, involving an individual subject to the College's authority, [the chiropractor]. Similar to record 114 in Order F05-18, the Record is [the chiropractor's] personal explanation of specific conduct by him while acting in his professional capacity. It contains the substance of the underlying factual material for his disciplinary record.
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> Accordingly, s. 22(3)(d) should apply to create a presumption that disclosure of the Record would unreasonably invade [the chiropractor's] personal privacy.[16]

[26] In Order 02-01,[17] the Commissioner reviewed the application of s. 22(3)(d) in cases involving self-governing professions and concluded that:

> [p]ersonal 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.[18]

[27] The record in this instance is a letter from the chiropractor to the College arising from the College's investigation of the chiropractor in response to a complaint. In it he recounts, as I described in more detail above, certain of his interactions with the applicant. It therefore constitutes information related to the chiropractor's occupational history and for that reason the presumption under s. 22(3)(d) applies to the third-party personal information in the letter.

[28] **3.4 Relevant Circumstances**—The findings I have made with respect to the s. 22(3) provisions of FIPPA are of course not determinative of whether disclosure of the record in dispute would be an unreasonable invasion of the chiropractor's personal privacy. They only create presumptions that may be rebutted considering all relevant circumstances, including those set out in s. 22(2). Section 22(2) contains a non-exhaustive list of relevant circumstances

[16] College's submission, paras. 42 and 43.
[17] [2002] B.C.I.P.C.D. No. 1.
[18] [2002] B.C.I.P.C.D. No. 1, para. 121.

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.

Supplied in Confidence

[29] The College submits that the chiropractor's letter to the College in response to the applicant's complaint was supplied in confidence:

> It is the standard practice of the E&D Committee to hold chiropractor's [*sic*] responses to complaints in confidence. There is nothing in the *Chiropractors Act*, the *Rules* or the Checklist that requires otherwise. In most cases, the E&D Committee members are the only ones to see a chiropractor's response to a complaint. In this case, it was the intention of the Committee to hold the Record in confidence…In accordance with s. 22(2)(f) of *FIPPA*, the fact that [the chiropractor] supplied the Record in confidence supports the presumption against disclosure in this case.[19]

[30] Dr. Douglas Alderson deposed in this inquiry that, "[g]enerally speaking", investigations are conducted in confidence.[20] Dr. Alderson also proffered the hearsay evidence of Dr. Heather McLeod, the member of the Ethics and Discipline Committee responsible for conducting the complaint in this case. Dr. Alderson states that Dr. McLeod told him that it was always the intention of the Committee to hold the record in dispute in confidence.

[31] I am not persuaded that s. 22(2)(f) is a circumstance which applies in this case. The College presents less than compelling after-the-fact evidence, some of it hearsay, of its intentions and practices about the confidential nature of its investigations and its treatment of complaint investigation records, including the record in issue here. It provides no written confidentiality statement or policy in force at the time respecting its complaint investigation and disposition processes. There is no evidence therefore of a written statement or promise that the chiropractor could have relied on to believe his response letters would be treated in confidence. Nor is there any evidence that the chiropractor was given any such notice or assurance verbally. There is also no persuasive evidence before me that the chiropractor believed at the time that he was supplying his response to the College in confidence. The College's letter to the chiropractor, asking for his written response to the complaint, makes no reference to treating the matter or his response in confidence. The disputed record itself contains no statement that it was supplied in confidence. Nor do I have any evidence from the chiropractor on this point. As noted earlier, he has simply adopted the College's position.

[32] For these reasons, I find that s. 22(2)(f) is not a relevant circumstance.

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[19] College's submission, paras., 45 and 46.
[20] Alderson Affidavit, No. 1, para. 8.

Public Scrutiny

[33] There is one other circumstance enumerated in s. 22 that the parties did not raise but which is relevant here. Section 22(2)(a) states:

> 22(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

[34] The College of Chiropractors, like a number of other professions, has been given the special power of self-regulation. This privilege has been extended through laws passed by the Legislature. This privilege is accompanied by the College's responsibility to protect the public interest within its regulatory role.[21] The public scrutiny objective expressed in s. 22(2)(a) is consistent with ensuring that the College's actions and practices in exercising its privilege of self-regulation are consistent with the public interest in protecting patients of College members.

[35] In the present case, the College dismissed the applicant's complaint without telling her why.[22] It also initially withheld the disputed record without citing any provision of FIPPA. Instead, it baldly asserted a College "policy" not to disclose response letters to complainants. Only belatedly, after the applicant requested a review by this Office, did the College outline to the applicant why it refused to release the record. Under these circumstances, it is understandable that it might appear to the applicant and reasonable members of the public that the College's processes are less than transparent.

[36] In the circumstances of this case, including given the nature of the third-party personal information in the record, public scrutiny of the College is advanced by lifting what appears by the College's own submission to be a blanket policy of non disclosure. This will enhance the public's trust and confidence in the College's process. It is also useful to remember that one of the main purposes of FIPPA, explicitly stated in s. 2(1), is to make public bodies "more accountable to the public", including patients who complain to the College. This is not to say the College must in all future cases disclose all information in

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[21] *Chiropractors Act,* s. 3

[22] I note here that a number of years ago the Supreme Court of Canada laid down rules requiring certain decision-makers to give reasons for their decisions. See *Baker v. Canada*, [1999] 2 S.C.R. 817. This is not to say the College breached any such requirement here. *Baker* does, however, articulate and acknowledge the public interest in openness and accountability where decisions are made affecting rights or interests.

such records or respecting all aspects of its processes. Previous orders make it clear that public scrutiny is not itself determinative under s. 22. Rather, in the circumstances of this case, I find that s. 22(2)(a) is a relevant circumstance and that it favours disclosure of the personal information in issue.

Other Relevant Circumstances

[37] In considering the circumstances in this case, I am guided by the comments of Commissioner Loukidelis in Order F03-24:

> Some of the information in the records is the applicant's own personal information, since it relates to her complaints to the College about the third party, her actions in her workplace and her interactions with the third party. The records also contain other personal information about the applicant, including the third party's [psychologist] diagnostic and other comments about her made at the time of treatment or as part of the College's complaint process, and comments the third party apparently made about the applicant's health to her employer. It is these last statements that led to the applicant's complaint to the College.
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> As noted earlier s. 57(2) places the burden on the applicant to prove that disclosure of a third party's personal information would not be an unreasonable invasion of personal privacy. It is well established, however, that a public body has the burden of proving why an applicant should not have access to her or his own personal information. The College has not addressed this issue at all in its submissions in this case.[23] The applicant is clearly aware of her complaints and the factual information about herself and is also aware, as the material before me indicates, the substance of what the respondent said about her and their interactions with each other. I do not consider that disclosure to the applicant of her own personal information would unreasonably invade the third party's personal privacy and it follows that the College cannot refuse under s. 22 to disclose the applicant's own personal information to her. My finding in this case is similar to the findings in Order 01-53, where I found that the applicant was entitled to information on the allegations she had made against the third party, as well as information about herself and the third party's identifying information.[24]

[38] Much like Order F03-24, the record in this case contains diagnostic and other comments about the applicant made at the time of treatment or as part of the College's complaint process. Not only is this material the applicant's own personal information, to which she is entitled, but a good deal of it is already known to the applicant through her interactions with the chiropractor and because the College has given her the clinical records concerning her visits to the chiropractor. The only matter not specifically known to the applicant is the

[23] [2003] B.C.I.P.C.D. No. 24, para. 55.
[24] [2003] B.C.I.P.C.D. No. 24, paras. 54 and 55.

chiropractor's response to her complaint that she did not consent to a treatment. That question is addressed in the record and its answer is primarily connected to the applicant's personal information. In these circumstances, it is difficult to see how releasing the record would be an unreasonable invasion of the chiropractor's privacy.

[39] I therefore conclude that, in considering all of the circumstances provided in the submissions and materials before me, the presumptions under s. 22(3) are rebutted and the disclosure of the letter to the applicant would not unreasonably invade the chiropractor's privacy.

4.0 Conclusion

[40] For the reasons given above, under s. 58(2)(a) of FIPPA, I require the College to give the applicant access to the letter it withheld under s. 22(1).

November 14, 2007

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

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