Rethinking Information Access in the Age of Accountability

Portland, Oregon
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Introduction

Highlights for this presentation:
• Where we were
• Why we needed change
• The changes we made
• Some things we learned from the process
• Some of the concerns we had about making these changes

Who are we?

The College of Physiotherapists of Ontario

The College regulates about 8000 physical therapists in Ontario

We are one of 25 health professional regulators in Ontario
Where did we start?

- Statutory minimum data requirements for content
- This content must be available on public website

But that is not all!

Additional information allowed through by-laws. We also offered information like:
- License class
- Current and previous business address
- Detail on discipline and incapacity hearings
- Interim orders

Still lots of information not public

- Additional demographic content
- Information on complaints outcomes
- Other public information that we have become aware of - criminal charges, bail information, convictions
And then things started to change...

- Major media campaign about regulators’ secret resolutions
- Other public institution accountability scandals
- ‘Open government’ movement

First set of learnings:

- Legal compliance didn’t matter
- Additional public access didn’t matter
- Balancing fairness to both members and public didn’t seem to matter
- What matters is demonstrating accountability and transparency and responding to public need

So what did we do (3 year project)?

- Regulators decided to act on their own
- Set up a working group which:
  - Developed transparency principles
  - Researched best practices and needs
  - Developed recommendations
- Regulatory boards adopted recommendations for more public information
The new information we provide:

External information:
• Criminal charges, where relevant to practice
• Bail conditions, where relevant to practice
• Criminal findings of guilt in certain cases

Internal information - Discipline
• Discipline referral date
• The status of the hearing (i.e. recessed, stayed)
• The full notice of the hearing including allegations
• Discipline finding from other jurisdictions, if known

Controversial internal information:
• Acknowledgements and undertakings
• Cautions
• Specified Continuing Education and Remediation Programs (SCERPS)
Second set of learnings:

- New rules are difficult to establish - hard to be consistent - time consuming - hard to make controversial rules
- Statutory changes might not be needed - you might just need the will!
- Boards will make changes when they understand the need

Problems encountered:

Practical issues include:

- Consistent understanding of information
- Obtaining and presenting consistent information
- Database changes
- Updating and removing information
- Members’ opposition

Theoretical Issues include:

- Impact on member’s willingness to agree to outcomes other than referrals to discipline
- Impact on committee outcomes
- Court challenges
- Just the beginning of more changes (e.g., fact of complaint)
Introduction

- Background regarding information added to register by some Ontario health regulatory bodies
- Possible challenges regarding increased transparency
Ontario Health Regulatory Colleges

- By-laws passed resulting in more information about members being publicly available
- Type of information

Implementation of New Rules

- Risk-based framework developed
- Cautions and SCERPs for behaviour which poses a moderate risk to public

Unintended Consequences?

- Might increased transparency have unintended consequences?
Screening Process for Complaints and Reports

- Regulatory bodies have a screening committee (or committees)
- Complaint about the conduct or actions of a registrant/member
- Mandatory reports or other information that comes to the attention of the regulatory body

Screening Process for Complaints and Reports (cont’d)

- Screening committee conducts an investigation
- Screening committee decides how to dispose of a complaint and/or report
- Types of disposition

What is Caution?

- One of dispositions of Inquiries, Complaints and Reports Committee (or other screening committee)
- Requires member to appear before a panel of Committee to be cautioned
- To hear concerns about member’s practice
- Remedial outcome
What is a SCERP?

- One of dispositions of Inquiries, Complaints and Reports Committee
- Requires member to complete a specified continuing education or remediation program
- Remedial outcome

Ontario Courts and Cautions

- Silverthorne vs. Ontario College of Social Workers and Social Service Workers (2006)
  
  “The Committee does not make findings of fact nor determine whether discipline is warranted; rather, it weighs the evidence to determine whether there is sufficient evidence to refer the matter to the Discipline Committee or the Fitness to Practise Committee. It is those bodies which will make findings of fact.

Ontario Courts and Cautions (cont’d)

While the Complaints Committee can itself caution a member, a caution is not a sanction. It is advisory in nature and intended to be remedial (citation omitted). A caution is not recorded in the public registry of the College nor publicized by it.”
Ontario Courts and Cautions (cont’d)

- Fielden v. Health Professions Appeal and Review Board (2013)
  “The decision of the Committee to caution the applicant in person is not a ‘sanction’. Cautions are entirely remedial in nature and intended to assist the applicant to improve his practice. A caution administered by the Committee is not a penalty and must be contrasted with the range of penalties that can be imposed by the Discipline Committee of the College consequent to a finding of professional misconduct. The Discipline Committee of a College can impose a variety of sanctions, which may be recorded on the permanent and public record of a member. By contrast, a caution is remedial only, cannot involve any finding of professional misconduct (a finding which is outside the jurisdiction of the ICRC and the Board), and does not appear on the register or in any public document of the College.”

Change in Nature of Outcome?

- Is remedial outcome converted into punitive outcome?
Decision about Appropriate Outcome

- Will screening committee’s decision about appropriate outcome be affected by publication being automatic?

Resistance to Remedial Outcome?

- Will members develop resistance to remedial outcome?

Inconsistency in Information Publicly Available

- Types of information
- How long information remains public
Conclusion

- Will these challenges materialize?

Speaker Contact Information

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Transparency – the Washington Way
We, the People...

“The people of Washington do not yield their sovereignty to the agencies that serve them. “

Public Records Act
RCW 42.56
• Liberally construed
• Exemptions narrowly construed
• Applies to every public entity

What’s a Record?
Any writing containing information relating to the conduct of government
What’s a Writing?

- **Writing** means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all paper, tape, Magnetic or paper tapes, photographic films and prints, motion picture film and video recordings, magnetic or punched cards, discs, drums, desktops, sound recordings, and other documents, including existing data compilations from which information may be obtained or transcribed.

What’s the Process?

5 days to respond:
- Provide requested record
- Internet address and link to records
- Provide copies or allow the requestor to view copies using an agency computer
- Acknowledge with estimate
- Deny the request

Case law

Investigative files
- 1997 - Newman v. King County
- 2013 - Sargent v. Seattle Police Department
- 2016 - Wade’s Eastside Gun Shop v L&I
Penalties
2004 - Penalties can be assessed per day
2007 - Penalty between $5 to $100 per day
2010 - WA Supreme Court Developed factors to determine penalty
2016 - WA Supreme Court upheld per page penalty

Fines
- $502,000
- $720,000
- 2011 - legislature amended PRA

Personal devices
- Prosecuting attorney
  - Text messages on personal cell phone
  - Turned over portions of phone bills, not text messages
- The Supreme Court - text messages sent and received employee's official capacity are public records
Horror stories
“Activist” group filed 275 requests

- 22 year old computer programmer:
  - Every e-mail ever sent from 60 state agencies
  - Every dispatch call, police report and video from every 911 response call from SPD.

- “Mr. Public Requestor”

Questions??

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