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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 214-1998
February 10, 1998**

INQUIRY RE: A refusal by the College of Massage Therapists of BC to disclose the mailing list of its members to the Independent Massage Therapists Society

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on September 16, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the Independent Massage Therapists Society (the Society) of a decision by the College of Massage Therapists of BC (the College) to refuse to disclose the College's mailing list of its registered members.

2. Documentation of the inquiry process

On April 18, 1997 the College received the Society's request for "a copy of the current mailing list of registered massage therapists as at March 31, 1997." On May 16, 1997 the College denied the Society's request relying on section 22(3)(i) (now section 22(3)(j) of the Act.) My Office received the Society's request for a review of this decision on May 26, 1997. Both parties subsequently agreed to an extension of the ninety-day time frame for resolving the review. On August 22, 1997 my Office issued a Notice of Written Inquiry to take place on September 16, 1997. After the exchange of reply submissions had taken place, both the Society and the College requested, and were granted, a right of surreply.

3. Issue under review and the burden of proof

The primary issue under review concerns the College's decision to deny access to the mailing list of its members under section 22(3)(j) of the Act. The relevant provisions of section 22 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,
 - (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
 - (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,
 -
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
 - (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

Section 57 of the Act establishes the burden of proof on parties in this inquiry. Under section 57(2), if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

The Society also argued that the record should be disclosed under section 25 and/or section 32 of the Act.

To the extent that the applicant relies on section 25 of the Act to say that the College is required to disclose the information in the public interest, the burden of proof is on the applicant to demonstrate that this section applies to the information. (See Order No. 165-1997, May 20, 1997; Order No. 182-1997, August 13, 1997; and Order No. 206-1997, December 18, 1997)

4. Procedural objections

The College requested additional time to submit its reply to the Society's initial submission; the Society objected. I find that fairness required that I accept the College's reply, and that the Society was not prejudiced by the time extensions. I note that the Society's reply was not sent to the College until after its late reply was received by my office. The College requested that its surreply submission, including an affidavit, be accepted; the Society objected. I find that fairness required me to accept the College's surreply. In addition, I granted additional time for the Society to make a surreply.

The Society objected to certain statements in the Portfolio Officer's fact report. I have considered its objections and find that the statements objected to were not relevant to my findings in this case.

The College took the position that I could only consider those facts which had been deposed to by Affidavit. The Act permits me to conduct inquiries either orally or in writing. Where I decide to proceed to conduct an inquiry in writing, as in this case, I am not required to accept only those facts that have been sworn to in an Affidavit. While I prefer that parties to an inquiry submit evidence through sworn Affidavits, the Act does not require it. I am therefore not precluded by the Act from accepting the Society's submissions, although, as a general rule, where conflicts exist, I am inclined to attach greater evidentiary weight to assertions that are supported by Affidavit material.

5. The record in dispute

The record at issue in this inquiry consists, essentially, of the College's mailing list: it is a computer print-out of mailing labels containing the names and addresses of College registrants.

6. The Independent Massage Therapists Society's case

This Society came into existence on March 5, 1997. It wants access to the mailing addresses that the College uses in communicating with its members.

I have presented below the detailed submissions of the Society with respect to the application of section 22 of the Act to the record in dispute.

7. The College of Massage Therapists of British Columbia's case

The College, which came into existence in 1994, does not wish to disclose the registrants' home addresses or other confidential addresses used for the receipt of mail from the College. It is only prepared to disclose the business addresses of its registrants where they are explicitly specified as such. Its registrants are required to provide either home or business addresses for such purposes.

The Registrar of the College submits that it has always maintained the personal information of its registrants on a confidential basis to be used for the exclusive use of the College. Among other reasons, it is concerned for the personal safety of its individual members, who may practice alone, often out of their own homes, or out of clinics attached to their homes.

The College submits that disclosure of its mailing list to the Society would be in breach of section 22(3)(j) of the Act in the absence of each registrant's express consent.

8. Discussion

Based on my review of the submissions of the Society in particular, it is evident that this inquiry is the tip of the iceberg of disputes over the appropriate relationship between the new Society and its members and the College, as well as the relationship among the Massage Therapists Association, the College, and the provincial government. The Act is not an appropriate vehicle for settling such matters, as my decision below indicates. (See also the Reply Submission of the College, p. 5)

The College has offered to re-distribute information from the Massage Therapists Association (MTA) to College members. The College has offered similar services to the Society.

Contrary to the views of the Society, I applaud the fact that the College has sought to give notice to its membership under section 23 of the Act. Of the one-third of the membership that had responded as of September 8, 1997, about one-half directed the College not to disclose their mailing address "for varying reasons relating to concerns about personal security, opposition to the aims and objectives of the applicant, and general concern about the mailing address being used for commercial purposes." (See Affidavit of D.M. McRae, Exhibit G; and the Reply Submission of the College, p. 5)

Section 22(2)(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,

The Society has sought to rely on this section as a relevant circumstance promoting disclosure of the mailing list. The thrust of the Society's submissions on this point is that it wishes, through its mail-out to all College registrants, to subject the activities of the College and its proposed by-laws to greater public scrutiny. While disclosure of the list itself does not achieve this goal, the list is the means by which the expressed goal may be accomplished. I have decided that the Society's submissions on

this point are not sufficiently compelling to overcome the statutory presumption against disclosure in section 22(3)(j). (See also the Reply Submission of the College, p.2)

Section 22(2)(b): the disclosure is likely to promote public health and safety or to promote the protection of the environment,

The Society has sought to rely on this section as a relevant circumstance promoting disclosure of the mailing list. I find that this subsection has no relevance to this request for access. (See also the Reply Submission of the College, p. 3)

Section 22(2)(c): the personal information is relevant to a fair determination of the applicant's rights,

The Society has sought to rely on this section as a relevant circumstance promoting disclosure of the mailing list. I find that this subsection has no relevance to this request for access. (See also the Reply Submission of the College, p. 3)

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

The Society has sought to rely on this section as not being a relevant circumstance militating against disclosure of the mailing list. I find that this subsection has no relevance to this request for access. (See also the Reply Submission of the College, p. 3)

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

This is one of the factors that may have a mitigating effect on the College's decision regarding disclosure of its mailing list to the Society. However, in this case it is not the determinative factor.

Section 22(3): A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if ... (j): the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

The 1997 registration form of the College (and its application form for membership) asks for the "business address" of the registrant, including a principal employer and secondary employer, and also the home address of the registrant. It then asks such persons whether their preferred mailing address is their home, principal employer, or secondary employer. However, not all registrants have separate business addresses. The Society seeks, in part, the addresses of those registrants who do not have business addresses. Such home addresses are "personal information," as defined in Schedule 1 of the Act.

I find through my review of the mailing list submitted by the College, as the record in dispute, that it is not possible to distinguish the registrants who use a business address from those who use their home addresses. Therefore, I do not think the business addresses can reasonably be separated from the list provided to me. In any event, the Society has received in the past a list, called the Registrants' Business Address list, which includes the names of the registrants, business address, status, and business and home telephone numbers. The latter information was blocked out.

Section 22(3)(j) creates a rebuttable presumption that the disclosure of a third party's name and address will be an unreasonable invasion of privacy, if "the personal information ... is to be used for mailing lists...."

The Society encourages me to restrict the application of section 22(3)(j) to "commercial solicitations" and emphasizes that it is a non-profit society. (Submission of the Society, p. 5) The Society argues that it is prohibited from carrying on a business for commercial purposes and has no intention of using the mailing list for such purposes or of allowing others to so use it.

In its submission, the Society says that the information is necessary to enable it to advise third parties of information which it says is relevant to the practice of their profession, particularly in regard to either the ongoing activity of the College or proposed changes to the College by-laws. The Society also wishes to obtain the mailing list so it can send out its newsletter to College members.

The Society wishes to communicate with College members for another specific purpose, which it describes this way:

... it will allow the IMTS [the Society] to advise new and past members of the College that it [*sic*] opportunity exists for obtaining practice insurance at rates comparable to those offered through membership in the Massage Therapists Association, without the heavy additional costs of membership in the Massage Therapists Association, and in fact without having to join either the IMTS or the MTA. (Submission of the Society, p.4)

The Society argues that I should consider its purposes for the use of the mailing list as a relevant circumstance under section 22(2) to rebut the presumption under section 22(3)(j). I do not agree with the Society's argument that section 22(3)(j) only applies to prevent disclosure of mailing lists intended for commercial use. There is nothing in the section which would support the Society's contention that its *only* intent and purpose is to protect third parties from commercial solicitations. The relevant test under this section is whether the Society intends to use personal information for "mailing lists or solicitation."

The Society's claim that its use of the personal information is for non-commercial purposes is not a relevant circumstance that could rebut the presumption of non-

disclosure in section 22(3)(j). Therefore, I find the Society intended to use the personal information for mailing lists. It has not demonstrated that there are circumstances such that the presumption in section 22(3)(j) should not apply.

Section 25: Information must be disclosed if in the public interest

The Society also argues that disclosure of the record is required under section 25(1)(b) of the Act, which provides that:

- 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.

I find the Society's submission that section 25(1)(b) applies in this case to be without merit. Section 25(1)(b) clearly has no application in this case. (See Order No. 165-1997, May 20, 1997; Order No. 182-1997, August 13, 1997; and Order No. 206-1997, December 17, 1997)

Section 32: Use of personal information

32. A public body may use personal information only
- (a) for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),
 - (b) if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or
 - (c) for a purpose for which that information may be disclosed to that public body under sections 33 to 36.

Section 32 of the Act specifies how a public body may use personal information in its possession. It restricts the use of such information to three circumstances, one of which is for purposes consistent with the purposes for which the information was obtained or compiled. The Society argues that the College may disclose the mailing list to the Society under section 32, because such disclosure "is a use consistent with the purpose for which the information was obtained or compiled, namely to regulate and govern the profession." (Submission of the Society, p. 8). Section 32 addresses the *use* of such information *by the College* but does not authorize *disclosure* to the Society.

Disclosure of personal information by public bodies like the College is dealt with under section 33 of the Act.

The Health Professions Act

The Society also argues that the College is under a legislated obligation to release the requested information under sections 21 and 22 of the *Health Professions Act*, R.S.B.C. 1996, c. 183. The Society states that this “obligation is only qualified by section 21(2) of the Act, namely, the information should not be released if the registrar reasonably believes that the person seeking access is doing so for commercial purposes.

The College has not provided any substantive information which gives it grounds to reasonably believe that is the purpose of IMTS’s request.” (Submission of the Society, p. 8)

The validity of any decision which the Registrar of the College may make under section 22 of the *Health Professions Act* is outside the scope of this inquiry. My task is to determine the applicability of the provisions of the *Freedom of Information and Protection of Privacy Act* to the record at issue. This Act does not permit me to inquire into any decisions of the College Registrar made under his or her governing legislation. As I indicated earlier in this Order, section 22(3)(j) is not limited to circumstances where an applicant seeks disclosure of a mailing list for commercial purposes.

9. Order

I find that the College of Massage Therapists of BC was required under section 22 of the Act to refuse access to the third-party personal information in the records in dispute. Under section 58(2)(c) of the Act, I require the College to refuse access to the personal information in the records.

I also find that the head of the College was not required to disclose information pursuant to section 25 of the Act. I make no Order in this respect other than to note that the Society has not satisfied me that the application of section 25 to the records at issue is required under the Act.

David H. Flaherty
Commissioner

February 10, 1998