



Health Professions Review Board

Practice Directive 3

Withholding information in the record from a party – Application under s.42 of the *Administrative Tribunals Act*

(Inquiry Committee Disposition Reviews)

Purpose

This Practice Directive supplements Rule 18 of the [Review Board's Rules of Practice and Procedure](#) in regard to requests for the review board to receive information in the complaint investigation record (the “record”) in confidence to the exclusion of another party or parties under s.42 of the *Administrative Tribunals Act*. It sets out possible factors that might be addressed in a s.42 application.

Principles

1. Where legislation gives a party the right to challenge a decision, that party has the right to a fair process.¹ In the interests of procedural fairness, all parties will have access to the entire record unless the proper administration of justice requires an exception to this principle.
2. Colleges are in the best position to identify any information that the review board should receive in confidence and not disclose to a party, because the college creates and produces the record. Therefore, colleges should carefully consider whether a s.42 application is required before providing the record to the review board.
3. A complainant's own health information is not subject to a s.42 application because there is an implied waiver of confidentiality regarding a complainant's health information when a complainant commences a review.²
4. Personal information that could potentially fall within the scope of s.42 includes the names of family members, sexual or mental health information whose prejudicial effect outweighs its probative value, and personal information about

¹ *Allen v. College of Dental Surgeons of British Columbia*, 2007 BCCA 75.

² *Wilson v. Bourbeau*, [2009] O.J. No. 1841 (S.C.J.); *Bongard v. Health Professions Board*, [1997] O.J. No. 1882 (Gen. Div.). NB See the review board's publication policy which sets out how it protects personal information.

third parties that was extraneous to the complaint investigation or not relied on by the college.

Procedure

1. The procedure for making a s.42 application is set out in rule 18 of the Review Board's [Rules of Practice and Procedure](#).*
2. Colleges do not need to make s.42 applications to sever or not include information in the record if it is permitted under the review board rules: See Rule 15 and [Practice Directive 2](#).
3. Per Rule 18(3)(b), when a party makes a s.42 application, that party must provide the other parties with a summary of why it has been made unless it would defeat the purpose of the application.

Summaries need not be long. For example, a summary could say: "contract with third party for health services, which is confidential business information and unrelated to the application for review," or "personal information of third party, received but not used in the investigation, to protect third party privacy."

4. If the review board decides to deny all or part of the s.42 application under Rule 18(8), the review board's notification to the parties of its intention to disclose will also specify that disclosure will be carried out 14 days after the date of the notification. This is to allow a party that intends to judicially review the decision to notify the review board of it.
5. If the review board grants a s.42 application, it will ask the college to produce a redacted copy of the record to the review board for distribution to the parties within 14 days of the review board's direction.

Content of the Application

1. The review board can direct that information is not disclosed to a party to ensure "the proper administration of justice." To assist the review board in making this determination, parties may wish to address:
 - a. the importance of the individual's interests at stake on the review and the impact of nondisclosure on their ability to advance their case;
 - b. the importance of the opposing privacy or other interest sought to be protected and the impact of disclosure on that interest; and
 - c. whether there are any reasonably available solutions that would address privacy or other interests while enabling disclosure.

2. Parties may find it helpful to consider the factors that govern the Ontario Health Professions Appeal and Review Board³ in making decisions on requests to receive information in confidence. That Board may refuse to give a party any evidence that may, in its opinion:
 - a. disclose matters involving public security;
 - b. undermine the integrity of the complaint investigation and review process;
 - c. disclose financial or personal or other matters of such a nature that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that disclosure be made;
 - d. prejudice a person involved in a criminal proceeding or in a civil suit or proceeding; or
 - e. jeopardize the safety of any person.
3. The weight the review board gives to any of these factors will depend on the context of the review.



David Hobbs, Chair

Issued: November 1, 2009

Revised: July 24, 2022

* The notice referred to in Rule 18 (4) is appended to this Practice Directive

³ [Regulated Health Professions Act, 1991, S.O. 1991, CHAPTER 18, Schedule 2, s. 32\(3\)](#)



Health Professions Review Board

NOTICE (for Complainants and Registrants)

Withholding Information in the Record from a Party (Section 42 application)

Fairness and Transparency

An important part of a fair review process is for all parties to have access to the same information.

The College's Record of Investigation

When the Review Board reviews how a college dealt with a complaint, it obtains a copy of the college's record of investigation (see [Practice Directive 2 Duty of a College to Produce the Record](#)). The Review Board then distributes it to all the parties.

Withholding Information

The Review Board always obtains a complete copy of the college's record of investigation in accordance with the Rules of Practice and Procedure. However, in exceptional cases, a party to the review (most often the college itself) might believe the Review Board should withhold certain information in the record from another party. For example:

- documents that disclose financial information that is not relevant to the review
- information that may bias a reviewer (for example, sexual health information or mental health information which does not relate to the subject of the complaint)
- information about a third party (such as names, statements, or personal information about family members that are not relevant to the review)
- information that should be withheld from a party to protect personal safety or security



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How to Apply

Write to the Review Board **no later than 14 days from the day you receive this notice**. If no requests are received, the Review Board will distribute the Record to all parties in full.

Your application must be in writing, and must:

1. describe the information that should not be disclosed, and which party it should not be disclosed to;
2. explain why the information should not be disclosed;
3. be sent to all other parties. **If copying the parties would defeat the purpose of the application, please contact your case manager.**

If you have any questions or need help, contact your case manager.

References:

[Practice Directive 3 Section 42 Applications Under the Administrative Tribunals Act \(Inquiry Committee Disposition Reviews\)](#).