

# **What is the Public Interest Demand for Openness and Transparency?**

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“The aim of professional licensing and regulatory legislation is to let the public pick a doctor, lawyer, accountant et al. without having to fear an imposter, quack, fake, crook, incompetent, predator, uncooperative person or persistent non-performer. Even an astute member of the public has no means to investigate such things”.

Zakhary v College of Physicians  
and Surgeons of Alberta  
2013 ABCA 336

## **I. Self-Regulation and the Public Interest**

In the spirit of openness and transparency, let me start my presentation with an admission. I have a particular perspective on this issue – some might say a bias. I am a strong supporter or believer in the value of openness, transparency and accountability. In my past professional life I was the Ombudsman for the Province of British Columbia for 7 years (1999-2006). One of the unique aspects of that office is that it has oversight responsibility for the professional colleges and regulatory bodies which regulated lawyers, health professionals, architects, engineers, etc. In that capacity the office received complaints about the processes of and the decisions made by these bodies – complaints not only from members of the public but from “applicants” seeking to join the “association”, and registrant/members upset about the actions or decisions of the regulatory body. My experience suggests that more openness and more transparency about how decisions are made is important to all of the interested parties – the public, the applicants, the registrant/members and also to the government in its evaluation of whether the association/college/body is serving the public interest. In fact, in May 2003 as Ombudsman, I released a report entitled “Acting in the Public Interest? Self-Governance in the Health Professions: The Ombudsman’s Perspective”. The report outlined some of the concerns I had in respect of ensuring that the “Public Interest” was being sufficiently considered by the “Colleges” in their decisions and actions, both in respect of complaints by the public about disciplinary matters or registrant/member complaints about policies, procedures and the management of the College’s operations.

It is important to recognize that self-regulation carries with it a responsibility to ensure that the public interest is being protected. Whether the body is exercising a licensing function – one that gives the members of the association the exclusive right to provide a particular service to the public and the right to determine who will be qualified to be a member of the association – or the more limited certification

function – one which may not limit or restrict the service per se but gives members of the association the exclusive right to use a particular title or name – the power is being exercised in the public interest.

It is argued that a system of self-regulation, where members/registrants regulate the activities of the association protects the public by establishing standards and regulating conduct. It is generally less costly to the public/taxpayer as the costs of operation, including admission and discipline activities are borne by the member/registrants not the public at large. The board of directors is generally made up of volunteers practitioners often selected or elected by members/registrants with some appointed public representatives (usually a small minority of the board).

However, on the flip side, there have been concerns expressed that these self-regulated associations are member-oriented, that the board of directors are member selected and that the association is motivated by member self-interest not by the public interest. It is argued that the members have a monopoly on services, that the association limits the number of new applicants thus restricting the number of “professionals” available to provide the service, and create new standards for admission without requiring existing members to demonstrate continuing competence. It is said that the associations are more focused on input regulation (licensing) than on output regulation (oversight of the practice of those already licensed). Further, some argue that self-regulation creates a sense of community amongst the members/registrants that has both a positive and a negative effect. It may strengthen the commitment to high standards of competence and ethical conduct and heighten the effect of peer disapproval but it also may lead to a perception of leniency by the association – a tendency to overlook or deal lightly with offenses and ethical breaches and to minimize publicity about unethical conduct or incompetence in an effort to protect the image of the occupational community. In fact, some commentators suggest that ethical codes and enforcement of the same is merely disciplinary symbolism aimed at creating an illusion of concern about ethical attitudes and assurances to outsiders. (L.D. Parker, 1994).

One of the ways of responding to these concerns and perceptions is by removing the fog or obscurity of how the process of decision-making works – whether it be in the board room or in the hearing room and providing explanations and reasons for decisions – whether on policy matters or on adjudicated hearings. Information, combined with an explanation of how the association evaluates and decides matters provides a response to the concerns about operating in a self-interested way as opposed to operating in the public interest.

## II. Acting in the Public Interest

Legislation establishing the regulatory body will often make explicit reference to the requirement to act in the public interest. For example the BC Real Estate Services Act (SBC 2004 c. 42) establishes a Real Estate Council of BC, which has as one of its objects – to uphold and protect the public interest in relation to the conduct and integrity of its licensees (Sec. 73(2)(c)). The BC Health Professions Act, in reference to the colleges established or continued under that Act, provides in Section 16(1)(a) and (b) that it is the duty of the college at all times to serve and protect the public and to exercise its powers and discharge its responsibilities under all enactments in the public interest. And, this concept of acting in the public interest is not simply a product or reflection of the past. The “Accounting” profession is undergoing a major change – amalgamating the Chartered Accounts, the Certified Management Accountants and the Certified General Accountants into one profession – The CPAs – Chartered Professional Accountants. New governing legislations is being introduced in each province. The new Alberta legislation – the Alberta Chartered Professional Accountants Act passed in December 2014 in Section 2 identifies the purpose of the Act is to (a) protect the interest of the public.

But none of the acts define the term “public interest”. Walter Lippmann, a United States writer, journalist and political commentator wrote in an attempt to define the term public interest that the public interest may be presumed to be “what a person would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently”. It has been described as referring to considerations affecting the good order and functioning of the community and government affairs, for the well-being of citizens (Ombudsman, New South Wales “Public Interest”). It is clear that the “public interest” is not synonymous with whatever interests the public. The public interest isn’t defined by People Magazine or Entertainment Tonight.

Although defining the term Public Interest is difficult and can capture a wide variety of concepts, the literature does recognize that the concept of “public interest” has some unifying themes. In their paper for External Advisory Committee on Smart Regulation entitled “Assessing the Public Interest in the 21<sup>st</sup> Century: A Framework” by Leslie A. Pal and Judith Maxwell (January 2004, Canadian Policy Research Network), the authors identify five distinctive approaches to understanding the public interest including process, public opinion and shared values. In discussing process, they state (at p. v of their report)

Has due process been followed in constructing the regulatory decision-making process and can we with confidence say that decisions that result from that process have been shaped fairly. Key benchmarks here are accessibility, transparency (distribution and availability of information), mechanisms for participation and deliberation, accountability and neutrality in decision-making.

The International Federation of Accountants (IFAC) in a policy paper “A Definition of the Public Interest” (June 2012) identified that an assessment of process is required in any consideration of the “public interest”. This involved an analysis of the extent to which the manner of considering the action, decision, or policy was conducted with the qualities of transparency, public accountability, independence, adherence to due process and participation that includes a wide range of groups in society. Further the IFAC defined transparency as the process of making information accessible to the public. Such information includes governance processes such as rules and regulations, meeting minutes, voting records, financial statements and the decisions that are reached including the process by which they were made.

### **III. Transparency – The New Order**

The Transparency Train has left the station. The real question to ask is whether you are on the train, either as the engineer driving the train or as a passenger along for the ride, or whether you are trapped in the headlights in danger of being run-over.

In Ontario, the Federation of Health Regulatory Colleges created a task force on accountability and in 2013, an Advisory Group for Regulatory Excellence (AGRE) was formed to look at how to increase transparency regarding regulated health professions. This group, made up from dentistry, medicine, nursing, optometry, pharmacy and physiotherapy, was tasked to examine information-sharing practices and to make recommendations as how regulators can make more information about members and college’s processes available to the public. It established 8 Transparency Principles to guide decision-making on the types of information about regulated health professions to make publically available.

The 8 principles are:

1. The mandate of regulators is public protection and safety. The public needs access to appropriate information in order to trust that this system of self-regulation works effectively.
2. Providing more information to the public has benefits, including improved patient choice and increased accountability for regulators.
3. Any information provided should enhance the public’s ability to make decisions or to hold the regulator accountable. This information needs to be relevant, credible and accurate.
4. In order for information to be helpful to the public, it must

- be timely, easy to find and understand
  - include context and explanation
5. Certain regulatory processes intended to improve competence may lead to better outcomes for the public if they happen confidentially.
  6. Transparency discussions should balance the principles of public protection and accountability with fairness and privacy.
  7. The greater the potential risk to the public, the more important transparency becomes.
  8. Information available from colleges about members and processes should be similar.

Of particular interest is principle 5 and 6 that speak to confidentiality and privacy and thus speak to restricting the flow of information.

Subsequently in October 2014, the Minister of Health in Ontario wrote to the Health Colleges asking them to make transparency a priority.

The Transparency initiative can be further broken down into two separate categories (1) information about the Association/Colleges governance and operations and (2) information about “conduct-related” matters in respect of members/registrants.

## **A. Governance Issues**

This matter relates to the operations and activities of the Association, its Board of Directors and its committees, what information is disclosed and how it is disclosed. In the past, one would have talked about publishing annual reports with detailed information. But in the era of the Internet, - it is what information is available thru the Internet and in particular the Association’s website.

The website has become the new public access point. If one is seeking information one immediately goes to the website of the Association. What should be on there? Information necessary to assess the functioning of the organization – name of the committee, their functions and their members’ names, all the relevant legislation, regulations, bylaws, policies and standards, posting of all council meeting dates, agendas, minutes, posting of annual reports, description of the process for application for membership, description of the discipline process, access to the Registrar of Members, including information re status of the member and current and past discipline history. (One of the difficult

questions regarding past history is how far back does one go? At what point should the past historical disciplinary information be removed from the website, if ever?)

## **B. Discipline Related Matters**

I will start from the premise that serious discipline matters – matters that would result in a suspension or expulsion if proved – should be made public and that information about discipline hearings – where, when, notice of citation – as well as the hearing itself will be public. Presumably, on the website of the association. Generally public hearing, public notification and publication of hearing outcomes are provided for in the legislation establishing the regulatory authority.

Also, I believe that there is a consensus that disclosure of a member's/registrar's name in respect of complaints summarily dismissed either without investigation (for example lack of jurisdiction) or after investigations is not appropriate. The privacy interest of the member/registrar needs to be considered; the potential harm to the member's/registrar's personal and professional reputation is too high. The Information and Privacy Commissioner of British Columbia considered this issue in *The Law Society of British Columbia 2002 CanLII 42426 (BCIPC)* in respect of a request for the complaint history of particular members. At par 54 and 55, the Commissioner discusses the Law Society's reasons for refusing to disclose the information and ultimately agrees with it.

[54] The Law Society's reasons for refusing to confirm the existence or non-existence of a complaint is that it would be unfair to the lawyer and the complainant. Disclosure can, the Law Society says, unjustly damage the lawyer's reputation, as well as his or her professional stature among peers and the broader community. Only when the Law Society has issued a formal citation following an investigation does it make the existence of a complaint publicly known. For the same reason, discipline matters or proceedings which have not resulted in a citation are not publicly disclosed. According to the Law Society, it is only at the point of citation that the lawyer's or another third party's personal privacy is outweighed by the public's interest in knowing about the complaint. The Law Society's reason for refusing to deny the existence of a complaint is that, if a complaint has been made, it would be inaccurate and misleading to deny its existence. It is also obvious, of course that a practice of acknowledging when a complaint does not exist would by inference disclose when a complaint actually does exist.

[55] I will discuss below the Law Society's disclosure practices in relation to complaints against its members or former members in connection with the "Member History" printouts that the Law Society has withheld in their entirety from the applicant. It is sufficient at this point to say that the Law Society has properly applied s.8(2)(b) in this case. In my view, disclosure of the mere existence or non-existence of complaint information would indirectly reveal whether negative opinions have been recorded about the professionalism or honesty of Law Society members or former members in a context where there is a significant likelihood of unfair damage to their reputations. As I discuss further below, I consider that information about the existence of a complaint against a lawyer is personal information that relates to the employment or occupational history of the lawyer within the meaning of s.22(3)(d) of the Act. Section 22(3)(d) provides that disclosure of such information is presumed to unreasonably invade the personal privacy of the individual whose personal information it is. Even though such information is not, properly understood, an indication of any actual wrongdoing, it is

nonetheless likely that negative conclusions will be drawn about the member or former member from the mere existence of such information. I consider that disclosure of this information would be an unreasonable invasion of the personal privacy of the Law Society members or former members involved here.

This approach is reflected in Principle #6 of the 8 Ontario Transparency Principles.

That is not to say that all information about complaint dismissals is protected from disclosure. The number of complaints received and their ultimate outcome (dismissal, sent to “charging committee”, citation, etc.) should be published. Further, one might consider publishing anonymized summaries of types of complaints received and dismissed. Such information would inform both the public and the profession about the nature of complaints being made and how they are being dealt with.

The more challenging issue is the publication of the information about complaints that result, either through consent or through a dispute resolution process, in a lesser penalty (fine, possibly reprimand) or in the registrant agreeing to some condition (additional training, education) or agreeing not to repeat the conduct. On this issue, there is no consensus. This question is reflected in Principle #5. Some argue that not publishing leads to a “learning not lynching, resolution not retribution” environment and promotes disclosure to the association and leads to consensual resolution. Disclosure to the public may lead to members/registrants being less willing to accept these consensual processes. Others argue that publication promotes transparency. It informs the public and helps to hold the regulator accountable by allowing the public, registrants and government to assess whether the regulator is acting proportionately and consistently. It allows the public more information about both registrants and the regulator. It is interesting to note that the Zakhary case, which I referred to at the outset of my paper involved the publication of a reprimand for the repeated failure to respond to an investigator from the college inquiring into an earlier discipline complaint. The Alberta Court of Appeal, in commenting on a secret reprimand, stated the following:

“Besides, a secret “reprimand” is close to an oxymoron. The Shorter Oxford Dictionary says “especially one given by a person or body having authority, or by a judge or magistrate to an offender (v.2, p 1801, 3rd ed. 1973, reprinted 1986). The connotation is publicity. A rebuke administered secretly is really just advice, and no punishment or penalty at all.” (par 24 of the decision).

In respect of other lesser penalties, a fine or conditions imposed on the registrant to take additional training or education, anonymized publication may be appropriate. Both the College of Dental Surgeons of BC and the Law Society of BC have policies or rules which permit anonymous publication of the outcome of some disciplinary matters. For example, the Law Society has conduct meetings and conduct reviews, which are possible outcomes of a complaint investigation that the Discipline Committee may order instead of a citation. A conduct meeting is a more informal process and does not

form part of the lawyer's professional conduct record. A conduct review is a more formal process although still conducted in private. A written report is presented to the Discipline Committee. However the report itself is not made public and the Executive Director may publish and circulate to the profession a summary of the circumstances of a matter that has been the subject of a conduct review (Rule 4-6.2, 4-7, 4-8 and 4-11). The publication is intended to assist lawyers by providing information about ethical and conduct standards. They are published in the Benchers' Bulletin sent to every lawyer.

The College of Dental Surgeons of BC has a Complaints and Discipline Publication Policy. I have attached a copy of that policy as an Appendix to this paper. It states that the CDSBC believes that public disclosure beyond the mandatory provisions of the Health Professions Act will increase public confidence, as well as educate registrants and the public about appropriate conduct and the regulatory process – all of which promotes an ethical and competent profession and effective regulation. The policy then identifies when publication of complaint and disciplinary matters will occur. It specifically provides for anonymous publication of complaint information (useful in educating the public about complaints that are not appropriate for the regulator, or will be useful in educating the profession) and settlement by resolution (if the complaint represents a trend). For a complaint resolved by consent with a reprimand or remedial action and not required to be published under the HPA, the CDSBC will publish a summary, usually anonymously. See their Complaint Summaries 2013 Report for an example of their publication.

#### **IV. Conclusion**

As I indicated earlier, the Transparency Train has left the station. There are many issues still to be resolved with respect to disclosure of information about both the regulator and member registrants. Your choice is to be proactive and drive the train, reactive and just ride the train, or stand by the track and risk being run over.

# Appendix 1

## Complaints and Discipline Publication Policy

### Background

CDSBC has an obligation to publish details of its complaints and disciplinary proceedings under certain prescribed circumstances, pursuant to section 39.3 of the [Health Professions Act](#) (the “HPA”).

The HPA mandates publication in certain situations, generally those involving an adverse finding against a registrant following a discipline hearing, a consent resolution with a registrant concerning a “serious matter” (as defined in the HPA), or cases in which restrictions are imposed on a registrant’s practice.

In other words, the HPA reserves mandatory public disclosure for the most serious outcomes. These are by far the least common types of complaints CDSBC receives. The HPA is silent on if and when regulatory colleges should provide public information, save in the limited circumstances described above.

CDSBC recognizes the trend in self-regulating professions, both locally and internationally, towards increased publication of information about complaints and disciplinary proceedings.

CDSBC views section 39.3 of the HPA as the starting point, rather than the end point, of public disclosure of information about complaints and disciplinary proceedings.

CDSBC believes that public disclosure beyond the mandatory provisions of the HPA will increase public confidence, as well as educate registrants and the public about appropriate conduct and the regulatory process - all of which promote an ethical and competent profession, and effective regulation.

CDSBC has adopted the common framework for publication of complaints and discipline information developed by the Health Professions Regulators of British Columbia (HRPBC). A copy of the framework is attached to this policy and forms part of the policy.

### Disclosure Policy

In consideration of the above, CDSBC publishes information about complaints and disciplinary proceedings as follows:

1. Publication will occur on the [CDSBC website](#) and will be posted generally for 10 years, or in accordance with the framework. A registrant’s discipline history can be accessed indefinitely by contacting the College.
2. CDSBC will continue to fully comply with the required disclosure provisions under section 39.3 (Public notification) of the HPA.
3. For a complaint summarily dismissed by the Registrar under section 32(3) of the HPA, CDSBC may publish information about the complaint anonymously (that is, without identifying the parties) if it will be useful in educating the public about complaints that

are not appropriate for the regulator, or if it will be useful in educating the profession about circumstances that give rise to complaints.

4. For a complaint dismissed under section 33(6)(a) or a complaint settled by resolution under 33(6)(b) of the HPA, CDSBC may publish information about the complaint anonymously if the complaint represents a trend or if it otherwise provides an opportunity to educate the public or the profession.
5. For a complaint resolved by consent under section 36 (Reprimand or remedial action by consent) which does not require disclosure under the HPA, CDSBC will publish a summary of the complaint, usually anonymously. A bylaw will be adopted permitting CDSBC to name the registrant in the publication, which will occur only if it is deemed by CDSBC to be in the public interest.
6. CDSBC will publish a citation on the College's website two to four weeks prior to a hearing.
7. For a citation that was issued and subsequently cancelled pursuant to section 37(4) of the HPA, CDSBC will publish notice of the cancellation if notice of the hearing has already been published.
8. For a citation dismissed by the Discipline Committee pursuant to section 39 (Action by discipline committee) of the HPA, the dismissal order will be published. The dismissal notice will be anonymous, unless the registrant asks that his or her name be included in the publication.
9. A copy of the discipline decision will be provided to the Canadian Legal Information Institute (CanLII) for publication.
10. Named publication, if applicable, will occur promptly. Anonymous publication may occur quarterly, and quarterly anonymous publications may be archived after one year.
11. A statistical summary of all complaints received will be published annually. The summary will not include any particulars but will inform the public of how CDSBC is fulfilling its mandate by stating the number of complaints received, how many were disposed of, and by which means.
12. The CDSBC website will include a link to the [Health Professions Review Board decisions](#) concerning CDSBC complaint disposition reviews.

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