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

Order F09-07

PROVINCIAL HEALTH SERVICES AUTHORITY

Celia Francis, Senior Adjudicator

April 30, 2009

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Summary: Applicant requested access to records from an investigation into human rights complaints against him. The PHSA disclosed some records and withheld others under s. 3(1)(b) and 22 of FIPPA and s. 51 of the *Evidence Act*. It also took the position that some pages were not in its custody or control. Section 3(1)(b) found not to apply and PHSA ordered to provide applicant with a decision on entitlement to access respecting those pages. Section 51 of the *Evidence Act* found to apply to other pages. PHSA found to have custody and control of certain pages and ordered to provide applicant with a decision on access regarding those pages. Section 22 found to apply to some information and not to other information. PHSA ordered to provide the applicant with access to information to which s. 22 was found not to apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(1), 3(1)(b), 4(1), 22(1), 22(2)(c) & (f), 22(3)(a) & (d), 79; *Evidence Act*, s. 51.

Authorities Considered: B.C.: Order F06-09, [2009] B.C.I.P.C.D. No. 9; Order 04-19, [2004] B.C.I.P.C.D. No. 19; Order F06-01, [2006] B.C.I.P.C.D. No. 2; Decision P07-02, [2007] B.C.I.P.C.D. No. 27; Order P05-02, [2005] B.C.I.P.C.D. No. 19; Order P05-03, [2005] B.C.I.P.C.D. No. 20; Order F05-34, [2005] B.C.I.P.C.D. No. 46; Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Order 02-34, [2002] B.C.I.P.C.D. No. 34; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order F06-15, [2006] B.C.I.P.C.D. No. 22; **AB:** Order F2003-009, [2005] A.I.P.C.D. No. 21, Order 2000-003, [2000] A.I.P.C.D. No. 33; Order 99-025, [1999] A.I.P.C.D. No. 31. **NL:** Intergovernmental Affairs Secretariat, Re, 2005 CanLII 44153 (NL I.P.C.); College of the North Atlantic, Re, 2006 CanLII 9399 (NL I.P.C.).

Authors Cited: *Hearings before Administrative Tribunals*, Second Edition (Carswell, 2002), Robert W. Macaulay, QC and James L.H. Sprague, BA, LLB.

Cases Considered: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2002 BCSC 250; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2003 BCCA 338; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562; *Cimolai v. Children's and Women's Health Centre of British Columbia*, [2008] S.C.C.A. No. 18; *Cimolai v. Hall*, 2004 BCSC 153; *Cimolai v. Hall*, 2005 BCSC 31; *Cimolai v. Hall*, 2007 BCCA 225; *Hung v. Gardiner*, 2003 BCCA 257; *Schut v. Magee* 2003 BCCA 417; *Sussman v. Eales,* [1985] O.J. No. 412, appeal allowed on another issue, [1986] O.J. No. 317 (Ont. C.A.); *Hamouth v. Edwards & Angell et al.* 2005 BCCA 172; *Ayangma v. NAV Canada,* [2001] P.E.I.J. No. 5 (PEICA); *College of Physicians and Surgeons v. British Columbia (Information and Privacy Commissioner,* 2002 BCCA 665; *M.N.R. v. Coopers and Lybrand,* (1978) 92 D.L.R. (3d) 1; *Hoem v. Law Society of British Columbia,* [1985] B.C.J. No. 2300; *Nelles v. Ontario,* [1989] 2 S.C.R. 170; *Guay v. Lafleur,* [1965] S.C.R. 12; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2004 BCSC 1597; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919; *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1987] S.C.J. No. 88.

1.0 INTRODUCTION

[1] This order arises out of an investigation into complaints against the applicant of personal harassment in the workplace. The applicant is a physician on unpaid leave from the Children's & Women's Health Centre ("CWHC").[1] Under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), he requested from the Provincial Health Services Authority ("PHSA") records concerning the investigator's "interactions" with the applicant and other individuals and bodies. He noted that the PHSA had paid the investigator and that there should be no doubt that the PHSA owned the investigation material.

[2] The PHSA provided the applicant with copies of some of the records he had requested. It also told him that other records were outside the scope of FIPPA under s. 3(1)(b) of FIPPA:

> As you are aware, Ms. Jensen's investigation was conducted pursuant to the Children's & Women's Health Centre Human Rights Policy dated January 1, 2000. The Children's & Women's Health Centre Human Rights process under the Human Rights Policy is a quasi-judicial process: *Cimolai v. Hall et al*, 2004 B.C.S.C. 153. The investigation conducted by Ms. Jensen is the initial phase of the Human Rights process and is therefore part of a quasi-judicial process. Therefore, some of the records within Ms. Jensen's file are excluded from the scope of the *Act* under section 3(1)(b):

[1] See para. 5, PHSA's initial submission. The CWHC is a hospital and a public body in its own right. It is also part of the PHSA, a public body listed in Schedule 2 of FIPPA.

> 3(1) This *Act* applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:[2] …
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity.

In accordance with section 3(1)(b), the personal notes and communications of Ms. Jensen made during the course of the investigation are excluded from the scope of the *Act*. Ms. Jensen's file does not include a draft decision.[3]

[3] The PHSA said that other documents were within the scope of FIPPA but that s. 22 of FIPPA required it to sever some of these records while still others

> … contain information provided to the Infection Control Committee and findings or conclusions of the Infection Control Committee of the Health Centre. The Infection Control Committee is a "committee" as defined in section 51(1) of the *Evidence Act* and the records are prohibited from disclosure by the PHSA under sections 51(5) and (6) of the *Evidence Act*. As such, these records, or portions of them, are excluded from disclosure under the *Freedom of Information and Protection of Privacy Act*.[4]

[4] The PHSA added that there were a small number of records

> … in particular, pages from the Transcript of evidence in *Cimolai v. Hall et al*, (BCSC No. S011108), which are subject to the publication ban issued in that case. In light of the publication ban, the PHSA does not have the legal right to disclose those records and therefore the records are not in the custody or under the control of the PHSA for the purposes of the *Act*.[5]

[5] The applicant requested a review by this Office of the PHSA's decision. Mediation led to the disclosure of two pages in severed form[6] but was otherwise unsuccessful. Because the matter did not settle in mediation, a written inquiry took place under Part 5 of FIPPA. This Office invited and received representations from the applicant, the PHSA and, as appropriate persons, the investigator[7] and the third-party complainant.

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[2] Underlining in PHSA's original letter.
[3] PHSA's letter of November 10, 2005.
[4] PHSA's letter of November 10, 2005.
[5] PHSA's letter of November 16, 2005.
[6] The PHSA had earlier withheld these pages, saying they fell under s. 3(1)(b). It later disclosed them with severing under s. 22, as it said it had determined that they were Hanne Jensen's "administrative notes" regarding her retainer by the PHSA to conduct the investigation; PHSA's letter of February 21, 2006.
[7] Although the investigator did not make a submission, she provided affidavit evidence as part of the PHSA's initial submission.

[6] I have taken the same approach to statutory interpretation as other decisions of this Office.[8] The relevant FIPPA and *Evidence Act* provisions are in the appendix to this Order.

2.0 ISSUE

[7] The issues listed in the notice for this inquiry are whether:

1. Under s. 3(1)(b) of FIPPA, the requested records fall outside the scope of FIPPA.

2. In light of s. 51(7) of the *Evidence Act*, the Commissioner has the jurisdiction to proceed with the inquiry respecting records to which the public body has applied s. 51(6) of the *Evidence Act*.

3. The PHSA is required to refuse access to information under s. 22 of FIPPA.

[8] The PHSA's position that certain pages that were the subject of a publication ban were not in its custody or under its control was not listed as an issue in the notice for this inquiry. It is however part of the PHSA's decision to deny access. The PHSA also provided argument on this point in its initial submission and the applicant had an opportunity to comment on it. As the issue of whether FIPPA applies to these records goes to jurisdiction, I have decided to deal with it.

[9] Under s. 57(1) of FIPPA, the PHSA has the burden of proof regarding its decision to deny access to records while, under s. 57(2), the applicant has the burden of proof regarding third-party personal information.

3.0 DISCUSSION

[10] **3.1 Background—**In January 2000, the CWHC adopted a Human Rights policy which established a process for the handling and resolution of human rights complaints.[9] In January 2001, the CWHC's human rights advisor began an investigation under the Human Rights policy into a number of harassment complaints made against the applicant. The result was a report[10]

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[8] See for example, Order F06-09, [2009] B.C.I.P.C.D. No. 9, at Paras. 15-26, which among other cases refers to *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27.

[9] The PHSA provided most of the information in the first four paragraphs of this background section; see paras. 5-16 of its initial submission. I drew the remainder from the court decisions cited and the other material before me. In December 2008, I invited the parties to comment on three decisions issued after the close of submissions on this inquiry (2007 BCCA 225, 2006 BCSC 1473 and 2007 BCCA 562) and received short supplementary submissions from the applicant (January 2, 2009) and the PHSA (January 8, 2009).

[10] The Axelrod report.

which found that the applicant had violated the Human Rights policy regarding one of the complaints. The Medical Staff Member Review Sub-committee[11] and the Medical Advisory Committee ("MAC") reviewed the report before referring it to the CWHC Board with the MAC's recommendations. In September 2001, the CWHC Board passed a resolution finding that the applicant had breached the CWHC's Human Rights policy and that he should be placed on a leave of absence and undergo psychological assessment, failing which his hospital privileges would be permanently suspended. In October 2001, the CWHC suspended the applicant's hospital privileges and stopped paying his salary.

[11] The applicant began judicial review proceedings seeking an order to quash the investigation report and any decisions arising from it. The Supreme Court of British Columbia dismissed the applicant's petition for judicial review in February 2002, on the grounds that he had an adequate alternative remedy in the form of an appeal to the Hospital Appeal Board ("HAB") but noted that the applicant had been denied essential procedural fairness in the investigation report.[12]

[12] In June 2003, the British Columbia Court of Appeal allowed the applicant's appeal from the Supreme Court decision, holding that the CWHC Board's process for suspending the applicant's hospital privileges had breached the duty of procedural fairness owed the applicant and that the appeal to the HAB was not an adequate alternative remedy. The Court of Appeal overturned the Supreme Court's decision but did not order the reinstatement of the applicant's hospital privileges.[13] As a result of the Court of Appeal decision, the CWHC retained an investigator, Hanne Jensen, in August 2003 to conduct a second investigation into the complaint against the applicant under the CWHC's Human Rights policy. This investigation led to the Jensen report of May 31, 2005.

[13] The applicant applied for judicial review, asking among other things for orders that the Jensen report be set aside and that the CWHC be prohibited from proceeding further with the complaint. The Supreme Court concluded that it would be premature to conduct a judicial review at that stage and dismissed the applicant's petition.[14] The Court of Appeal dismissed the applicant's appeal of this decision.[15] The Supreme Court of Canada later dismissed the applicant's application for leave to appeal.[16]

[14] In parallel with these matters, the applicant sued a number of CWHC employees for defamation. Early in that process, the applicant sought to

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[11] Also known as the Peer Review Committee.
[12] *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2002 BCSC 250.
[13] *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2003 BCCA 338.
[14] *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473.
[15] *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2007 BCCA 562.
[16] *Cimolai v. Children's and Women's Health Centre of British Columbia*, [2008] S.C.C.A. No. 18.

introduce evidence from the human rights complaint process mentioned above. In a preliminary ruling, Holmes J. concluded that absolute immunity applied to certain aspects of the complaints and that communications within the hospital's human rights process were subject to a partial privilege restricting the disclosure of certain information. Holmes J. ordered a ban on the publication of the names or identifying information of the complainants in the human rights process.[17] In a later decision, Holmes J. dismissed the applicant's defamation suit on a number of grounds.[18] The Court of Appeal dismissed the applicant's appeal of that decision.[19]

[15] **3.2 Records in Dispute**—The PHSA retrieved over 1,400 pages of records in response to the applicant's request: the investigator's running and log file notes;[20] correspondence between the investigator and others on a variety of matters; records the applicant, the third party and the CWHC provided to the investigator; the investigator's typed notes of her interviews with the applicant, third party and witnesses; her notes of a tape recording of a meeting; relevant court decisions; and the investigator's report. The PHSA disclosed a number of records and withheld or severed others.

[16] The material before me indicates that, during the investigation, the applicant supplied the investigator with copies of a number of the records in dispute and received copies of others from her. Nevertheless, the applicant wishes access to all of the withheld information and records (which include records he supplied or received during the investigation) and the PHSA argues that he is not entitled to any of the withheld information or records.

3.3 Preliminary Matters

In camera material

[17] The PHSA initially submitted portions of the Jensen affidavit on an *in camera* basis. The applicant objected to this and asked that he receive complete copies of the affidavit.[21] I questioned whether any of this material should be received *in camera* and gave the PHSA an opportunity to consent to the disclosure of the affidavit or to withdraw the affidavit and resubmit it in a version that could be provided to all parties.

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[17] *Cimolai v. Hall*, 2004 BCSC 153. As far as I know, this ban still stands.
[18] *Cimolai v. Hall*, 2005 BCSC 31.
[19] *Cimolai v. Hall*, 2007 BCCA 225.
[20] The PHSA said that the investigator's "log and running file notes were made to record the ongoing process of the investigation, to record her observations, opinions and queries with respect to further investigation or issues to be identified and resolved. The notes were for her own use in conducting the investigation and preparing the report"; para. 74, initial submission.
[21] Reply submission.

[18] The PHSA chose to withdraw the affidavit and resubmit it in a form that all parties could receive, that is, with no material submitted *in camera*.[22] The applicant complained that the new affidavit was shorter than the previous version and suggested that there was extra material that he should receive.[23] As I have considered only the revised version of the Jensen affidavit, I need not deal with the applicant's point.

Custody or control of investigator's records not an issue

[19] The third party (the complainant in the human rights process) argues that, despite previous orders such as Orders 04-19[24] and F06-01,[25] the PHSA has not established that the requested records were its custody or control.[26]

[20] The applicant describes the third party's arguments on this point as "bizarre, obtuse, and not in keeping with reality". He says that the investigator herself has admitted that her records are under the PHSA's control.[27]

[21] The PHSA says that it and the investigator take the position that the investigator's file is under the PHSA's control by virtue of the service contract relationship between the investigator and the PHSA. Thus, it says, the personal information in the files is not, in accordance with s. 3(2)(d) of *Personal Information Protection Act* ("PIPA"), subject to PIPA.[28]

[22] In Decision P07-02,[29] I dealt with the issue of whether PIPA or FIPPA applied to personal information in the investigator's files. In that case, the same applicant had made a request under PIPA to the same investigator (as an organization under PIPA) for access to his personal information in her investigation files. The investigator noted that previous orders such as Order 04-19 had found that records of a contractor such as herself were covered by FIPPA. She also referred to Orders P05-02 and P05-03[30] which involved the same applicant.[31] I found that the investigator's records were under the PHSA's control and thus subject to FIPPA. For the reasons I gave in Decision P07-02, I reject the third party's arguments on control.

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[22] Reply submission.
[23] Letter of May 17, 2006.
[24] [2004] B.C.I.P.C.D. No. 19.
[25] [2006] B.C.I.P.C.D. No. 2.
[26] Pages. 3-10, initial submission. The third party made a number of arguments in support of her position which I have not reproduced here but I have considered them carefully.
[27] Paras. 19-20, reply submission.
[28] Paras. 19-20, reply submission.
[29] [2007] B.C.I.P.C.D. No. 27.
[30] [2005] B.C.I.P.C.D. No. 19; [2005] B.C.I.P.C.D. No. 20.
[31] The applicant attached a copy of this letter to his submissions in this inquiry; p. 32, initial submission.

[23] **3.4 Section 3(1)(b) of FIPPA**—The PHSA argues that most of the records that Hanne Jensen created or compiled during her investigation are excluded from the scope of FIPPA under s. 3(1)(b) because they are "personal notes or communications of a person who is acting in a … quasi judicial capacity".[32]

[24] **3.5 Investigation Framework––**Before I consider the parties' arguments, it is helpful to describe the framework giving rise to the investigation as well as the investigation itself.

The Hospital Act and the Hospital Act Regulation

[25] Under s. 4 of the *Hospital Act Regulation ("Regulation")*, a hospital's board of management must promulgate bylaws for its medical staff.[33] This section also prescribes that medical staff of a hospital may discipline its members in a manner it thinks fit and may recommend to the hospital board the cancellation, suspension, restriction or non-renewal of a member's permit to practice in the hospital. Section 6 of the *Regulation* gives a hospital board the power to exclude a person from a hospital for, among other things, failing to comply with the medical staff bylaws.

[26] Section 7(1)(b) of the *Regulation* provides for a hospital's issuance and management of hospital privileges. Section 8 of the *Regulation* sets out the process for applying for a permit to practice in a hospital, and for issuing, restricting, cancelling or suspending a permit. Section 8 of the *Regulation* also states that a medical practitioner whose permit has been suspended, restricted, cancelled or not renewed may appeal to the hospital board and appear in person before it. The hospital board must hear and consider or reconsider the matter and advise the practitioner of its decision within 30 days after the practitioner has appeared.

[27] A practitioner who is dissatisfied with a hospital board's decision may, under s. 8(5) of the *Regulation*, appeal to the hospital board or, under s. 8(6), to the Hospital Appeal Board ("HAB"). An appeal before the HAB is a new hearing of the subject matter (s. 8(8) of the *Regulation*). Section 10 of the *Regulation* sets out various powers and duties of the HAB, including: the requirement to provide notice of an appeal and to hold an oral hearing (unless the parties waive it); the ability to receive submissions; and the power to require parties to disclose documents. Under s. 46 of the *Hospital Act,* the HAB can affirm, vary, reverse or substitute its own decision for that of a hospital board and its decision is final and binding.

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[32] The PHSA said there is no draft decision and did not argue that any person was acting in a "judicial" capacity.

[33] These three paragraphs outline the legislation in effect at the time of the investigations.

The CWHC's human rights policy

[28] The human rights policy provides that

> [This Policy] and its procedures cover all individuals who are in any way associated with the C&W workplace including employees, volunteers, suppliers, contractors, medical staff, dental staff, allied staff, trainees, students, patients, clients, long-term care residents and visitors.

[29] The policy states that it:

> … provides a fair complaint resolution process that assures the rights of both the complainant and the respondent to dignity, safety and confidentiality.
>
> …
>
> The complaint resolution process is a remedial one, which may involve progressive discipline. To resolve concerns about discrimination and harassment at C&W [CWHC], informal procedures may first be used to improve communication and respect in the workplace and to facilitate changes in an individual's conduct through education.

[30] The complaint under investigation in this case was of personal harassment which the policy defines as

> … objectionable or unprofessional conduct or comment, directed towards a specific person, which serves no legitimate work purpose and has the effect of creating an intimidating, humiliating, hostile or offensive work environment.

[31] Section 3 of the policy sets out a set of procedures which are applicable to everyone covered by the policy. These include processes for complaint intake (3.3.1) and informal resolution procedures (3.3.2) which involve a Human Rights Advisor. Section 3.3.3 of the policy is headed "Formal Investigation and Decision". It provides that a request for a formal investigation will be made to the Human Rights Advisor with a detailed written account of the allegations. If the Advisor decides to conduct an investigation, s/he provides the respondent with a detailed account of the allegations and invites a response and any proposal for resolution. The Advisor reviews any response and proposal with the complainant who may accept the proposed resolution or ask that the matter proceed; in the latter case, an investigator[34] takes over. The policy states that

> 9. The investigator will apply appropriate procedures and practices to investigate and conduct interviews properly and confidentially, within the

[34] The policy defines "investigator" as "The Human Rights Advisor or one appointed by the Human rights Advisor if circumstances warrant".

> framework of natural justice.[35] This will include each party's rights to know and respond to all allegations. …

[32] The policy provides some guidelines with respect to the requirements of para. 9. Paragraph 9(a) states:

> The Investigator shall provide an opportunity to both the complainant and the respondent to provide verbal and/or written information related to the allegations. All potential witnesses may be interviewed by the Investigator. The complainant and respondent will be provided an opportunity to respond to all relevant information provided by witnesses.

[33] Paragraph 9(c) states:

> Typically within 30 days, the Investigator shall review all relevant information and make a determination whether or not there has been a violation of the Policy.

[34] The policy states that the investigation report is to contain:

- a summary description of the allegations
- a summary of the testimony provided by the witnesses and the respondent
- a determination as to whether the allegations have been proven on the balance of probabilities and whether the policy has been violated
- if the allegations are supported, a determination of whether the discrimination or harassment was intentional or not
- if the complaint is not substantiated, a determination of whether the complaint was vexatious or made in bad faith
- mitigating or aggravating circumstances affecting either party

[35] Section 4 of the policy relates to Disposition and Remedy. This section has numerous provisions which apply to the various groups of people who are covered by the policy, including employees, volunteers, suppliers, patients and students. Section 4.04 sets out the procedure regarding Medical/Dental and Allied Staff.

Application of the policy to medical staff

[36] The PHSA says that the human rights policy is a policy under Part 9 of the CWHC's Medical Staff Bylaws.[36] The PHSA also states that the CWHC Bylaws provide that any violation of the Bylaws, the Medical Staff Rules or the policies

[35] The policy defines "natural justice" as "A duty of procedural fairness where by all parties are given reasonable opportunities of presenting their cases, all parties are listened to fairly, and a decision is reached that is untainted by bias".

[36] The PHSA did not provide me with a copy of these bylaws or the Medical Staff Rules.

and procedures of the CWHC's Board is grounds for cancellation, suspension, restriction or non-renewal of hospital privileges in accordance with the Medical Staff disciplinary procedures. The procedures for any action affecting those privileges are governed by the statutory framework of the *Hospital Act* and *Hospital Act Regulation* set out above. As a result, any decision with respect to those privileges based on a violation of the policy is governed largely by the statutory framework, including the Medical Staff Rules. The Supreme Court decision on the applicant's petition for judicial review of the Jensen report quotes the CWHC's summary of the rest of the process after the Investigation Report is delivered:[37]

> The Human Rights Policy requires the Report to be delivered to certain individuals including the Vice President Human Resources, the complainant and the respondent.
>
> Section 4.04 of the Human Rights Policy provides that if the Respondent is a member of the medical staff (as the Petitioner[38] is), the Department Head and the Vice President Medical Affairs shall discuss with the respondent their recommendation as to the appropriate action to be taken. If the respondent concurs, the action is confirmed in writing and placed on the respondent's personnel file. If there is no agreement, the Vice President Medical Affairs refers the report and recommendations to the Chair of the Medical Advisory Committee ("MAC") and the Chair directs the formation of a Peer Review Committee ("PRC").
>
> **From this point, the administrative process is governed by the provisions of the Medical Staff Rules (see s. 9.2.1.4).**
>
> The PRC conducts a form of investigation and gives the respondent an opportunity to be heard. The PRC examines the documentation, receives input from the Department Head and others who can speak directly to concerns raised in the Investigation Report. The respondent Member of the Medical Staff, and legal counsel, may make a presentation and produce supporting documentation and the comments of others who can speak directly to the matters in issue (Medical Staff Rules, ss. 9.2.2.12 and 9.2.2.13).
>
> Following the investigation by the PRC, the Department Head, the Member (and legal counsel), the Senior Medical Administrator and the Hospital's counsel propose recommendations to the PRC. The PRC considers these recommendations and determines its own recommendation to put before the MAC (Medical Staff Rules, ss. 9.2.2.14 and 9.2.2.15).
>
> The MAC may accept or reject the PRC's recommendation or decide to hold its own hearing into the Member's conduct. If the MAC approves the recommendation the MAC records its approval in writing and forwards it to

[37] 2006 BCSC 1473, at para. 17.
[38] The applicant in this inquiry.

> the Board. If the MAC rejects the recommendation or decides to hold its own hearing, it will do so, allowing the Member the opportunity to make a full presentation, with documents and the comments of others with direct knowledge. The MAC thereafter forms its own recommendations and those recommendations are referred to the Board (Medical Staff Rules, ss. 9.2.2.16 and 9.2.2.17).
>
> Following the referral of the recommendations to the Board, the Senior Medical Administrator informs the Member under investigation and his or her counsel, of the recommendations. The Member must be given at least seven days notice of the Board meeting at which the recommendations will be considered. The Member and counsel have the right to be heard by the Board before the Board makes its decision. It is only when the Board decides that there is a substantive decision on the Member's situation.
>
> In the proceedings that led to the decision of the Court of Appeal in the previous judicial review application, the Board had in fact reached a decision to terminate the Petitioner's hospital privileges.
>
> The Board decision may be appealed to the Board, or to the Hospital Appeal Board, as per the Hospital Act Regulations. An appeal to the Hospital Appeal Board is a "new hearing". [emphasis added]

The investigation process & report

[37] Hanne Jensen deposed that the PHSA appointed her to investigate and report on the third party's complaint. I summarize below her description of her investigation process:

- she reviewed the complaint of the complainant (the third party in this inquiry) and provided a copy to the respondent (the applicant in this inquiry)
- she prepared notes of questions and issues to discuss with the third party and interviewed her
- she carried out a similar but separate process with the applicant after receiving his written response to the complaint
- she requested and received documents from the third party, the applicant and the CWHC
- she identified witnesses with relevant information, prepared questions and issues to raise with them and interviewed them
- she prepared notes of questions and issues to discuss with the third party and applicant and conducted further (separate) interviews with them to review the witnesses' evidence

- at the applicant's request, she listened to a tape recording of a meeting of September 15, 1999[39] of the Infection Control Committee but did not receive a copy
- she invited and received further submissions from the parties before preparing her report which she issued on May 31, 2005[40]

[38] The investigator's 250-page report sets out the allegations and accounts of her interviews with the third party, the applicant and a number of witnesses. Most witnesses agreed to her request to be interviewed. The investigator also requested and received documentation from the complainant, the respondent, witnesses and the CWHC.

[39] The investigator described the "legal framework for decision-making" in the analysis section of her report:

> In complaints of discrimination and harassment heard by tribunals, the burden of proof is on the complainant. The standard of proof is the civil standard, balance of probabilities. This means that a decision maker must decide whether the complainant's version of events is more probable than other conflicting versions of those events, considering the totality of the circumstances. It means that a decision maker must be satisfied that, on balance, what a complainant says happened did happen. This is a more relaxed standard than that applied in a case of criminal charges where the adjudicator must be persuaded beyond a reasonable doubt that the accused committed the offence with which he or she is charged.
>
> The role of an investigator is to make findings of fact regarding the matters which form the basis of a complaint. It is imperative that all relevant information be sought and obtained and that all evidence be considered and weighed very cautiously. An investigator then bases her findings on a careful analysis of all the available information.
>
> In an investigation, the interviewees are not sworn to tell the truth and the safeguards of a process such as an arbitration hearing are absent. At the same time, and as is often the case in complaints of harassment, much hinges on the impressions, perceptions and interpretations of exchanges between individuals that occurred in the context of a busy workplace over an extended period of time. …[41]

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[39] The investigator's affidavit at para. 12(p) and the PHSA's submission at para. 87(o) both refer to the Infection Control Committee ("ICC") meeting of September 19, 1999 but the records themselves show that the meeting in question took place on September 15, 1999. See also Order F06-15, [2006] B.C.I.P.C.D. No. 22, which dealt with the tape recording and transcript of the same ICC meeting of September 15, 1999.

[40] Para. 12, Jensen affidavit. The investigator also outlined the types and contents of the files she created; paras. 17-19, Jensen affidavit.

[41] Pages 197-198, Jensen report.

[40] The report continues with the investigator's assessment of the credibility of the interviewees' evidence and her findings of fact. It concludes with a finding that the third party's allegations of harassment were substantiated and proven, that the applicant had violated the CWHC's Human Rights policy and that the applicant had acted intentionally. The report makes no recommendations.

[41] **3.6 The parties' arguments on s. 3(1)(b)**—The PHSA takes the position that the CWHC's process under its human rights policy is a "quasi judicial process" and that the investigator, Hanne Jensen, was acting in a quasi judicial capacity in creating the records in issue. The PHSA states that "the quasi-judicial status of the process for investigating and resolving complaints made under the Health Centre's Human Rights policy was decided against the Applicant" by Holmes J., and that "relitigation of that issue is an abuse of process."

[42] PHSA notes that, in the first judicial review, the Court of Appeal held that the applicant was entitled to judicial review of the decision to terminate his hospital privileges. The Court of Appeal determined that the Board of the Health Centre (CWHC) was a "public body with the power to decide a matter affecting [the applicant's] rights, interests, property or privileges" and therefore owed a duty of procedural fairness to the applicant. The PHSA goes on to assert that, in the defamation action, Holmes J. relied on the Court of Appeal's conclusions and then determined that "all stages of the Human Rights process….are a quasi-judicial process…".[42]

[43] The PHSA also drew my attention to a number of decisions which found that complaint investigations undertaken by professional disciplinary or regulatory bodies are part of a quasi judicial process or continuum, whether or not the investigation results in an adjudicative proceeding: *Hung v. Gardiner*,[43] *Schut v. Magee*,[44] *Sussman v. Eales*,[45] *Hamouth v. Edwards & Angell et al.*[46] and *Ayangma v. NAV Canada*.[47] The PHSA then argued as follows:

> 41. The purpose for the qualified privilege afforded to statements made in quasi judicial proceedings is to protect and advance the administration of justice. The public interest in the administration of justice outweighs the private interests of the individual who alleges defamation. [citations omitted]
>
> 42. The PHSA submits that the policy interests in the protection of deliberative secrecy that underlie section 3(1)(b) of the Act are consistent with the policy interests in the defence of absolute privilege with respect to

[42] PHSA initial submission, paras. 28-33.
[43] 2003 BCCA 257.
[44] 2003 BCCA 417.
[45] [1985] O.J. No. 412, appeal allowed on another issue, [1986] O.J. No. 317 (Ont. C.A.).
[46] 2005 BCCA 172.
[47] [2001] P.E.I.J. No. 5 (PEICA).

communications and statements made in quasi judicial proceedings, that is, the overall protection and promotion of the administration of justice.

[44] The PHSA says that the process under the human rights policy is quasi judicial, as follows:

> 45. The PHSA submits that the Health Centre's process under the Human Right's policy is quasi-judicial:
>
> (a) The investigation is commenced on the receipt of a written complaint made under the Human Rights policy;
>
> (b) The respondent is provided with a copy of the written complaint;
>
> (c) The investigator hears from the complainant in person;
>
> (d) The investigator hears from the respondent in person;
>
> (e) Both parties are able to submit documentary evidence to the investigator;
>
> (f) Both the complainant and respondent are given the opportunity to respond to evidence and issues raised by the other;
>
> (g) The investigator identifies relevant witnesses and interviews those witnesses on matters at issue in the investigation;
>
> (h) Both the complainant and respondent are given the opportunity to respond to evidence provided by the witnesses;
>
> (i) The investigator hears submissions from the parties and issues interim decisions on evidentiary issues that arise in the course of the investigation;
>
> (j) The parties are given the opportunity to provide final written submissions to the investigator and to respond to the other party's submissions;
>
> (k) The investigator weighs the evidence and assesses the credibility of the parties and the witnesses in making findings of fact; and
>
> (l) The investigator applies the criteria set out in the Human Rights policy to the findings of fact to determine whether or not there has been a violation of the Human Rights policy.
>
> 46. The investigator does not determine the consequences to a member of the medical staff for a breach of the Human Rights policy. The Health Centre's Board, acting on recommendations from the Medical Advisory Committee, determines the appropriate discipline.

[45] The PHSA argues that administrative decision-makers can be acting in a quasi judicial capacity even when they are not exercising an adjudicative function. It referred for support to *College of Physicians and Surgeons v. British*

Columbia (Information and Privacy Commissioner)[48] where the court commented that the purpose of s. 13[49] of FIPPA is to protect deliberative secrecy and that the deliberative process includes the investigation and gathering of facts necessary to the consideration of courses of action. In the PHSA's view, the investigator was acting in a quasi judicial capacity in investigating and gathering the facts and information necessary to consider whether the applicant had breached the human rights policy.[50]

[46] The applicant rejects the argument that the investigator in this case was acting in a quasi judicial capacity as a "long stretch of the imagination". He says that characteristics of judicial and quasi judicial proceedings are independence and neutrality, they are adversarial processes in that the parties determine what evidence to adduce, there is a discovery process and evidence is subject to cross-examination. He added that in Order F05-34[51] similar information was ordered disclosed. He takes the view that the CWHC's human rights process was not quasi judicial but administrative because:

- the investigator was appointed and paid by the public body,
- the investigator was not neutral
- there was no hearing "in the sense of a trial or adversarial hearing"
- there was no first hand testimony or cross-examination of witnesses
- the investigator might or might not interview all suggested witnesses
- the investigator might or might not review all submissions[52]

[47] The PHSA responded to the applicant's arguments on these points, as follows:

- while the PHSA retained and paid the investigator, this is not inconsistent with the human rights process being quasi judicial; the applicant has provided no authority to suggest that such a situation "renders the process

[48] 2002 BCCA 665, at paras. 105-106.
[49] This exception permits a public body to withhold information where its disclosure would reveal advice or recommendations developed by or for a public body or minister.
[50] Paras. 60-62, initial submission. I will say here that I do not find this argument, which relies on a case dealing with an exception under FIPPA to the right of access, s. 13(1), persuasive. The PHSA also described certain types of records which in its view were not excluded by s. 3(1)(b) and which it had therefore disclosed; paras. 63-71, initial submission. The PHSA argued in its supplementary submission of January 8, 2009 that 2006 BCSC 1473 and 2007 BCCA 562 both support its arguments that the human rights process is a quasi judicial process and the investigator was acting as a "quasi-judicial decision-maker" in conducting her investigation and preparing her report.
[51] [2005] B.C.I.P.C.D. No. 46. This was a case involving the same applicant and the Vancouver Coastal Health Authority, where the applicant requested access to records from the first human rights investigation, which led to the Axelrod report.
[52] Paras. 41 & 43, initial submission; paras. 4-18, reply submission.

administrative rather than quasi judicial, or compromises the independence of the investigator"

- the PHSA disagrees with the applicant's opinion that the investigator was not neutral
- while the investigator did not conduct oral hearings, the PHSA argued that doing so is not required in order for a process to be quasi judicial
- the process was adversarial in that the complainant and respondent in the human rights process made submissions to the investigator
- while the investigator did not examine or cross-examine witnesses, the PHSA argued that these are not necessary elements of a quasi judicial process
- the investigator determined which witnesses to examine, based on her identification of the matters in issue and the best sources of evidence; the investigative nature of the human rights process does not mean that the process was not quasi judicial
- the investigator accepted lengthy submissions and replies from both parties in the investigation[53]

Previous orders

[48] In Order No. 321-1999,[54] Commissioner Flaherty considered the issue of whether a Crown prosecutor acts in a "judicial capacity" for the purposes of s. 3(1)(b) when exercising prosecutorial discretion under the *Crown Counsel Act*:

> The purpose of section 3(1)(b) appears to be to create an exclusion from the scope of the Act which extends deliberative secrecy to personal notes, communications, and draft decisions of those engaged in a judicial and quasi-judicial capacity. The only functional parameter required to trigger section 3(1)(b) is a person acting in a judicial or quasi-judicial capacity. Thus, despite the fact that the deliberative secrecy concept normally revolves around protecting the integrity and independence of *adjudicative* processes, there is no requirement in 3(1)(b) that the function be *adjudicative*. [italics in original]

[49] The Commissioner reviewed the non-exhaustive criteria for judicial or quasi judicial functioning set out in *M.N.R. v. Coopers and Lybrand*[55] and referred to *Hoem v. Law Society of British Columbia*[56] and *Nelles v. Ontario*.[57] He said he considered *Nelles* to hold that, although a Crown prosecutor has investigative and administrative functions which are not judicial in nature, the exercise of

[53] Paras. 12-15, reply submission.
[54] [1999] B.C.I.P.C.D. No. 34, at p. 9.
[55] (1978) 92 D.L.R. (3d) 1.
[56] [1985] B.C.J. No. 2300.
[57] [1989] 2 S.C.R. 170.

prosecutorial discretion was judicial, "albeit not of an *adjudicative* quality". He found that the Crown prosecutor's notes made in the judicial exercise of his discretion to charge were excluded from the scope of FIPPA under s. 3(1)(b).[58]

[50] Other orders dealing with the quasi judicial aspect of s. 3(1)(b) have generally concerned administrative tribunals or bodies performing an adjudicative or decision-making function. In Order 00-16,[59] for example, Commissioner Loukidelis considered the *Coopers & Lybrand* criteria in concluding that Labour Relations Board panel members were acting in a quasi judicial capacity when they were considering, deliberating on and disposing of an application of some kind under the *Labour Relations Code*. He found that certain records fell under s. 3(1)(b), such as panel members' comments and thoughts about issues raised in the application, as well as their comments on the evidence before them. He found that certain other communications, such as those concerning the scheduling of meetings and the constitution of the panel, did not fall under s. 3(1)(b) because they "did not engage the deliberative processes that are protected by s. 3(1)(b)".[60] Commissioner Loukidelis applied the *Coopers & Lybrand* criteria in arriving at similar findings in Order 02-01,[61] Order 02-12[62] and Order 02-34.[63]

[51] The common features of these orders are that they all deal with individual decision-makers, appointed under statutory authority, who are hearing, deliberating on, disposing of or deciding an individual's legal rights, usually in the form of a decision on or adjudicative determination of those rights. Alberta orders on the equivalent provision in Alberta's *Freedom of Information and Protection of Privacy Act* have made similar findings.[64] Another theme running through these orders is that they are premised on the rationale that s. 3(1)(b) is designed to ensure protection of deliberative secrecy.

[52] The usual practice for public bodies dealing with complaint investigation records has been to process such records under FIPPA and to disclose them, subject to any applicable exceptions.[65] As the applicant notes, this is what happened in the case that led to Order F05-34.

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[58] Page 11. Italics in original.
[59] [2000] B.C.I.P.C.D. No. 19.
[60] At pp. 7-10.
[61] [2002] B.C.I.P.C.D. No. 1.
[62] [2002] B.C.I.P.C.D. No. 12.
[63] [2002] B.C.I.P.C.D. No. 34.
[64] See, for example, Alberta Orders F2003-009, [2005] A.I.P.C.D. No. 21, 2000-003, [2000] A.I.P.C.D. No. 33 and 99-025, [1999] A.I.P.C.D. No. 31. See also these Newfoundland and Labrador Reports: Intergovernmental Affairs Secretariat, Re, 2005 CanLII 44153 (NL I.P.C.) and College of the North Atlantic, Re, 2006 CanLII 9399 (NL I.P.C.).
[65] See any of the numerous orders dealing with complaint and investigation records, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8 and Order 03-24, [2003] B.C.I.P.C.D. No. 24.

3.7 Analysis

Does the decision of Holmes J. decide the issue?

[53] The PHSA's arguments rely heavily on Holmes J.'s preliminary ruling. The issue giving rise to that ruling was whether evidence related to the human rights process was protected by absolute privilege or immunity in a defamation suit. During the *voir dire* proceedings, the defendants in the defamation suit and the PHSA (for the CWHC) took the position that "the complaints were made within a quasi judicial process that gave rise to an absolute privilege that prevents their use in evidence" and "an evidentiary privilege arising from the confidential character" of the complaint process.[66]

[54] The applicant (the plaintiff in the defamation suit) questioned there whether "the hospital's human rights process is or is incidental to a quasi-judicial proceeding" and argued that absolute privilege "does not create a broad basis for the exclusion of evidence in a separate action".[67]

[55] In deciding the matter, Holmes J. said she would first "address whether the hospital's human rights process is *incidental* to a quasi-judicial proceeding" [my italics].[68] After referring to the Court of Appeal's description of the "statutory framework" under which the CWHC's human rights advisor, management and hospital board acted in connection with the complaints, and of the human rights process itself,[69] Holmes J. said this:

> ¶28 On this basis, I accept Mr. Dives'[70] submissions that the statutory regime providing for the cancellation by the hospital board of a doctor's hospital privileges creates a quasi-judicial process. I accept also that a workplace harassment complaint submitted under the Human Rights Policy is incidental and sufficiently proximate to the adjudicative event of the board's decision to fall within any absolute privilege the quasi-judicial proceedings enjoys [*sic*].

[56] The PHSA interprets this passage to mean that "all stages of the Human Rights process", from the investigation through to review by hospital management and the hospital board hearing, are a quasi judicial process.[71] The PHSA also drew my attention to paras. 56-57 of the Court of Appeal decision:

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[66] 2004 BCSC 153, at paras. 2 and 21.
[67] 2004 BCSC 153, at para. 24.
[68] 2004 BCSC 153, at para. 25.
[69] 2003 BCCA 338, at paras. 4 & 29-31.
[70] Mr. Dives was counsel for the defendants in the defamation action.
[71] Para. 33, initial submission.

(b) Exclusion of Evidence

> ¶56 Harassment complaints arose in the course of this dispute. After a *voir dire*, the judge excluded evidence of the complaint process, sought to be tendered by the appellant (2004 BCSC 153), on the ground that the complaints and the way they were handled fell under the absolute privilege attaching to quasi-judicial proceedings and on the additional ground that the complaints and the ensuing process originated in the confidence provided by the terms of the hospital's human rights policy.
>
> ¶57 In order for the appellant to succeed on this issue, he must show a reversible error in the judge's opinion that the evidence occurred within a quasi-judicial process and within the confidentiality promised in the hospital's policy. I can find no reason to disagree with the judge's careful analysis of the law or her application of the law to the facts as she found them.[72]

[57] In my view, Holmes J. considered a very different question than that which arises in the matter before me. Holmes J. held that the statutory regime the Hospital Board applied to consider whether a doctor's hospital privileges should be revoked is a quasi judicial process. The "adjudicative event" associated with that quasi judicial process was the decision whether or not to suspend those privileges. Holmes J.'s decision means that when the Hospital Board makes that decision, it must act quasi judicially. As a result, Holmes J.'s decision would be determinative of any request to access the "personal notes, communications or draft decisions" of members of the Hospital Board with respect to that decision, since they are persons acting "in a quasi judicial capacity."

[58] Holmes J. also held that, because the ultimate decision is one which is required to be made on a quasi judicial basis, the absolute immunity which is afforded to that process extends to all activities which are necessarily incidental to that process, such as the making of the complaints under the Human Rights policy. However, the fact that the immunity from suit flows back over complaints brought pursuant to the policy does not address whether any specific participant in the application of the policy is required to act in a quasi judicial capacity.

[59] In the application of s. 3(1)(b), I am concerned with the specific question of whether the investigator herself, not the Board, was acting in a quasi judicial capacity. A person is acting in a quasi judicial capacity when she is engaged in a function which must be carried out on a quasi judicial basis. This involves an inquiry into the function the investigator is carrying out and whether she is required to act in a quasi judicial manner in discharging that function. While context is important in assessing that question, the fact that she is

[72] 2007 BCCA 225. The applicant argued in his supplementary submission of January 2, 2009 that these paragraphs are irrelevant in this inquiry as Holmes J. simply decided that information from the "bogus harassment process" could not be used against the defendants in the defamation suit.

a participant in a process which may lead to the Hospital Board making a decision which must be made on a quasi judicial basis does not mean that the investigator is required to act on that basis herself. Rather, it is necessary to apply the factors which determine whether an activity must be carried out in a quasi judicial manner to the investigation and report function. This is not something which Holmes J. considered.

[60] In my view, Holmes J.'s decision does not provide the PHSA any assistance as regards s. 3(1)(b) of FIPPA. That provision extends only to certain types of records of persons "acting in a judicial or quasi judicial capacity". It does not extend to records that might be "proximate" or "incidental" to someone acting in this capacity. As for the Court of Appeal decision, it confirmed Holmes J.'s findings on the immunity issue. It did not extend the ruling to encompass the PHSA's assertion that the entire human rights process is quasi judicial. As a result, it is necessary to consider whether the activities of the investigator are required to be made in a quasi judicial manner.

Is the investigator required to act on a quasi judicial basis?

[61] The categorization of the activities of public actors as either administrative or quasi judicial has been the subject of much judicial discussion. In the past, the distinction was of critical importance in determining both the availability of judicial review and the procedural requirements which a decision-maker was required to follow. If a decision was required to be made on a quasi judicial basis, the decision-maker was required to apply the principles of natural justice and the decision was subject to judicial review. If the powers were administrative only, requirements of procedural fairness did not apply and the decision was not subject to review. However, as the Supreme Court of Canada has stated, that Court has "gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions."[73] Once it was recognized that a duty of fairness attached to many administrative decisions, it became less important whether the decision was administrative or quasi judicial, since both attracted procedural protection.

[62] Prior to the recognition of the duty to be fair, it had been generally understood that investigative and fact-finding powers were not required to be exercised on a quasi judicial basis and thus the party being investigated did not necessarily even have a right to be heard. In *Coopers & Lybrand*, the Supreme Court of Canada referred to the older case of *Guay v. Lafleur.*[74] In that case, an officer of the Department of National Revenue was authorized by the Deputy Minister, pursuant to the *Income Tax Act,* to make an inquiry into the affairs of the respondent and others. The Court held that the investigation was a purely

[73] *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919, para. 22.
[74] [1965] S.C.R. 12.

administrative matter which could neither decide nor adjudicate upon anything. It was not "a judicial or quasi-judicial inquiry, but a private investigation" through which the Minster sought to obtain the facts which he considered necessary to discharge his statutory obligation to assess taxes. As a result there was no obligation to even hear from the individual being investigated.

[63] The duty to be fair in the context of administrative decisions emerged as a result of the recognition that denying all procedural protections on the basis that a function was not quasi judicial could work a serious injustice.[75] Since the development of the duty of fairness, it has often been held to apply to investigators. As a result, investigation processes and reports may be required to be procedurally fair and may be subject to judicial review. However, this does not change the fact that these powers are not required to be exercised on a quasi judicial basis. Rather, it is a function of the expanded scope of judicial review, which provides that these powers can be supervised by the court notwithstanding that they are not of a quasi judicial nature.[76]

[64] Macaulay & Sprague describe investigative powers as "generally administrative functions which do not result in binding decisions but rather are inquiries to determine facts or the state of things which culminate in a report to another body."[77] In the context of information and privacy legislation, the Newfoundland and Labrador Information and Privacy Commissioner has held that investigative powers would not trigger an exemption with substantially the same wording as s. 3(1)(b):

> I believe it to be clear from the Supreme Court of Canada and the textual descriptions that a judicial or quasi-judicial proceeding involves significant judicial power, including the power to make a finding of guilt or innocence, to impose sanctions or to award remedies. Key to this process is the ability to render a decision or an order. Such a process is to be distinguished from a proceeding with a mandate to investigate or to inquire into a matter and to issue recommendations in response to this investigation or inquiry. This latter process is more administrative in nature as opposed to judicial.[78]

[65] The leading case from the Supreme Court of Canada on the characteristics of a body that is required to act on a judicial or quasi judicial basis is *Coopers & Lybrand*. That case states:

> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

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[75] *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1987] S.C.J. No. 88.
[76] See, for example, *Hammond v. Assn of British Columbia Professional Foresters*, [1991] B.C.J. No. 295.
[77] *Hearings before Administrative Tribunals*, Second Edition (Carswell, 2002), page 9-20.6
[78] 2005 CanLII 44153 (N.L.I.P.C.), Report 2005-007, *Intergovernmental Affairs Secretariat*, para. 25.

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth* v. *National Parole Board* [[1976] 1 S.C.R. 453.], a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butlers* v. *Matsqui Institution Inmate Disciplinary Board* [[1978] 1 S.C.R. 118.].
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah* v. *Fernando* [[1967] 2 A.C. 337 (P.C.).]. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.[79]

[66] The first thing that is noteworthy is that the Court's discussion relates to decisions which are required "by law" to be made on a quasi judicial basis. While this refers to the specific statute which was under consideration, namely the *Federal Court Act*, it is also the case that bodies are normally considered to be quasi judicial when an examination of the legislative context in which they operate demonstrates that the legislature intended that body to act in a judicial or quasi judicial manner.[80] In this case, of course, the function of the investigator does not arise from any statute, but the internal policy of the hospital. While the *Hospital Act* and *Hospital Act Regulation* govern the process by which decisions regarding hospital privileges may be made, they do not in any way address investigations under the human rights policy. The investigator is, in a very real sense, tasked with undertaking an investigation on behalf of the hospital, at the hospital's request, and in a manner prescribed by an internal hospital policy, to determine whether that internal policy has been violated by anyone who is in

[79] At pp. 5-6.
[80] *Coopers v. Lybrand*, p. 503

attendance at the hospital at any time. In my view, the hospital would not have the capacity to create a position such as that of the investigator if the functions which the investigator exercised with respect to those bound by the policy were, in fact, judicial or quasi judicial. That would be a matter for the legislature. On that basis alone, I would find that the investigator is not acting "in a quasi judicial capacity." [81]

[67] Apart from this, on an application of the specific factors set out in *Coopers & Lybrand*, I also find that the investigator was not acting in a "quasi judicial capacity". First, it should be noted that the investigator was a contractor employed by the PHSA. The investigator herself notes she is not independent but one who acts under the CWHC's human right's policy.[82] That said, the CWHC's human rights policy requires the investigator to conduct her investigation "within a framework of natural justice". This, however, appears to relate only to the conduct of interviews and information gathering.

[68] The investigator's process did not have "procedures, functions and happenings approximating those of a court." In this regard, the investigator's activity can be contrasted with the activities considered to be "quasi judicial" in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*.[83] In that case, the court noted that a quasi judicial body is one "from which the law will require some measure of judicial procedural conduct." That case concerned a Commission of Inquiry, established by Order In Council pursuant to the *Inquiry Act*. The Commission held 87 days of hearings where witnesses testified under oath. There was provision for the calling of rebuttal evidence, the cross-examination of witnesses and publication bans. The Commissioner, pursuant to the *Inquiry Act*, "had most of the powers and legal privileges of a Supreme Court judge." The Court noted that some of the procedures and ruling made by the Commissioner were "similar to those in court proceedings, including various rulings of law." The Court found that the Commissioner "intended to act in a judicial-like capacity."

[69] In contrast, in this case, the investigator gave the third party an opportunity to substantiate her complaint and the applicant an opportunity to respond to the third party's allegations in a series of separate interviews and written submissions. I accept that, in carrying out her duty to be procedurally fair in her fact-finding role, the investigator thus heard from the applicant and the third party. I do not however think this means the investigator conducted a "hearing" as contemplated by *Coopers & Lybrand*.

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[81] See also, 2006 CanLII 54099 (N.L.I.P.C.), Report 2006-014, College of the North Atlantic at para. 27.
[82] Jensen running notes, p. 4.
[83] 2004 BCSC 1597.

[70] The investigator had no power to compel the applicant, third party or witnesses to be interviewed[84] or to produce documents. Rather she depended on their voluntary co-operation to participate in interviews (at least one person refused) and to provide documents that she requested. The applicant and third party chose to have legal counsel present during their individual interviews, but neither they nor the witnesses gave sworn evidence and there was no cross examination.[85]

[71] The applicant and third party often differed in their accounts of the events leading to the complaints and may therefore be said to have had opposing views on the allegations. In participating in the investigation, however, the applicant and third party were not in my view involved in an "adversarial process". Indeed the investigator herself did not regard her investigation as an "adversarial process".[86]

[72] It is true that in making her determination regarding whether the policy had been breached, the investigator was required to apply the policy to an individual's behaviour. However, in my view, that is not sufficient to establish that she was acting in a quasi judicial capacity.

[73] The investigator's "decision" was not one whereby she adjudicated on or disposed of anyone's "rights". Her process ended with the issuance of her report. She made no recommendations for further action by CWHC management and had no power to impose sanctions on the applicant or award remedies to the third party. The purpose of the investigation report was to assist CWHC management in deciding whether or not to pursue further action and possible discipline against the applicant. The investigator's conclusions, while possibly influential, were not binding on those who had the power to make decisions affecting the applicant's rights.

[74] Rather, her report was only one in a series of steps leading to further reviews, recommendations, investigations and the Board's decision. The report's conclusions could have been varied or even rejected at any stage in the process. These things are evident, not only from the policy itself (see paras. 25-36 above) and the investigator's report (see para. 37 above), but also from the Supreme Court decision on the applicant's petition for judicial review of the Jensen report:[87]

> ¶14 … It is the respondent's [CWHC's] position that this application for judicial review is premature because no substantive decision has yet been made. Furthermore, [the applicant] has not exhausted any of the

[84] See, for example, p. 1, Tab 3, binder of third party's interview notes.
[85] See p. 2, Tab 4, binder of third party's interviews.
[86] See p. 1393 of the records in dispute.
[87] 2006 BCSC 1473.

> procedural steps of internal review available to address the asserted procedural and substantive deficiencies in the investigation and Report.
>
> …
>
> ¶31 The respondent contents [*sic*] that only where the investigation is conducted by a body "seized of powers to determine matters in a final sense" will its report be open to review.
>
> ¶32 While conceding an investigation report or recommendation may be subject to judicial review where any further process is no more than a rubber stamp to the report or recommendations, the respondent submits that that is not the case at bar. Here, what remains to be decided is whether there are any valid challenges to the Report and the impact, if any, on the status of the petition flowing from the investigation or hospital management's recommendations. In other words, the conclusions of the Report and the hospital management recommendation are susceptible to variation as the internal review proceeds. In that context, the respondent submits the Report should not be subject to being quashed because it does not represent a decision that has crystallized into something that is more than a step in an ongoing process.
>
> …
>
> ¶36 The respondent submits:
>
> > In the case at bar, there are still a number of steps in the decision-making process which have not yet taken place. The Investigator's Report and the management recommendations have yet to be reviewed by three separate decision-making bodies. None of these bodies is required to accept the findings or recommendations of the previous decision-maker. The Petitioner will have the opportunity to make representations and present evidence at each stage. Beyond these three internal bodies, there is a further right of appeal to another administrative body.
>
> …
>
> ¶56 In the case at bar, I am satisfied that the Report does not determine [the applicant's] hospital privileges and status at CWHC and thus far has served only as a foundation for recommendations subject to review and challenge.
>
> ¶57 However, the Report plays a significant role in the process of internal review and significant consequences can flow from acceptance of the determinations made at the investigation stage. Therefore, the Report is subject to judicial review.

[75] The "significant consequences" arise, not from the Report itself, but from the possible acceptance of its determinations by another body. In any case, the fact that there may be consequences for an individual does not necessarily involve a duty to act judicially, although it may impose a duty of fairness.

Indeed, it was such a duty of fairness which the Court held might attach to the preparation of the report. The Court concluded:

> What clearly emerges from the judgments of Fraser J. and the Court of Appeal in relation to the first investigation and its subsequent review is that it is incumbent on those discharging the function of the peer review committee, the medical advisory committee and the Board in relation to the complaints at issue, to bring an independent responsible and committed approach to the review process and to not merely serve as a rubber stamp to the investigation. That approach includes assessing the procedural fairness of the investigation, in light of complaints made by [the applicant], and, if necessary, deciding what, if any, measures must be taken to ameliorate any unfairness.

[76] It is clear from this passage that, if an individual's rights are to be affected, it will only be after the peer review committee, the medical advisory committee and the Hospital Board have each discharged their own functions independent of the investigation. In these circumstances, it cannot be said that the report itself affects those rights, although it may be utilized in a process which will affect them.

[77] As recognized in *Coopers & Lybrand*, "[a]dministrative decision does not lend itself to a rigid classification of function." Rather, the determination of whether an activity must be carried out on a quasi judicial basis depends on weighing the relevant factors to determine where the function falls on the spectrum of decision-making. I find that, on balance, the investigator was not required to, and indeed did not, act in a manner similar or analogous to a court.

Conclusion

[78] The application of the human rights policy to medical staff can lead to the suspension of hospital privileges by the Board in accordance with the statutory scheme, a disciplinary process which has been held to be quasi judicial. The communications which are necessarily incidental to that quasi judicial process, such as the content of complaints under the human rights policy, enjoy the immunity which attaches to the quasi judicial process itself. As well, because of the role which the investigation and report may play in that process, it is subject to judicial review and must be conducted in accordance with procedural fairness. However, this does not mean the investigator herself, as opposed to the Board, is required to act in a quasi judicial manner when carrying her functions under the Policy.

[79] For all the reasons set out above, I conclude that the investigator was not "acting in a quasi judicial capacity" for the purposes of s. 3(1)(b) and I find that s. 3(1)(b) does not apply to the records which the PHSA withheld as being excluded from the scope of FIPPA under that section. The PHSA must therefore

process these records under FIPPA and decide whether or not the applicant is entitled to have access to them.

[80] Given my decision on s. 3(1)(b), I need not deal with the PHSA's arguments on the types of records it considers are or are not excluded from the scope of FIPPA under s. 3(1)(b).[88] I also need not deal with the PHSA's submission that the applicant is not entitled to argue the issue of the quasi judicial nature of the human rights process because that matter has already been decided by the courts and relitigation would be an abuse of process.[89]

[81] **3.8 Section 51 of the *Evidence Act***—The PHSA argues that it is prohibited by ss. 51(5) and (6) of the *Evidence Act* from disclosing some information by s. 51 of the *Evidence Act* as it is "information provided to or the findings and conclusions" of the CWHC's Infection Control Committee ("ICC"), which the PHSA says is a "committee" for the purposes of s. 51 of the *Evidence Act*. The PHSA notes that the status of the ICC is an issue in another inquiry (which later led to Order F06-15[90]). The PHSA said that, in this inquiry, it relies on the evidence and submissions it made in the other inquiry.[91]

[82] The applicant rejects the PHSA's arguments as "foolish" and the application of s. 51 of the *Evidence Act* as "a stretch of the imagination". He says that the material was used in other proceedings and "[t]here cannot therefore be any seclusion thereafter", especially when the material was used against him in the human rights process.[92]

[83] In Order F06-15, I concluded that the ICC was a "committee" for the purposes of s. 51 of the *Evidence Act*.[93] I also concluded that the information in question, contained in a tape recording and transcript of an ICC meeting of September 15, 1999, was provided to the ICC within the scope of s. 51 of the *Evidence Act*. I then found, because of s. 51(5) and s. 51(7) of the *Evidence Act* and s. 79 of FIPPA, the records in question could not be disclosed to the applicant, despite his right of access under FIPPA.

[84] As I have previously found that the ICC was a "committee" for the purposes of s. 51(1) of the *Evidence Act*, I need only consider whether the

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[88] Paras. 72-82, initial submission; paras. 8-19, Jensen affidavit.
[89] Paras. 48-59, initial submission.
[90] [2006] B.C.I.P.C.D. No. 22.
[91] Paras. 83-86, initial submission.
[92] Para. 42, initial submission and pp. 1-2, reply submission; see also paras. 27-28 of Order F06-15 for a summary of similar arguments the applicant made there. The PHSA said that any use of the records in other proceedings is not relevant here; para. 16, reply submission; see also para. 49 of Order F06-15 for a summary of its response to the applicant on this point. Paras. 51-53 of that order set out my comments on this issue which also apply here.
[93] At paras. 29-44.

records in question are prohibited from disclosure under s. 51(5) of the *Evidence Act*, according to these principles:[94]

- section 51(5) of the *Evidence Act* prohibits a s. 51 committee or a person on a s. 51 committee (including, by implication, the PHSA) from disclosing or publishing information or a record provided to the committee within the scope of s. 51 or any resulting findings or conclusion of the committee
- sections 51(5) and s. 51(6) of the *Evidence Act* take precedence in the event that they conflict with one of FIPPA's provisions, such as the right of access to information in s. 4

[85] The records and information in issue here regarding s. 51 of the *Evidence Act* consist mainly of ICC meeting minutes and agendas, emails and various versions of a draft policy on screening health care workers for Methacillin Resistant Staphylococcus Aureus ("MRSA").[95] I agree with the PHSA's characterization of these items as information provided to and findings of the ICC on the issue of health care worker screening and MRSA for the investigation and evaluation of infection control practices at the CWHC, within the meaning of s. 51(1) of the *Evidence Act*. I find that disclosure of these records and information is prohibited by s. 51(5) and that, because of s. 51(7) of the *Evidence Act* and s. 79 of FIPPA, this prohibition prevails despite the applicant's right of access in s. 4 of FIPPA to records in the custody or under the control of the PHSA.

[86] **3.9 Custody or Control of a Transcript**—The PHSA says that pages 766-771 are excerpts from the transcript of evidence in the trial proceedings in the defamation action and are subject to a ban on publication.[96] The PHSA also noted that the applicant had provided these pages to the investigator during her investigation.[97] The PHSA argues that custody requires more than physical possession—a public body must have "charge and control".[98] It says it does not have control over the use of these records because under the ban it is prohibited from publishing or disclosing them.[99]

[87] The applicant is of the view that the publication ban was "unconstitutional"[100] and that the PHSA's attempt to deny access to the trial excerpt on that basis is "absolutely ludicrous". He added that

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[94] I distil these from para. 40 of Order F06-15 where I first said the ICC had to be a s. 51 "committee".
[95] They do not form part of the records which the PHSA argued were excluded from the scope of FIPPA under s. 3(1)(b) but are in their own category.
[96] 2004 BCSC 153 at para. 54.
[97] The applicant also attached copies of these pages to his initial submission as pp. 90-94.
[98] The PHSA refers here to Order 02-30, [2002] B.C.I.P.C.D. No. 30.
[99] Paras. 18-21, initial submission.
[100] The applicant did not press this issue and I have not considered it.

> … it is quite a stretch to envisage that the materials in the possession of the public body, because they were subject to the publication ban, all of a sudden do not belong to the public body. Of course they belong to the public body. The ban only relates to suppression in the manner of the courts, not for access to other proceedings nor for denial under freedom of information. …[101]

[88] The PHSA did not explain how the publication ban goes to the issue of custody or control of pp. 766-771. It did not for example argue that, because of the ban, it cannot destroy these pages or retain them for its use. The PHSA also did not explain how, in its view, disclosure under FIPPA is "publication" for the purposes of the publication ban and did not cite any case law in support of its arguments on this point.

[89] Holmes J. concluded that communications within the CWHC's human rights process were "subject to a partial privilege that restricts the disclosure of the identity of the complainants and the content of their complaints to those within the 'circle of confidentiality'." This "circle of confidentiality" would include the applicant as the respondent in that process. The ban on publication "prohibits the publication of evidence, information, submissions or reasons for decision in this proceeding", identifying the complainants or disclosing the content of their complaints made in that process.[102] It does not however support a finding that the PHSA does not have custody or control of the records in question.

[90] I therefore reject the PHSA's arguments on this point and find that it has custody and control of pp. 766-771 within the meaning of ss. 3(1) and 4(1) of FIPPA. The PHSA must process these pages under FIPPA and decide whether or not the applicant is entitled to have access to them.

[91] My decision and order on this issue do not vacate the publication ban, which as noted elsewhere, still stands as far as I am aware. The applicant may, if he wishes, seek his own legal advice on the ban.

[92] **3.10 Section 22 of FIPPA—**The PHSA says that it severed some third-party personal information of patients and CWHC employees under ss. 22(3)(a), (d) and (g). It does not believe that any relevant circumstances favour disclosure of this information.[103]

[93] The applicant generally questions the application of s. 22, suggesting that the PHSA applied it "haphazardly". He also argues that there is no guarantee of confidentiality and that release of the information is "critical to my employment and to my life" and relevant "to my defence after having suffered through another

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[101] Paras. 3-4, reply submission.
[102] Para. 54 of decision and para. 2 of corrigendum, 2004 BCSC 153.
[103] Paras. 88-91, initial submission.

bogus investigation process". These latter arguments appear to relate to the factors in s. 22(2)(f) and (c). The applicant also notes that the information in this inquiry is similar in nature to the information that I ordered disclosed in Order F05-34.[104]

[94] The third party (the complainant in the human rights process) argues that ss. 22(2)(f) and 22(3)(d) apply to the third-party personal information, as the information relates to an investigation of her workplace harassment complaint. The third party says that, during that investigation, she supplied the information in confidence during the course of her employment and expected that it would be kept confidential. She argues that her opinions of the applicant arose in the course of her employment and are part of her employment history.[105]

[95] The relevant parts of s. 22 are set out in the attached appendix. Numerous orders have considered the application of s. 22.[106] I have taken the same approach here.

[96] Although the PHSA describes the information it withheld under s. 22 as third-party personal information, this is only partly correct. Some is exclusively the applicant's personal information and some is the combined personal information of the applicant and third parties.

The investigator's report

[97] The PHSA severed information under s. 22(1) in the following pages from the investigator's report: 1096, 1101, 1168, 1252, 1173-1178, 1253-1254.

[98] Pages 1173-1178 and 1253 recount third parties' versions of an incident in the workplace involving the applicant and the third-party complainant, as well as his response to the third parties' accounts. The information is the combined or joint personal information of both applicant and third parties and falls under s. 22(3)(d) as it relates to the third parties. However, it is clear from the context that the investigator told the applicant what the third parties said about the incident and asked the applicant to comment on their accounts. Given this and the fact that the applicant was also involved in the incident, I find there is no unreasonable invasion of third-party privacy in providing the applicant with complete copies of these pages.

[99] The withheld information on p. 1254 consists of the investigator's assessment of the applicant's actions and is solely the applicant's personal information. Section 22 does not apply to an applicant's own personal

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[104] Paras. 38 & 42, initial submission.
[105] Pages 10-14, initial submission.
[106] See Order 01-53, [2001] B.C.I.P.C.D. No. 56, for example, for a discussion of how to apply s. 22 in the context of a workplace investigation.

information. The applicant is therefore entitled to have access to this page in full as well.

[100] The severed portions of pp. 1096, 1101, 1168 and 1252 (a sentence or two in each case), all refer to the same incident involving a patient. While the information falls under s. 22(3)(a), it is clear from the context that the applicant himself provided this third-party personal information to the investigator during his interviews. He is thus already aware of the information and I fail to see how its disclosure to the applicant would be an unreasonable invasion of third-party privacy.

Other records

[101] The remaining information that the PHSA severed under s. 22(1) is exclusively third-party personal information. Some relates to third parties' employment or occupational history and I agree with the PHSA and the third party that s. 22(3)(d) applies to this information. The rest of the information relates to other individuals' medical information, mainly patients who had MRSA, and thus falls under s. 22(3)(a). Given these findings, I need not deal with whether s. 22(3)(g) applies.

[102] Turning to a consideration of the relevant circumstances, it is not clear from the information itself how it relates to a fair determination of the applicant's legal rights, as past orders have interpreted s. 22(2)(c).[107] Nor did the applicant elaborate on this. I find that this section is not relevant here.

[103] There are indications in the material before me that the applicant and third party supplied documents to the investigator and received copies of each other's documents from the investigator during the investigation. However, the inquiry material also shows that this supply and exchange took place under conditions of confidentiality imposed by the CWHC's human rights policy. I therefore find that s. 22(2)(f) applies, favouring withholding this remaining information.

[104] Aside from those set out above, the applicant provided no arguments in support of disclosure of the remaining third-party personal information to him under FIPPA, although the notice for this inquiry explicitly states that he has the burden of proof with regard to third-party personal information. No other circumstances in s. 22(2) are relevant here, in my view.

[105] I find that the remaining withheld third-party personal information falls into ss. 22(3)(a) and (d) and that the only relevant circumstance favours withholding it. The applicant has not met his burden regarding the third-party personal information. It follows that I find that s. 22(1) requires the PHSA to withhold the remaining information.

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[107] See Order 01-07, for example.

4.0 CONCLUSION

[106] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I require the PHSA to comply with FIPPA by processing the applicant's request for access to the investigator's records that it withheld under s. 3(1)(b).

2. I confirm the PHSA's decision to refuse the applicant access to the records and information that it is prohibited from disclosing under s. 51 of the *Evidence Act*.

3. I require the PHSA to comply with FIPPA by processing the applicant's request for access to pages 766-771.

4. Subject to para. 5 below, I require the PHSA to refuse access to the information it withheld under s. 22.

5. I require the PHSA to give the applicant access to the information that it withheld under s. 22 on pp. 1096, 1101, 1168, 1252, 1173-1178, 1253-1254.

6. I require the PHSA to provide the applicant with its decisions under paras. 1 and 3, and to give the applicant access to the information described in para. 5 above, within 30 days of the date of this order, as FIPPA defines "day", that is, on or before June 12, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records it is disclosing.

April 30, 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File: F05-27152

Appendix

The relevant provisions of the *Freedom of Information and Protection of Privacy Act* read as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: …

(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity. …

Information Rights

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

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 …

(c) the personal information is relevant to a fair determination of the applicant's rights, …

(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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, …

(d) the personal information relates to employment, occupational or educational history, …

Relationship of Act to other Acts

79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

Section 51 of the *Evidence Act* reads, in full, as follows:

Health care evidence

51(1) In this section:

"board of management" means a board of management as defined in the *Hospital Act;*

"committee" means any of the following:

(a) a medical staff committee within the meaning of section 41 of the *Hospital Act;*

(b) a committee established or approved by the board of management of a hospital, that includes health care professionals employed by or practising in that hospital, and that for the purpose of improving medical or hospital care or practice in the hospital

(i) carries out or is charged with the function of studying, investigating or evaluating the hospital practice of or hospital care provided by health care professionals in the hospital, or

(ii) studies, investigates or carries on medical research or a program;

(c) a group of persons who carry out medical research and are designated by the minister by regulation;

(d) a group of persons who carry out investigations of medical practice in hospitals and who are designated by the minister by regulation;

"health care professional" means

(a) a medical practitioner,

(b) a person qualified and permitted under the *Dentists Act* to practise dentistry or dental surgery,

(c) a registered nurse as defined in the *Nurses (Registered) Act,*

(d) [Repealed 1998-42-7.]

(e) a person registered as a member of a college established under the *Health Professions Act,*

(f) a pharmacist as defined in the *Pharmacists Act, or*

(g) a member of another organization that is designated by regulation of the Lieutenant Governor in Council;

"hospital" means a hospital as defined in the *Hospital Insurance Act* and includes

(a) a hospital as defined in the *Hospital Act,* and

(b) a Provincial mental health facility as defined in the *Mental Health Act;*

"legal proceedings" means an inquiry, arbitration, inquest or civil proceeding in which evidence is or may be given, and includes a proceeding before a tribunal, board or commission, but does not include any of the following proceedings:

(a) a proceeding before a board of management;

(b) a proceeding before a board or body connected with an organization of health care professionals, that is a hearing or appeal concerning the conduct or competence of a member of the profession represented by that organization;

(c) a proceeding in a court that is an appeal, review or new hearing of any matter referred to in paragraph (a) or (b);

"organization of health care professionals" means an organization of health care professionals that is designated by regulation of the Lieutenant Governor in Council for the purposes of this section;

"witness" includes any person who, in the course of legal proceedings,

(a) is examined for discovery,

(b) is cross examined on an affidavit made by him or her,

(c) answers any interrogatories,

(d) makes an affidavit as to documents, or

(e) is called on to answer any question or produce any document, whether under oath or not.

(2) A witness in a legal proceeding, whether a party to it or not,

(a) must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and

(b) must not be asked to produce nor be permitted to produce, in the course of the legal proceeding, a record that was used in the course of or arose out of the study, investigation, evaluation or program carried on by a committee, if the record

(i) was compiled or made by the witness for the purpose of producing or submitting it to a committee,

(ii) was submitted to or compiled or made for the committee at the direction or request of a committee,

(iii) consists of a transcript of proceedings before a committee, or

(iv) consists of a report or summary, whether interim or final, of the findings of a committee.

(3) Subsection (2) does not apply to original or copies of original medical or hospital records concerning a patient.

(4) A person who discloses information or submits a record to a committee for the purpose of the information or record being used in a course of study, an investigation, evaluation or program of that committee is not liable for the disclosure or submission if the disclosure or submission is made in good faith.

(5) A committee or any person on a committee must not disclose or publish information or a record provided to the committee within the scope of this section or any resulting findings or conclusion of the committee except

(a) to a board of management,

(b) in circumstances the committee considers appropriate, to an organization of health care professionals, or

(c) by making a disclosure or publication

(i) for the purpose of advancing medical research or medical education, and

(ii) in a manner that precludes the identification in any manner of the persons whose condition or treatment has been studied, evaluated or investigated.

(6) A board of management or any member of a board of management must not disclose or publish information or a record submitted to it by a committee except in accordance with subsection (5) (c).

(7) Subsections (5) and (6) apply despite any provision of the *Freedom of Information and Protection of Privacy Act* other than section 44 (2) and (3) of that Act.

(8) Subsection (7) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act,* that has been in existence for at least 100 years or to other information that has been in existence for at least 50 years.

The provisions of the *Hospital Act* that s. 51 of the *Evidence Act* refers to are:

"board of management" means the directors, managers, trustees or other body of persons having the control and management of a hospital;

41(1) In this section, **"medical staff committee"** means a committee established or approved by a board of management of a hospital for

(a) evaluating, controlling and reporting on clinical practice in a hospital in order to continually maintain and improve the safety and quality of patient care in the hospital, or

(b) performing a function for the appraisal and control of the quality of patient care in the hospital.