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Order F13-08

COLLEGE OF PSYCHOLOGISTS OF BRITISH COLUMBIA

Elizabeth Barker, Adjudicator

March 15, 2013

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Summary: The applicant made two separate requests for records. The first request was for a copy of a report of an organizational review of the College. The adjudicator found that the College was not justified in withholding information from the report under ss. 12(3)(b) and 13(1) of FIPPA. However, with two small exceptions, the adjudicator found that disclosure of the personal information contained in the report would be an unreasonable invasion of third-party personal privacy under s. 22(1) of FIPPA and it may not be disclosed. The applicant's second request was for records related to the issue of assessing substantially equivalent qualifications of College registrants, and the adjudicator found that the refusal to disclose them was authorized under s. 13(1) of FIPPA.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(3)(b); 13(1); 13(2)(a), (g), (i), (k), (l) and (m); 22(2)(a), (b), (f), (g) and (h); 22(3)(d) and (g); *Health Professions Act*, R.S.B.C. 1996, c.183.

Authorities Considered: B.C.: Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41; Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39; Order 00-11, [2000] B.C.I.P.C.D. No. 13; Order 00-14 [2001] B.C.I.P.C.D. No. 15; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-37, [2001] B.C.I.P.C.D. No. 38; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F05-13,2005] B.C.I.P.C.D. No. 14; Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23.

Cases Considered: *Aquasource Ltd., v. British Columbia (Information and Privacy Commission)*, [1998] B.C.J. 1927; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

INTRODUCTION

[1] This inquiry concerns two separate requests for records in the custody and under the control of the applicant's former employer, the College of Psychologists of British Columbia ("College"). The College was established under the *Health Professions Act*, as the self-governing body that regulates the practice of psychology in the province. Its responsibilities include setting the standards for College registrants, monitoring psychology practitioners and taking action when standards of ethical and competent practice are not met. The College is governed by a nine person board ("board"), and it employs six staff including a registrar who is the College's chief executive officer.

[2] The applicant's first request is for a copy of a report prepared by a consultant who conducted an organizational review of the College and the second is for records related to the issue of substantial equivalence (explained below). I will deal with each in turn.

Consultant's Report

[3] **Background**—In December 2010, the College commissioned a management consultant to conduct an organizational review of the College. The consultant's review resulted in a 35-page[1] report ("report") which was presented to the board at its February 18, 2011 meeting.

[4] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for "a copy of the 'organizational review' referenced by the Chairman of the College Board during the Chair's Report in the public portion of the College's Board meeting on Friday, February 18, 2011."[2] The College responded by withholding the report in its entirety under sections 12(3)(b), 13(1), 14 and 22(1). The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the College's decision. During the OIPC investigation and mediation process, the College released a severed copy of the report and confirmed that it no longer relied on s. 14. The matter did not resolve in mediation, however, and the applicant requested that it proceed to inquiry under Part 5 of FIPPA.

ISSUES

[5] The questions that I must decide are:

1. Is the College authorized by ss. 12(3)(b) and/or 13(1) of FIPPA to refuse access to the severed portions of the report?

[1] Several pages in the report lack page numbers.
[2] Applicant's February 22, 2011 email request for records.

2. Is the College required by s. 22(1) of FIPPA to refuse access to the severed portions of the report?

[6] Section 57(1) of FIPPA imposes the burden on the College to establish that the exceptions under ss. 12 and 13 apply. However, s. 57(2) of FIPPA imposes the burden on the applicant to prove that disclosure of personal information would not be an unreasonable invasion of third-party privacy under s. 22(1).

DISCUSSION

Local public body confidences – s. 12(3)(b)

[7] The College withheld portions of the report on the basis that they would reveal the substance of deliberations at a February 18, 2011 *in camera* board meeting. The relevant section of FIPPA reads as follows:

> 12(3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> …
>
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[8] Previous orders have consistently applied the following framework in analyzing s. 12(3)(b):

> … a local public body may rely on s. 12(3)(b) only if it proves three things. It must show that there is statutory authority to meet in the absence of the public, that a meeting actually was held in the absence of the public and that the information would, if disclosed, reveal the substance of deliberations of the meeting.[3]

[9] I apply the above approach in this case.

[10] The College explains that the board deliberated on the report at an *in camera* meeting held on February 18, 2011, and that all three elements of the above test have been met. The College says that after a line by line review of the report, it disclosed only those portions comprising factual and background information that did not reveal the substance of its board's deliberations at the meeting. This included portions of the executive summary, the table of contents,

[3] Order 00-14, [2000] B.C.I.P.C.D. No. 17, p. 2.

the introduction, the methodology, references to an historical review and portions of the summary and conclusion.

[11] **Statutory Authority**—The College submits that its statutory authority to meet in the absence of the public derives from its bylaws which were enacted under s. 19 of the *Health Professions Act* and approved by way of Order-in-Council.

[12] The applicant disputes that the College had the statutory authority to hold *in camera* proceedings on February 18, 2011, and he raises three arguments. First, he disagrees that the language in s. 12(3)(b) encompasses bylaws. Second, he argues that even if a bylaw is found to be capable of providing the authority to withhold information under s. 12(3)(b), the bylaws in this case were not lawfully enacted. Third, he argues that even if the College's bylaws provide statutory authority to exclude the public from meetings, the College did not comply with the bylaws; specifically, it failed to pass a special resolution before excluding the public and to note in the minutes the reasons for moving *in camera*.

[13] The relevant portions of the *Health Professions Act* are as follows:

> **Bylaws for college**
>
> 19(1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:
>
> ...
>
> (c) regulate the time, place, calling and conduct of meetings of the board and general meetings of registrants;
>
> ...
>
> (3) A bylaw under subsection (1) has no effect unless it is filed with the minister.

[14] The bylaws contained in the College's affidavit evidence are labelled "Bylaws (Revised November 7, 2008)". The relevant bylaw reads as follows:

> 9. Board meetings
>
> …
>
> (8) Subject to subsections (4) and (9), board meetings must be open to registrants and to the public.
>
> (9) The board, by special resolution, may exclude any person from any meeting or part of a meeting if it is satisfied that
>
> (a) the matters which may be disclosed present issues of protection of any person, or the public interest, which outweigh the principle that meetings be open to the public,

> (b) a person involved in a criminal proceeding or civil suit or proceeding may be prejudiced,
>
> (c) personnel matters or property acquisitions will be discussed,
>
> (d) the contents of examinations will be discussed,
>
> (e) communications with the Office of the Ombudsman will be discussed,
>
> (f) privileged communications or opinions will be discussed or provided to the board or committees by legal counsel for the College,
>
> (g) professional discipline matters and appeals under the *Act* are being discussed in relation to a particular individual, or
>
> (h) the attendance of the person at the meeting is disruptive.
>
> (10) If the board excludes any person from a part of a meeting, the board must note its reasons for doing so in the minutes of the meeting.

[15] The bylaws define "special resolution" as "a resolution which requires a two-third [*sic*] vote of those persons present and eligible to vote".

[16] The applicant's first argument is that bylaws can never provide the requisite statutory authority under s. 12(3)(b) to exclude the public from a meeting. I agree that the existence of a bylaw that permits *in camera* meetings is not, on its own, sufficient to bring that bylaw within the ambit of s. 12(3)(b). However, I find that a bylaw, when authorized and properly enacted in compliance with a statute, does provide the statutory authority required by s. 12(3)(b). This finding is consistent with that of Adjudicator James Burrows in a previous case involving the College, Order F05-13,[4] where he also found that the College's bylaws provided the requisite statutory authority under s. 12(3)(b).

[17] The essence of the applicant's second argument is that the College is not entitled to hold *in camera* meetings because an Order-in-Council signed in 2002 is insufficient evidence that the bylaws, which are labeled as having been revised on November 7, 2008, were lawfully enacted. I am not convinced by this argument. The registrar's affidavit evidence includes the College's bylaws and the Order-in-Council approving them. There is no evidence that the provisions in the bylaws allowing for *in camera* proceedings have been altered in any way since the Order-in-Council approval in 2002. Moreover, I do not understand the applicant to suggest that this is the case. Therefore, I conclude the College's bylaws authorize it to hold *in camera* meetings.

[4] [2005] B.C.I.P.C.D. No. 14.

[18] I have also looked at the evidence with respect to the applicant's third argument which is that the College failed to comply with its bylaws. In the affidavit accompanying the College's reply, the registrar explains that she was present at both the public and the *in camera* portions of the meeting. She states:

> As required by the College's Bylaws [Exhibit "A" attached to my Affidavit #1 sworn February 13, 2012], the Board passed a special resolution to move in camera during its meeting on February 18, 2011 as it was satisfied that the issues to be discussed in camera were the types of matters listed in Bylaw 9(9), including privileged communications and opinions by legal counsel, and personnel matters...[5]

[19] Even though the minutes for the public and *in camera* portions of the subject meeting make no mention of a special resolution or decision to exclude the public, the *in camera* minutes do support the registrar's evidence that what was discussed included matters that fall under bylaw 9(9)(c) and (f). Based on the sworn statement of the registrar, I am satisfied that a special resolution was passed.

[20] The final issue is whether the College's failure to comply with bylaw 9(10) would negate the authority to go *in camera*. I note that the bylaws do not stipulate that a special resolution to exclude the public is conditional on compliance with bylaw 9(10); nor do they spell out any consequences for failing to comply with bylaw 9(10). I find that a failure to comply with bylaw 9(10) does not vitiate the College's authority under bylaw 9(9) to meet *in camera*. The College has the statutory authority to exclude the public once it passes a special resolution in accordance with bylaw 9(9), regardless of whether, and where, it subsequently records the reasons for doing so.

[21] To summarize, I am satisfied that the College properly exercised its statutory authority to meet *in camera* by passing a special resolution once it determined that the matters to be discussed included those listed in bylaw 9(9). Therefore, I find that for the purposes of s. 12(3)(b), the College was authorized to hold the February 18, 2011 board meeting in the absence of the public.

[22] **Substance of Deliberations**—The purpose of s. 12(3) is to protect a public body's full and frank exploration of issues, and "to protect what was said at a meeting about controversial matters, not the material which stimulated the

[5] Paragraph 4, Registrar's Affidavit #2, College's reply submission.

discussion or the outcomes of deliberations in the form of written decisions".[6] Former Commissioner Loukidelis had this to say about the meaning of "substance of deliberations":

> The first question is what is meant by the words "substance" and "deliberations" in s. 12(3)(b). In my view, "substance" is not the same as the subject, or basis, of deliberations. As *Black's Law Dictionary*, 8th ed., puts it, 'substance' is the essential or material part of something, in this case, of the deliberations themselves...
>
> Without necessarily being exhaustive of the meaning of the word "deliberations", I consider that term to cover discussions conducted with a view to making a decision or following a course of action...[7]

[23] The College argues that the applicable test for s. 12(3)(b) is found in *Aquasource Ltd., v. British Columbia (Information and Privacy Commission)*:[8] "Does the information sought to be disclosed form the basis for the deliberations?"[9] However, I observe that *Aquasource* dealt with a different section of FIPPA, s. 12(1), which concerns executive council and cabinet confidences. In my view, it does not accurately capture the issue here. The pertinent question in the circumstances of this case is whether disclosure of the report would reveal the substance of the February 18, 2011 *in camera* deliberations either directly or by permitting accurate inferences to be drawn.[10]

[24] I agree with the approach taken by former Commissioner Loukidelis who said the following about a report on firefighting services that the City of Cranbrook considered *in camera*:

> Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report - which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings.[11]

[25] Similarly, I find that the report in the present case does not directly reveal, or allow the reader to accurately infer, what the board members said for or against any particular course of action, how they weighed or examined the

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[6] Order No. 114-1999, [1999] B.C.I.P.C.D. No. 41, p. 3.
[7] Order 00-11, [2000] B.C.I.P.C.D. No. 12.
[8] [1998] B.C.J. 1927.
[9] College's initial submission, para. 34.
[10] Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, p. 3.
[11] Order No. 326-1999, p. 4.

issues, whether there was agreement or disagreement, what was decided and how voting proceeded. Moreover, I do not believe that the applicant, even with his personal knowledge of the College, would be able to accurately determine the substance of the board's deliberations.

[26] In conclusion, I find that s. 12(3)(b) does not authorize the College to refuse to disclose the report.

Policy advice or recommendations – s. 13(1)

[27] The College also relied upon s. 13(1) of FIPPA to withhold information from the report. The process for determining whether s. 13 of FIPPA applies to information involves two stages. The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for a public body or a minister. If so, it is then necessary to consider whether the information falls within any of the categories of information listed in s. 13(2). The applicant argues that ss. 13(2)(a), (g), (i), (k) and (l) apply.

[28] The relevant portions of s. 13 are as follows:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> ...
>
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,
>
> ...
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> ...
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
>
> ...

[29] Section 13 has been the subject of many orders, for example Order 01-15 where former Commissioner Loukidelis said:

> This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.[12]

[30] These orders have also found that a public body is authorized to refuse access to information which would allow an individual to draw accurate inferences about advice or recommendations.[13]

[31] I apply the reasoning in these orders to the facts before me in this case.

[32] **Does the Record Contain Advice or Recommendations?**—I have reviewed the report and find that the information to which the College has applied s. 13(1) is advice and recommendations or information from which one could draw accurate inferences about advice or recommendations. It also includes several instances where the consultant provides an opinion about requirements for the future, and I also find this to be advice and recommendations.

[33] **Is the Report Final?**—The applicant argues that the consultant's report is a final report on the performance or efficiency of the College, its policies, programs and activities, and that s. 13(2)(g) applies. The College asserts that the report at issue was subsequently amended, so it is only a "draft" and there are other draft versions; however, due to changed circumstances, it has no intention of finalizing the report or making operational decisions based on it.

[34] I have reviewed the report in detail, and there is little doubt that it relates to the performance or efficiency of the College, its policies, programs and activities. The College's registrar provided the following explanation:

> The sole purpose of the organizational review was to provide to the College's Board timely analysis, strategic advice, opinions, options and recommendations regarding a variety of governance and organizational issues, including staffing and workload issues. It was a key term of [the consultant's] retainer that he compile and summarize his advice and recommendations to the Board in a confidential report.[14]

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[12] Order 01-15, [2001] B.C.I.P.C.D. No. 16, para. 22.

[13] Order F10-15, [2010] B.C.I.P.C.D. No. 24; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order F06-16, [2006] B.C.I.P.C.D. No. 23; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2002] BCCA 665.

[14] Paragraph 17, Registrar's Affidavit #1, College's initial submission.

[35] The report commences by reviewing the College's accomplishments and examines how well it has met its mandate over the past ten years. It addresses personnel, workload, organizational structure and board governance and how these factors affect the efficiency and functioning of the College. Therefore, I find that the report is concerned with the performance and efficiency of the College and its activities.

[36] In her affidavit, the registrar explains that the consultant presented his report at the February 18, 2011 *in camera* board meeting, which was the agreed upon target date for presentation. I have reviewed the minutes from both the public and the *in camera* portions of the February 18, 2011 meeting, and neither set of minutes refers to the report as a draft. The content of the report itself gives no indication that it is a draft, nor is there any typeface to that effect such as a heading or watermark. I note that the word "Draft" has been handwritten on page one and there are handwritten arrows on page 12. The College has provided no explanation as to when this was done and by whom.

[37] The registrar explains that by the time the report was presented to the board, it no longer accurately reflected the organization because the applicant's employment had just ended. Also, the College found that the report contained a number of errors and incorrect assumptions which have been described in the *in camera* portion of the College's submission, so I will not detail them here. She adds that minor amendments were made to the report during and after the February 18, 2011 *in camera* session, but that ultimately the College decided not to devote any more time or resources to correcting or finalizing it.

[38] The registrar's affidavit contains the consultant's letter setting out his proposal for the terms of the organizational review. His letter makes no mention of a process that involves more than one version of the report or submitting a draft for review and approval before completion. He writes:

> All of this information will be compiled and summarized with recommendations presented in person by means of a confidential report to the Board.
>
> In conducting the review, it is important that my client [*sic*] is the Board of Directors which generally is represented by Board Chair.
>
> Depending on the nature of the assignment and the desire of the client, there can also be follow up activities such as a Board workshop for the development of changes in the organization's focus and strategy, development of a strategic plan, etc. Generally this is not decided until the client has had an opportunity to see the report.[15]

[15] Registrar's Affidavit #1, Exhibit D, College's initial submission.

[39] None of this suggests anything other than the report was final when received by the board. The letter is the only evidence revealing the communication between the College and the consultant concerning the nature of the report presented at the February 18, 2011 board meeting.

[40] With respect to the board's assertion that the report was amended, no persuasive evidence was proffered that would substantiate this claim. The College does not say what these amendments were nor do they include any of the other draft versions of the report which, in its submission, the College maintains exist. In my view, the handwriting referred to above appears to be the kind of jottings one makes when reviewing or discussing a document and it does not persuade me that the consultant intended the document to be anything except a final report.

[41] Further, there is no evidence that the report was subject to the approval of anyone other than the consultant himself before it could be presented to its intended recipient, which was the board. That presentation took place as planned on February 18, 2011. When combined with the consultant's letter explaining the reporting-out process he would use at the conclusion of his review, this strongly supports my conclusion that what was presented was not a work-in-progress or a preliminary form of a possible future document but his final report. The fact that the board felt that the report was inaccurate does not make the consultant's report any less final in the circumstances.

[42] Therefore, I find that the report meets the requirements of a final report on the performance or efficiency of the College and its activities in accordance with s. 13(2)(g). It follows that s. 13(1) does not apply to any portion of the report. As I have found that s. 13(2)(g) applies to the entire report, I have not considered the applicant's other arguments regarding the application of ss. 13(2)(a), (i), (k) and (l).

Harm to personal privacy – s. 22(1)

[43] The College has also withheld certain information from the report under s. 22(3)(d) and (g). The relevant sections of s. 22 are as follows:

> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment.
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant…
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,…

[44] Numerous decisions have considered the application of s. 22, and consistently applied the following principles:[16]

> [14] … The goal of s. 22(1) is to prevent the unreasonable invasion of the personal privacy of individuals through the disclosure of personal information. As has been observed in other orders, s. 22 does not guard against all invasions of personal privacy. It is explicitly aimed at preventing only those invasions of personal privacy that would be "unreasonable" in the circumstances of a given case.
>
> [15] It is worth repeating here the approach that should be used in assessing s. 22. In deciding whether it is required by s. 22(1) to refuse to disclose personal information to an applicant, a public body must first consider whether personal information is involved. The Act's definition of personal information, found in Schedule 1 to the Act, provides that "personal information" means recorded information about an identifiable individual…

[16] Order 01-37, [2001] B.C.I.P.C.D. No. 38.

> [16] The public body then must decide if the disclosure is deemed, by s. 22(4), not to be an unreasonable invasion of third-party personal privacy. If any of ss. 22(4)(a) through (j) applies, the information must be disclosed. If none of them applies, the public body then must consider whether any of the presumed unreasonable invasions of personal privacy created by s. 22(3) apply. If any one or more of those apply, the public body must consider all relevant circumstances – including those found in s. 22(2) – in deciding whether disclosure of the personal information would constitute an unreasonable invasion of a third-party's personal privacy. Last, even if none of the s. 22(3) presumed unreasonable invasions of personal privacy applies, the public body must still, considering all relevant circumstances, decide under s. 22(1) whether disclosure would be an unreasonable invasion of a third-party's personal privacy.

[45] I agree with this approach and apply it to the facts before me.

[46] **Personal Information**—I find that, for the most part, the information that the College has withheld under s. 22 is properly characterized as personal information because it is about identifiable individuals. This includes one section where no one is named, but the group is small and as the applicant is a former employee, it is likely that he could identify the individuals referenced.[17] However, there are a few passages where the College incorrectly withheld information that is not about identifiable individuals and could not reasonably be linked to identifiable individuals.[18] For example, it incorrectly identified information about the College's governance, priorities, policies and processes as personal information. It also incorrectly identified generic or aggregate employee attitudes, skills and observations, as well as information about board working committees and their responsibilities, as personal information. Given that the argument and evidence regarding this disputed information was accepted into the inquiry on an *in camera* basis, I am restricted in what I may say on this point. However, having reviewed the evidence and submissions, what I can say is that these few passages in question do not consist of personal information.

[47] **Section 22(4) Factors**—A disclosure of personal information is not an unreasonable invasion of a third-party's personal privacy if any of the factors in s. 22(4) apply, and I find that s. 22(4)(e) applies to the personal information withheld on pp. 9-10 under the heading "Recommendations on the Registrar's Workload"[19] and to a sentence on p. 15 identifying an employee as the author of a workplace document. In my view, the heading on pp. 9-10 is misleading as the information is not about the incumbent registrar's workload. Rather, it is a description of the position and functions of the registrar position, akin to what one finds in a job description. Regarding the sentence on p. 15, I consider it to

[17] Bottom of p. 8 to top of p. 9.
[18] Executive summary and pp. 6, 7, 8, 9, 11, 12, 15, 16, 17.
[19] The College has already disclosed this heading to the applicant.

be a factual, objective statement about a function performed by an employee in the normal course of work-related activities on behalf of the College, so it falls within s. 22(4)(e). Therefore, I find that disclosure of the above personal information on pp. 9-10 and p. 15 would not be an unreasonable invasion of a third-party's personal privacy, and it must be disclosed.

[48] **Section 22(3) Presumptions**—I have considered whether disclosure of the balance of the personal information would be presumed to be an unreasonable invasion of third-party personal privacy. The College submits that the personal information is of the type encompassed by ss. 22(3)(d) and (g). The applicant provided no argument on this point.

[49] I agree that ss. 22(3)(d) and (g) are applicable to the balance of the personal information because it consists of details of the employment history, experience and training of employees and board members as well as the consultant's evaluations of employee demeanour, performance and skills.

[50] **Relevant Circumstances**—Having found that disclosure of some of the third-party personal information is presumed to be an unreasonable invasion of third-party personal privacy under ss. 22(3)(d) and (g), the final step in the analysis is to determine whether the relevant circumstances in s. 22(2) rebut the presumption.

[51] The applicant argues that disclosure is desirable for the purpose of subjecting the activities of the College to public scrutiny (s. 22(2)(a)) and to promote public health and safety (s. 22(2)(b)). He points out that the organizational review examined how to improve the functioning of the College, and the public has an interest in this because the College is a regulatory body charged with safeguarding the public's health and safety.

[52] The College makes a number of arguments that none of the relevant circumstances in s. 22(2) rebut the presumption. The essence of these arguments is as follows:

- Release of the information is not desirable for the purpose of subjecting the College's activities to public scrutiny because the report contains errors and would not provide an accurate portrayal of the College, staff and processes and would negate any value to be gained by public scrutiny (s. 22(2)(a) and (g)).
- Disclosure could unfairly harm the professional or personal reputations of College employees and board members and result in financial harm (s. 22(2)(e) and (h)).
- The report was commissioned on the understanding that it would be confidential and it was marked as such (s. 22(2)(f)).

[53] I have considered the parties submissions as well as the following relevant circumstances and find that the presumption has not been rebutted:

- *Public Scrutiny Desirable (s. 22(2)(a))*—The personal information concerns individual employee work habits and performance and the impact on their health and wellbeing. It has no broad or public significance, and disclosing it would not benefit the public or enhance understanding of the College to an extent that warrants the resulting invasion of personal privacy.

- *Public Health and Safety (s. 22(2)(b))*—The personal information contained in the report does not relate in any way to issues involving public health and safety, so this factor has no relevance.

- *Financial or Other Harm (s. 22(2)(e))*—The College writes, "If third-party personal information protected under s. 22(3)(d) is disclosed, it could potentially unfairly harm the professional or personal reputations of College employees or Board members."[20] It provided no additional information regarding s. 22(2)(e), and I am not persuaded that financial harm is a factor here. I will address the issue of harm to professional and personal reputation below in s. 22(2)(h).

- *Supplied in Confidence (s. 22(2)(f))*—The evidence clearly supports the College's assertion that the report was designed to be confidential. In his proposal letter, the consultant explains that he will conduct confidential interviews with staff and board members and present a confidential report. The report is headed "Personal and Confidential. Not for Distribution or Reproduction." I find that this factor weighs in favour of withholding the personal information.

- *Inaccurate or Unreliable Information (s. 22(2)(g))*—I carefully examined the College's evidence and argument that inaccuracies in the personal information weigh against disclosure.[21] I find that most of the inaccuracies, which are explained in the *in camera* portion of the submissions and the registrar's affidavit, do not involve personal information. The few that do, consist of the consultant paraphrasing what the interviewees said, and it is clear that he is reflecting what he was told, not agreeing or adopting the interviewees' sentiments as accurate. Therefore, I do not believe that there are inaccuracies in the personal information that weigh against disclosure.

[20] College's initial submission, para. 136.
[21] Registrar's affidavit, para. 30.

- *Unfairly Damage Reputation (s. 22(2)(h))*—The personal information includes details about individuals' work habits and performance, skills and training, and the impact of work on their health and personal lives. It also contains information that could be viewed as critical of certain individuals' work performance. Therefore, I believe that disclosing this sensitive and occasionally negative detail could unfairly damage the professional or personal reputations of the individuals referenced.

Section 22 — Conclusion

[54] For the most part, I agree with the College's identification of the personal information contained in the report. Section 22(4)(e) applies to the personal information about an employee's functions (pp.9-10) and about a work document prepared by an employee (p. 15), so disclosure would not be an unreasonable invasion of personal privacy. Regarding the balance of the personal information, I find that the presumption that disclosure would be an unreasonable invasion of third-party privacy under ss. 22(3)(d) and (g) applies and has not been rebutted. Given that this is not a large amount of information, I have highlighted what must be withheld under s. 22(1) in a copy of the report that will be sent to the College along with this decision.

Substantial Equivalence Information

[55] **Background**—The *Health Professions Act* confers on the College the ability to make bylaws to determine if an individual's knowledge, skills and abilities are substantially equivalent to the academic and technical competencies and qualifications required of members of the College.

[56] The applicant requested the following records from the College:

> 1. Any policy, procedure, guidance or reporting document related to the concept of "substantial equivalence";
> 2. Any blank grid, score sheet, comment sheet, or similar templates used by the College to assess "substantial equivalence"; and
> 3. Any document that discusses any proposed "substantial equivalence" bylaws. [22]

[57] The College responded to the applicant's request by disclosing certain records, but withholding others under ss. 12(3)(a), 12(3)(b), 13(1) and 14. The applicant requested that OIPC review the College's decision. Although the College released further records, the dispute did not resolve in mediation, and the applicant requested that the matter proceed to inquiry. The applicant also

[22] Applicant's April 8, 2012 request for records.

alleged that the College failed to fulfil its obligations under s. 6(1); however that matter is the subject of a separate file and is not at issue in this inquiry.

[58] **The Records**—The records at issue consist of 28 pages, all of which have been fully withheld.[23] With the exception of p. 4, they are labelled "confidential – not for circulation". The majority of the records also contain a "draft" watermark running across the middle. I note that p. 3 is a duplicate of p. 2, and pp. 25-28 are duplicates of pp. 5-8 (with the exception of the date of the draft which is located in the footer).

ISSUE

[59] Is the College authorized by any or all of ss. 12(3)(a), 12(3)(b), 13(1) and 14 to refuse access to the records?

DISCUSSION

Policy advice or recommendations – s. 13(1)

[60] **Do the Records Contain Advice or Recommendations?**—I take the same approach to s. 13 and these records as I did for the consultant's report, above.

[61] The College describes the records as follows:

> These records are confidential draft materials prepared by the Registrar, her staff and legal counsel for the college for the purpose of providing the Registration Committee and the Board with options, advice and recommendations about the implementation of the "substantial equivalence" requirement and development of the related Bylaws and Schedules.[24]

[62] The applicant does not deny that the records constitute, or would reveal, advice or recommendations as captured by s. 13(1).

[63] I find that the records are advice and recommendations under s. 13(1). They consist of the College staff's advice and recommendations for the classification and assessment of registrants and for the content, wording and appearance of bylaws, schedules, related policy and communication documents.

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[23] Sections 13(1) and 12(3)(b) have been applied to all pages; s. 12(3)(a) was applied to all pages except pp. 10-13; s. 14 has been applied to pp. 14-24.
[24] College initial submissions, para. 104.

[64] **Section 13(2) Exceptions**—The applicant submits that ss. 13(2)(a), (i), (k), (l) and (m) preclude the College from withholding the records. The College argues that any factual material is so interwoven with the advice and recommendations that it cannot reasonably be considered separate and distinct. It also believes that given the applicant's personal knowledge of the College, he would be able to draw accurate inferences about the advice and recommendations from the facts contained in the records. The College submits that the documents are drafts developed for discussion and decision by the board and the Registration Committee and that some of the withheld records still have not been finalized as the decision-making process has not concluded.

[65] As discussed in the above case, the effect of s. 13(2) is that even in situations where information would reveal advice or recommendations developed by or for a public body, if the information falls within any part of s. 13(2), the public body may not withhold the information. I have considered the applicant's argument that ss. 13(2)(a), (i), (k), (l) and (m) apply as well as the College's arguments that they do not. I agree with the College, and my reasons are as follows:

- *Factual material (s. 13(2)(a))*—The factual material that is contained in the records is so intertwined with the advice and recommendations as to be incapable of severing in a manner that would provide intelligible information for the applicant.

- *Feasibility or technical study, including a cost estimate, relating to a policy or project (s. 13(2)(i))*—The records do not contain a "study" into the development of a policy or project. A study implies that a decision still needs to be made about whether to proceed with a course of action, in this case the development of bylaws. Clearly, any such study is long past and bylaw development is underway.

- *Report of a task force, committee, council or similar body, established to consider a matter and make reports or recommendations (s. 13(2)(k))*—I disagree with the applicant's assertion that the College's staff and legal counsel, who are the authors of the records in question, amount to a task force, committee, council or similar body.

- *Plan or proposal to establish a new program or activity or to change an existing one, if the plan or proposal has been approved or rejected by the head of the public body (s. 13(2)(l))*—The records are not a plan or proposal to develop a new program or activity. The College's established activities already include setting standards for registration of psychology practitioners, and the records relate to how to continue this existing activity in light of the legislative requirements about substantial equivalence.

- *Information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy (s. 13(2)(m))*—The applicant's argument on this point is as follows:

> ...The College's own documents, some of which were produced in response to the FIPPA request, reveal that information from the withheld documents, including the incorporated "substantial equivalence guidelines," were cited by the College at a series of information meetings in the fall of 2010 as well as in the Fall 2010 issue of the College's publication, *The Chronicle*...[25]

[66] I have considered the records and supporting materials, and I do not agree that s. 13(2)(m) is applicable. In particular, the language used in the Fall issue of *The Chronicle* makes it clear that no decision has yet been made:

> The goal of the proposed changes is… See Figure 1 in this issue for a graphic depiction of the three pillars of the proposal… Registrants will be provided a full opportunity to engage in discussion and provide feedback regarding this important College initiative through written feedback and attendance at an information meeting… It is important to emphasize that the proposal is being circulated now for registrant information and to provide the opportunity for comment. The bylaws for these new classes have not yet been formally submitted to the government for approval…[26]

[67] In conclusion, I find that the College is authorized by s. 13(1) to refuse access to the 28 pages of records in this case.

[68] In light of my determination that s. 13(1) applies to all 28 pages of the records, I need not deal with the remaining grounds which the College relied upon to withhold portions of the record: ss. 12(3)(a), 12(3)(b) and 14.

CONCLUSION

[69] **Consultant's Report**—The College is not authorized to withhold the information in the report under ss. 12(3)(b) and 13(1) of FIPPA. With respect to the personal information contained in the report, I find that s. 22(4)(e) applies to that dealing with an employee's functions on pp. 9-10 and to work tasks performed on p. 15. Disclosure of that information would not be an unreasonable invasion of third-party personal privacy and it must be disclosed. Regarding the balance of the personal information, I find that ss. 22(3)(d) and (g) apply and have not been rebutted. Therefore, disclosure would be an unreasonable invasion of third-party privacy and it may not be released.

[25] Applicant's initial submission, para. 29.
[26] Exhibit G, registrar's reply submission affidavit.

[70] **Substantial Equivalence Records**—The College is authorized by s. 13(1) to refuse access to all 28 pages of the records on substantial equivalence.

ORDERS

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

Consultant's Report (OIPC File F11-45327)

1. I require the College to disclose all information that it withheld from the report under s. 12(3)(b) and s. 13(1) of FIPPA.

2. I require the College to refuse to disclose, in accordance with s. 22(1), the personal information which I have highlighted in the copy of the report that is being sent to the College along with this decision.

3. Subject to para. 2 immediately above, I require the College to give the applicant access to all of the information in the report within 30 days of the date of this order, as FIPPA defines "day", that is, on or before April 30, 2013. The College must concurrently copy me on its cover letter to the applicant, together with a copy of the records.

Substantial Equivalence Records (OIPC File F11-46333)

4. I confirm that the College is authorized by s. 13(1) to refuse access to all 28 pages of the records.

March 15, 2013

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

OIPC File No.'s: F11-45327
F11-46333