DECISION NO. 2011-HPA-176(a)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant COMPLAINANT

AND: The College of Psychologists of BC COLLEGE

AND: A Psychologist REGISTRANT

BEFORE: Rex D. Blane, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on January 21, 2013

APPEARING: For the Complainant: Self-represented

For the College: Jason Herbert, Counsel

For the Registrant: Lara Zee, Counsel

I DECISION

[1] Upon considering the application made by Complainant under section 50.6 of the Act, I confirm the disposition of the Inquiry Committee of the College.

II INTRODUCTION

[2] In February 2003 the Complainant arranged a visit with the Registrant that took place at a physician’s [Dr. X] home office in a small British Columbia community. It was likely an hour or less in duration and likely resulted in a page or less of clinical notes. Unfortunately the treatment was apparently ineffective and no further visits ever occurred.

[3] The Registrant arranged to store his files relating to patient visits within the community in a storage box in Dr. X’s storage area. This included the Complainant’s file.
[4] In November of 2010 the Complainant contacted the Registrant and requested he provide her with a copy of any record made at their encounter approximately eight years earlier. The Registrant, who could recall no specifics of the Complainant’s visit, advised that his file would have been stored with Dr. X. Shortly thereafter Dr. X, responding to a telephone message left by the Complainant, advised her that in light of the intervening years, the Registrant’s file would have been shredded in accordance with standard practice, however she would check to see.

[5] On November 14, 2010 Dr. X left a telephone message for the Complainant indicating that she thought she had located the file. However on closer investigation she discovered that the file was empty save for a note that the contents had been shredded in July 2010 and that the record the Complainant was seeking no longer existed.

III  COMPLAINT TO THE COLLEGE

[6] The initial Complaint of January 2011 was that the Registrant was unable to provide the record she was seeking. The Complainant also complained that the registrant had “violated the confidentiality clause when he gave my clinical records to [Dr. X]”. She also complained that she paid the Registrant $100.00 for treatment that did not work.

IV  INVESTIGATION OF COMPLAINT BY THE COLLEGE

[7] Having summarized the complaint, the College sought and obtained a written response from the Registrant. The Registrant advised that sometime prior to the Complainant’s consultation he had been approached by Dr. X to see some of her patients and that consultation notes had been stored with Dr. X so that she could refer to them during any patient follow-ups.

[8] The Registrant also provided a copy of a letter from Dr. X to the Complainant, which explained the circumstances resulting in the destruction of the Complainant’s record. Dr. X advised that her practice was to destroy records seven years after a patient’s last visit. The Complainant took issue with the recollection of Dr. X and the Registrant that she had been referred to the Registrant by Dr. X. She believed that she had made a direct appointment with the Registrant.

[9] The College then brought the matter back before the Inquiry Committee for further review. The College also received further correspondence from both the Complainant and the Registrant.

[10] The Complainant provided recordings of telephone messages and conversations which she made involving herself, the Registrant, and Dr. X. A written summary of the recordings was made by College staff and made available to the Inquiry Committee with the recordings.

[11] The College reviewed all available evidence with respect to the issues raised in the Complaint including the Registrant’s description of the services that he likely provided.
V DISPOSITION OF COMPLAINT BY THE COLLEGE

[12] The inquiry Committee determined that the Registrant was not obligated to retain the Complainant’s record beyond August 2009, and the destruction of the Record in July of 2010 met the College’s required standard provided by their Code of Conduct.

[13] The College reviewed all available evidence with regard to the confidentiality issue, the Complainant’s position being that although her visit with the Registrant took place at Dr. X’s home office, she made an appointment directly with the Registrant and was not seen on referral from Dr. X. The College did not find evidence to substantiate this allegation.

[14] While, in the result, the College was not critical of the Registrant’s conduct it determined that a review of the Registrant’s own practice and procedures was appropriate and stated “in light of the Complainant’s ongoing concerns, the Inquiry Committee requested, and [the Registrant] signed, a Resolution Agreement” which addressed certain matters relating to his file management practices, documentation of informed consent to ensure compliance with confidentiality standards and provision of a letter of regret to the Complainant all of which was agreed to by the Registrant.

VI SCOPE OF REVIEW BY THE REVIEW BOARD

[15] The scope of review by the Review Board is set out in s. 50.6 of the Act. The following are relevant subsections that relate to this matter.

50.6 (1) A complainant may apply to the review board for a review of a disposition described in section 50.53 (1)(c).

. . .

(5) On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:

(a) the adequacy of the investigation conducted respecting the complaint;

(b) the reasonableness of the disposition.

(6) A review under this section is a review on the record.

(7) The review board may hear evidence that is not part of the record as reasonably required by the review board for a full and fair disclosure of all matters related to the issue under review.

VII COMPLAINT TO THE REVIEW BOARD

[16] The Complainant believes that there was a breach of confidentiality by the Registrant in storing his notes of the Complainant’s visit with him with Dr. X and that “…this became much more than that as time progressed. It turned into a crime. [Dr. X] shredded the notes just so that I could not have them.” She disagreed with the Inquiry Committee’s Disposition and made detailed written submissions to the Review Board accompanied by transcripts of the various telephone recordings.
VIII  ISSUES

[17] The issues to be decided in this application:

(a) The admissibility of additional evidence
(b) Was the investigation adequate?
(c) Was the Disposition by the College reasonable?

A.  Admissibility of Additional Evidence

[18] By reason of section 50.6(7) the Review Board is permitted to admit evidence not contained in the Record under certain circumstances. Review Board Decision No. 2009-HPA-0001(a)-0004(a) paras. [71]-[72] are helpful in defining the test for admissibility.

[71] In our opinion the suggested constraints and criteria are too narrow and do not reflect the plain language used in section 50.6(7) of the Act. On this subject, the British Columbia legislature has intentionally given the Review Board a more flexible test to apply than the traditional “fresh evidence” rules that apply to courts and to the Ontario tribunal. What is “reasonably required” for a “full and fair disclosure of all matters related to the issues under review” is a decision for the Review Board, acting in good faith, to decide on a case by case basis, according to the matters at issue on a particular review. In this case, we have admitted some fresh evidence and rejected evidence that has no relevance to the issues we are called upon to decide. That decision was based on our review as to whether the evidence was reasonably required to fully and fairly deal with issues under review. To make that determination in this case, we first assessed whether the new evidence is relevant. If it is then we asked generally:

(a) how relevant is the material to the matters at issue on review;
(b) would it be fair to all parties to admit it?
(c) does the admission of the information render the disclosure more full or complete so as to enable the Review Board to render a full, fair and proper decision?

[72] The weight we assigned to the factors considered depended on the evidence in question.

[19] The College and the Registrant request the introduction of a letter of explanation dated October 18, 2012 from the Registrar of the College to the Review Board which provided additional detail as to the College’s review of audio recordings made and provided by the Complainant and provided an explanation for the lack of a transcript. I consider it to be relevant and fair to all parties to admit it.

[20] The College also requests the introduction of the College’s letter to the Complainant dated December 14, 2011 providing a copy of the Registrant’s letter to the Complainant dated December 7, 2011 containing the Registrant’s explanation of what likely occurred at the Complainant’s visit to him on February 16, 2003 based upon his clinical practice at the relevant time. This is also admitted as additional evidence for the above reasons.
The Complainant submitted transcripts of the telephone recordings between herself and the Registrant and Dr. X. These are admitted for the same reasons. Further, none of the parties object to this admission.

B. Adequacy of the Investigation

The Review Board has considered the question of adequacy of the investigation in a number of previous decisions including decision No. 2009-HPA-0001(a)-0004(a), paragraphs [97] and [98] of which are as follows:

[97] A complainant is not entitled to a perfect investigation, but he or she is entitled to an adequate investigation. Whether an investigation is adequate will depend on the facts. An investigation does not need to have been exhaustive in order to be adequate, provided that reasonable steps were taken to obtain the key information that would have affected the Inquiry Committee’s assessment of the complaint.

[98] The degree of diligence expected of the College – what degree of investigation was adequate in the circumstances – may well vary from complaint to complaint. Factors such as the nature of the complaint, the seriousness of the harm alleged, the complexity of the investigation, the availability of evidence and the resources available to the college will all be relevant factors in determining whether an investigation was adequate in the circumstances.

The role of the Review Board in assessing the adequacy of an investigation is to determine whether the Inquiry Committee’s investigation provided sufficient information to assess the Complaint. In this case the challenge facing the Inquiry Committee is to review and assess the circumstances relating to the likely existence and subsequent destruction of notes made on the occasion of the Complainant’s visit to the Registrant in February 2003. Dr. X stored the notes of the Registrant and in due course destroyed them. There was, in my opinion, an adequate investigation by the College. It obtained and considered all reasonably available and relevant information, including the recordings of conversations made and provided by the Complainant, to allow the Complaint to be appropriately assessed.

C. Reasonableness of the disposition

The Review Board has considered the question of reasonableness of the disposition of a complaint in a number of previous decisions including No. 2009-HPA-0001(a)-0004(a) which reflects the law in determining reasonableness in the following passages at paragraphs [91] and [92]:

[91] In Dunsmuir v. New Brunswick, 2008 SCC 9 at paras. 47 and 49, the Supreme Court of Canada had earlier stated as follows:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the
existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law....

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: D.J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[92] In our view, these passages reflect the approach the Review Board should take in reviewing the reasonableness of an inquiry committee’s disposition. While the Review Board’s application of the test will necessarily reflect its expertise as a specialized administrative tribunal rather than a Court, the Review Board’s focus is nonetheless not to step into the shoes of the Inquiry Committee, but rather to determine whether the Inquiry Committee’s disposition falls within the range of acceptable and rational solutions, and is, viewed in the context of the whole record, sufficiently justified, transparent and intelligible to be sustained.

(emphasis added)

[25] I have made a careful review of all available materials concerning the matter of the patient/doctor relationship between Dr. X and the Complainant. The clinical records of Dr. X end in September 2002 but there is no specific indication when the relationship was terminated. The pattern of medical visits is consistent with Dr. X and the Registrant being unaware that the Complainant may have been seeking alternative medical advice by February 2003. I find it reasonable that both Dr. X and the Registrant believed that the Registrant saw the Complainant on referral from Dr. X. Dr. X also prepared a medical report at the Complainant’s request just a few weeks prior to her visit with the Registrant, which identified the Complainant as her patient.

[26] The College reviewed all available evidence with respect to the question of confidentiality and I find that their conclusion that there was, in fact, no breach of confidentiality was reasonable. The Complainant did not seek medical advice from Dr. X subsequent to the consultation with the Registrant and there is no evidence to indicate that Dr. X ever looked in the Complainant’s file prior to her request many years later.

[27] With respect to the consultation itself the Committee accepted the Registrant’s description of the services he likely provided and found them in accordance with professional standards. This too, in my opinion, was reasonable.

[28] The Complainant continues in her belief of some form of conspiracy to deprive her of the record of her encounter with the Registrant, a visit that was sufficiently
unremarkable that he had no recollection of it while the Complainant’s recollection was that of a failed attempt to hypnotize her.

[29] The Complainant’s recollection of the visit was that the Registrant shone a light in her eyes which caused rapid blinking. However, it is clear from the recording of her conversation with the Registrant of November 10, 2010 that he never used lights in the course of patient treatment.

[30] Dr. X initially stated to the Complainant she did not expect to have retained the record; however, her initial search indicated that she still had it. Subsequent examination of the file revealed it had been shredded in accordance with her usual and appropriate practice. While this may have been confusing and disheartening for the Complainant, it is not surprising - particularly in a paper-based system - if one considers that the file folder would have been retained to indicate the previous existence of a file, and that it contained nothing more than documentary confirmation that the contents had been shredded in accordance with proper records management practices. There was no motive or rational reason for the Registrant or Dr. X to engage in conduct that would deprive the Complainant of the Registrant’s record. The Disposition of the College in finding no reason to criticize the Registrant for lack of his record was reasonable.

[31] Although the Inquiry Committee found no reason to criticize the Registrant I find that the Resolution Agreement was appropriate with its emphasis on the importance of record keeping and confidentiality in accordance with the College’s Code of Conduct.

IX CONCLUSION

[32] My role is not to step into the shoes of the Inquiry Committee but to decide whether the Disposition as a whole falls within a range of acceptable outcomes and is sufficiently justified, transparent and intelligible to be sustained. In my opinion the Disposition does fall within that range and does meet the appropriate tests of justification and sustainability. It is therefore confirmed.

[33] In making this decision I have considered all available information, documentation and submissions whether or not specifically referred to herein in confirming the Disposition of the College.

"Rex Blane"

Rex D. Blane, Panel Chair
Health Professions Review Board

July 5, 2013