Order F07-24

COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

Michael McEvoy, Adjudicator

December 11, 2007

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Summary: The applicant requested a copy of a letter a doctor wrote to the College in response to the applicant's complaint about her. The College disclosed part but not all of the letter, withholding some on the basis that doing so could result in harm to the safety of a third party and would constitute an unreasonable invasion of third-party privacy. The College was authorized to refuse disclosure under s. 19(1)(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 19(1)(a), 28.

Authorities Considered: B.C.: Order No. 28-1994, [1994] B.C.I.P.C.D. No. 31; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-28, [2000] B.C.I.P.C.D. No. 31; Order 02-10, [2002] B.C.I.P.C.D. No. 10; Order 02-17, [2002] B.C.I.P.C.D. No. 17; Order 03-08, [2003] B.C.I.P.C.D. No.8. **Sask:** Report H-2007–001, 2007 CanLII 51193 (SK. I.P.C.).

1.0 INTRODUCTION

[1] The applicant complained to the College of Physicians and Surgeons of British Columbia ("College") about a doctor who treated him. The College sent a copy of the complaint to the third-party doctor ("doctor"), who in turn wrote to the College with her response. The College reviewed the matter and told the applicant that it did not find fault with the doctor's conduct. The applicant then asked the College to provide him with all relevant letters and other documents the College had pertaining to him, in particular any communications between the doctor and the College. The College provided all of the material requested to the applicant save one letter that the doctor wrote to the College in answer to the

applicant's complaint. The College said it decided not to disclose the letter because doing so could result in harm to third-party safety and would constitute an unreasonable invasion of third-party privacy. The applicant asked for a review of this decision under the *Freedom of Information and the Protection of Privacy Act* ("FIPPA").

[2] Mediation did not resolve the matter and so under Part 5 of the FIPPA a date for inquiry was established. After the applicant made his initial submission, the College decided to release a portion of the letter and then asked for an adjournment to see if further discussion could fully resolve the matter. The outstanding issues were not resolved and the inquiry process was reconvened to review the College's decision not to release the remaining part of the letter.

2.0 ISSUE

[3] The issues in this inquiry are:

1. Whether the College is authorized by s. 19(1)(a) of FIPPA to refuse to disclose part of the requested letter.

2. Whether the College is required by s. 22(1) of FIPPA to refuse to disclose part of the requested letter.

[4] Section 57(1) of FIPPA provides that the College bears the burden of proof in this inquiry with respect to the application of s. 19(1)(a). With respect to s. 22 of FIPPA, s. 57(2) provides that the applicant bears the burden of proving that disclosure of the personal information contained in the record would not be an unreasonable invasion of the third-party doctor's personal privacy.

3.0 DISCUSSION

[5] **3.1 Section 19 of FIPPA**—The College and the doctor both argue that portions of the record should not be disclosed under s. 19(1)(a) of FIPPA. This provision reads as follows:

> ***Disclosure harmful to individual or public safety***
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> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, ...

[6] This section has been considered in numerous orders.[1] The central issue in these cases is whether a rational connection has been established between disclosure of the disputed information and a reasonable expectation of a threat to anyone's safety or mental or physical health.

[7] In Order 00-28, Commissioner Loukidelis discussed the burden that falls on a public body seeking to make this connection under s. 19(1):

> As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing - based on the evidence available to it - whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the information could threaten the safety, or mental or physical health, of anyone else. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a) calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.
>
> It is not necessary to establish certainty of harm or a specific degree of probability of harm. The probability of the harm occurring is relevant to assessing whether there is a reasonable expectation of harm, but mathematical likelihood is not decisive where other contextual factors are at work. Section 19(1)(a), specifically, is aimed at protecting the health and safety of others. This consideration focusses on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm.[2]

[8] I have assessed the evidence in this case in light of this and other relevant orders.

[9] The material provided to me indicates that the applicant was a patient of the doctor between 2001 and late 2004.[3] The doctor says that during the course of a physical examination in 2003 she diagnosed the applicant with pelvic malady.[4]

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[1] For example see: Order No. 28-1994, [1994] B.C.I.P.C.D. No. 31; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 02-10, [2002] B.C.I.P.C.D. No.10; Order 02-17, [2002] B.C.I.P.C.D. No.17; Order 03-08, [2003] B.C.I.P.C.D. No. 8. For a recent analysis and thorough treatment of the matters at issue here please also refer to Report H-2007–00, 2007 CanLII 51193 (SK. I.P.C.), a decision of the Office of the Information and Privacy Commission of Saskatchewan. The Report considered s. 38(1) of that province's *The Health Information Protection Act,* an analogous provision to our s. 19.

[2] [2000] B.C.I.P.C.D. No. 31, p.3.

[3] Doctor's affidavit, para. 8.

[4] Parts of the doctor's chronology are not set out here because these matters were properly received *in camera*.

[10] During a subsequent appointment five months later, the applicant asked that his pelvic area be examined again but the doctor demurred on the basis there was no medical reason to do so. She says the applicant continued to press for this examination and though this was not noted in her chart she has a clear memory of it. In December of 2004, her office received a telephone call from the applicant requesting the last appointment of the day. The applicant was told that he had to attend during regular office hours. When he did arrive for his visit during regular hours, the doctor says the applicant was very anxious and agitated. He stated that doctors were "two-faced" and "would say one thing and think another". During this visit the doctor says the applicant again wanted her to examine his pelvic area and pressured her to do so but she refused because it was not medically necessary.[5]

[11] Approximately two weeks later, a member of the doctor's staff received a phone call from the office of a specialist doctor who reported that the applicant was in their office behaving in a rude, angry and aggressive manner and saying derogatory things about physicians. The applicant had earlier been referred to the specialist by the doctor.[6] A member of the specialist's staff provided affidavit evidence that the applicant arrived at that office and was extremely rude and abusive. The staff member said the applicant was behaving very aggressively with respect to both the words that he was using and his body language. The affidavit goes on to say that the applicant was speaking very loudly and was quite animated and would not listen. After the applicant left the specialist's office in a very anxious and angry state, the staff member called the applicant's doctor's office.[7]

[12] Two days following this encounter, the doctor wrote to the applicant to say that she was not willing to offer her medical services to him any longer. She stated that she was uncomfortable with his recent visit and with his interactions at the specialist's office. She offered to supply the applicant with a list of family doctors who were accepting new patients. The College was copied on this letter.[8]

[13] The doctor states that, during the time the applicant was her patient, she formed the opinion that he suffered from the psychiatric disorder of anxiety. She notes that,

> Persons with anxiety disorders may more easily lose control of their emotions and actions and become a danger to themselves and others. They can be become unpredictable and volatile.[9]

[14] The doctor says her opinion is supported by a report from another physician to whom the applicant was sent for a consultation.

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[5] Doctor's affidavit, para. 13.
[6] Doctor's affidavit, para. 14.
[7] Affidavit by member of specialist's office, paras. 3 and 4.
[8] Doctor's affidavit, exhibit B, doctor's letter to applicant, January 7, 2005.
[9] Doctor's affidavit, para. 6.

[15] Taken together with matters submitted *in camera*, the doctor submits that the cumulative effect of the applicant's behaviour gives rise to a legitimate concern that the applicant is a risk to the doctor's future well-being if the severed portions of the letter are disclosed.[10] The phrase "legitimate concern" is found in Order 02-10, cited by the doctor. In that case, Commissioner Loukidelis determined that none of the factors advanced by the public body in and of themselves was determinative under s. 19(1). He went on to say that, "[t]aken together, however, they speak to a history of behaviour on the applicant's part that legitimately raises concerns under s. 19(1)(a)."[11]

[16] The College says that s. 19 requires a public body to act with deliberation and care where the health and safety of others are at issue in connection with the possible disclosure of records.[12] The College says that, in light of the doctor's concerns, and in considering all of the information before it with respect to the physician-patient relationship in question, it concluded that it had an overriding responsibility to act cautiously and carefully with respect to the disclosure of the limited information in question.[13]

[17] The College also contends that the doctor is in the best position to assess the potential threat to her safety and the safety of others. In considering the applicant's request for the record, the College gave due weight to the professional opinion the doctor expressed, as she had had the opportunity to observe the applicant and assess the potential risk to her own safety.[14]

[18] The applicant says the attempt to use s. 19 of FIPPA to block access to the remaining severed potions of the document under s. 19 is without merit. He says the doctor has purposely misled the inquiry and that s. 19 has no application in this case.[15] The applicant says that, contrary to the doctor's opinion, he has no more issues with anxiety than the average person and probably has far fewer. He says that anxiety cannot be diagnosed only by one's demeanour in a medical office. He says such a diagnosis can only be made after considering other areas of a person's life. He states that he has a successful professional career as well as being a world traveller. He says he has encountered many stressful situations in his travel, including having to cross remote border points in third world countries where he has displayed patience and tolerance. He describes the doctor's opinion as either pathetically incompetent or demonstrative of a willingness to lie. In either case, he says, this cannot be the basis to withhold material under s. 19. He asks me to consider as well that five months have passed since the partial release of the record and his

[10] Doctor's submission, para. 19.
[11] Order 02-10, [2002] B.C.I.P.D. No.10, p.5.
[12] College's initial submission, para. 14.
[13] College's submission, para. 14.
[14] College's submission, para. 18.
[15] Applicant's reply submission, p. 1.

supposed volatility and loss of control due to anxiety have yet to pose any danger to the doctor, even though he lives only a five-minute walk from her office.[16]

[19] He says that the consultation report referred to by the doctor does not support her contention that he has an anxiety disorder. He says the consultation report never mentions anxiety and that the doctor's comments are misleading and do not support her contention in relation to s. 19 of FIPPA.[17]

[20] He says that what the doctor saw in her office as anxiety was actually a combination of things. He asserts that the doctor is a very moody person who, he contends, has trouble controlling her temper if disagreed with. The applicant says he dreaded facing the doctor's "wrath" when he would point out that her explanation or diagnosis was not right. What the doctor was seeing, the applicant states, was not anxiety, but his frustration with her. He says that he has a considerable amount of life sciences training and that he has found in the past that doctors are intimidated by this, thereby leading him to be careful not to disclose too much of his knowledge. He said the doctor's personality demanded that he not disclose the extent of his knowledge and this required a fine balancing act on his part.[18] He says he was also unsettled because the doctor often began his appointments by telling him that she had to chide or dismiss some other male patient. The applicant states that if he suffered from anxiety or panic attacks it would not affect the doctor's safety. He says he hopes the doctor does not have any patients with these problems because her self-serving characterization of them is reprehensible.

[21] The applicant says that when he finally received his clinical files from the doctor it confirmed why he felt so frustrated at each visit. He says those medical reports demonstrate that the doctor never listened to him and instead focused on in-passing comments that ignored the most important aspects of his appointments. In explaining why he continued to use the doctor's services, the applicant says her location was convenient, just a few minutes walk from his residence, and it was also a nuisance finding a different doctor.[19]

[22] I pause here to note that there are a number of other matters where the applicant and the doctor disagree about the nature of their interactions. I will outline what I consider the most salient of the remaining issues.

[23] On the matter of pressuring the doctor to examine his pelvic area, the applicant says that this is not only untrue but that it was the doctor who suggested several times that he needed to be examined, but he said no. He points out that the doctor's note in the clinical chart states "refused

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[16] Applicant's reply submission, p. 2.
[17] Applicant's reply submission, p. 2.
[18] There is no evidence in the applicant's submissions to support his contention that he has "life sciences" education or any medical or other training, or other knowledge that equips him to say that the doctor's diagnoses were not right.
[19] Applicant's reply submission, p. 3.

examination" (*i.e.*, he refused the exam) and that she did not write out in her chart that he tried to pressure her.[20]

[24] The applicant says that as 2004 drew to a conclusion it was obvious to him that things would not improve and that it was detrimental for him to continue seeing the doctor. He said he made an appointment with her to discontinue the relationship and to inform her of the things she needed to improve. The applicant says the reason he tried to arrange the appointment at the end of the day was to spare other patients from having to bear the doctor's bad mood after she received his criticisms. He also believed an end-of-the-day appointment would allow more time for their discussion.

[25] He denies that he asked her to examine his pelvic region in this appointment and says that she did not offer to examine him.

[26] He says the reference the doctor attributed to him concerning doctors being "two-faced" makes a mountain out of a mole hill and has no relevance to the s. 19 discussion. He says he was merely pointing out that doctors have two perspectives, one as professionals and the other as regular people, and that the statements they make as doctors do not necessarily agree with what they think personally. He does not know why the doctor would have a problem with this and says this demonstrates how hard it is to talk with the doctor.

[27] In response to the doctor's claim about an incident at the specialist's office, the applicant says he made arrangements to get records from that office in order to have some "documentation" for a concluding meeting with his doctor. He says that when he arrived to pick the records up the receptionist did not want to give them to him. He says that after he put up with her "abuse" he reminded her he had a right to the records. He said that when she finally handed them to him he thanked her and left. He says he was not intimidated by the receptionist's actions and that she attempted to get back at him by calling his doctor's office. He says the affidavit describing his actions at the specialist's office is false and, rather, describes the receptionist's behaviour towards him.[21] The applicant says the specialist apologized afterwards to him for the conduct of his staff member. He also says he can provide any number of references to support his claim that his personality is completely inconsistent with the actions described by the receptionist.[22]

[28] In summary, the applicant says the doctor has written a considerable amount of personal amount of information about him which is now in the hands of the College. The applicant states that most of it is untrue or is lacking so much qualifying information that it is essentially untrue.[23]

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[20] Applicant's reply submission, p. 3.
[21] Applicant's reply submission, p. 4.
[22] Applicant's reply submission, p. 5.
[23] The applicant states at p. 5 of his reply submission "imagine someone saying someone else had shot and killed someone, but didn't mention it was done in their role in a movie – that is how misleading [the doctor's] letter is."

[29] I appreciate this has been a difficult matter for the applicant and the doctor and I am grateful for the submissions of all of the parties to this inquiry.

[30] It has been said in a number of previous orders, and noted earlier, that it is not necessary to establish a mathematical probability or certainty of harm for the purposes of s. 19(1)(a). Rather, this provision calls for a reasonable expectation of a threat to health or safety. I have considered the doctor's submissions, both *in camera* and those shared with the other parties, and the arguments of the College, which of course bears the burden respecting s. 19(1). I have also weighed the extensive submissions of the applicant. After carefully considering all of this material, I have concluded that the reasonable expectation test under s. 19(1)(a) has been established.

[31] It is frequently not possible in s. 19 proceedings to elaborate on the conclusions reached because doing so would effectively disclose the information in dispute. I regret that this is the case here and I am therefore constrained from saying more than I would otherwise.

[32] In light of my finding under s. 19(1)(a), it is not necessary to consider whether or not the College is required under s. 22(1) to withhold the record in dispute.

[33] **3.2 Section 28 of FIPPA**—The applicant also argues that s. 28 of FIPPA is applicable here. Section 28 reads as follows:

> ***Accuracy of personal information***
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> 28 If
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> (a) an individual's personal information is in the custody or under the control of a public body, and
>
> (b) the personal information will be used by or on behalf of the public body to make a decision that directly affects the individual,
>
> the public body must make every reasonable effort to ensure that the personal information is accurate and complete.

[34] The applicant argues as follows:

> The College is using the unreliable information (apparently exclusively) from [the doctor's] letter to (mis)handle my complaint. Any reasonable effort to ensure that the information is accurate and complete requires my review of it—especially so when how the College has dealt with my complaint thus far is considered. FIPPA section 28 requires that I review the letter, as I am the only person can [*sic*] verify its accuracy.[24]

[24] Applicant's initial submission, p. 2.

[35] The third party says this, among other things, in reply to this last argument:

> This submission simply cannot stand so far as it relates to a request for the personal information of persons other than the Applicant. Section 28 of the FIPPA cannot be relied upon by the Applicant to compel the production of otherwise protected third party personal information.

[36] The applicant's argument, in effect, asks me to use s. 28 to override privacy and other protections which exist under Part 2 of FIPPA. Nothing in s. 28 or in FIPPA as a whole implicitly or explicitly imparts such a broad meaning to s. 28. This argument is without merit and I reject it.

4.0 CONCLUSION

[37] On a final note, I acknowledge that it is often challenging for self-governing bodies to determine what information can be disclosed to an applicant in a case where a patient or client complaint is investigated. In this case, the College, commendably, carefully assessed the record and disclosed a considerable portion of it to the applicant. I would only add that it would have been helpful had this occurred at an earlier stage, preferably during the College's complaint investigation itself. Such an action might not have obviated the need for an inquiry, but it could perhaps have brought the matter and the accompanying stresses to a head sooner.

[38] For the reasons given above, under s. 58(2)(b) of FIPPA, I confirm the decision of the College that it is authorized under s. 19(1)(a) to refuse to disclose the disputed portions of the record to the applicant.

December 11, 2007

ORIGINAL SIGNED BY

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Michael McEvoy
Adjudicator