

April 18, 2017

The College of Veterinarians of Ontario
2106 Gordon Street
Guelph, Ontario
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VIA EMAIL

Attention: Jan Robinson, Registrar and CEO

Dear Ms. Robinson:

RE: Dr. James McCleary – Bucksburn Veterinary Hospital - Advertising

I am following up to your letter of January 4, 2017 declining my client's request for disclosure of information.

You directed my attention to a Court of Appeal for Ontario decision in D'Mello v. Law Society of Upper Canada and a B.C. Court of Appeal decision in Hung v. Gardiner. In addition, you referred me to s. 36 of the Veterinarians Act. You stated that s. 36 of the Act mandates confidentiality and thereby precludes the College from disclosing the identity of the veterinarian who mentioned our client's veterinary clinic.

My review of s. 36 of the Act does not provide any insight into what it is you rely on as a statutory confidentiality provision. Indeed, a review of s. 33 of the Public Inquiries Act, which is incorporated by reference into S. 36(2.1) of the Act does not provide any statutory provision for confidentiality.

Both the cases you cited: D'Mello and Hung, stand for the proposition that the defence of absolute privilege applies in an action for defamation surrounding the act of providing a report to a professional body. In the Hung case the issue was whether a person (the complainant) who provides information to a professional disciplinary body about the conduct of one of its members is liable in an action brought by that member. The B.C.C.A. held that the communication of that information is subject to absolute privilege, which provides a defence to all claims. D'Mello stands for the same

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proposition however the facts are somewhat different in that it was the professional disciplinary body and one of its investigators that were being sued in defamation.

In this case we are not dealing with a civil claim for defamation. Here we are dealing with a request for disclosure of information by a member who is the subject of an investigation by a professional disciplinary body.

The leading case on disclosure is a decision of the Ontario Superior Court of Justice, Divisional Court, cited as *Law Society of Upper Canada v. Savone*, 2016 ONSC 3378. It is a case involving the extent of pre-hearing disclosure required in a conduct proceeding.

The Law Society Act does have a statutory confidentiality provision at s. 49.12. The provision does have exceptions however, including s.49.12(2)(a) "disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure; (b) disclosure required in connection with a proceeding under this Act;..." among other exceptions. The Divisional Court, in affirming the decision of the Law Society Tribunal Appeal Panel stated that a conduct proceeding falls within the s. 49.12(2)(b) exception, being a proceeding.

The Veterinarians Act does not contain any provision under S. 36 that is similar to S. 49.12 of the Law Society Act, or its listed exceptions.

In the Savone decision, the Divisional Court, M. Dambrot J. writing for the panel, stated at para. 40, that s. 49.12 of the Law Society Act does not "create privilege or confidentiality in the content of a lawyer's file. It simply prohibits benchers, officers, employees, agents or representatives of the Society from disclosing any information that comes to their knowledge as a result of an audit, investigation, review, search, seizure or proceeding, subject to statutory exceptions." Other provisions of the Law Society Act, in particular "s. 49.8(2) provides that privileged or confidential information, or documents provided to the Law Society pursuant to an investigative request, are admissible in proceedings under the Act, whether or not they are privileged or confidential." at para.41. The learned panel goes on to confirm that the requirement and extent of disclosure by the Law Society is set out in the Supreme Court of Canada decision in *R. v. Stinchcombe*, 1991 CanLII 45 – see in particular paras. 50 and 55 of Savone.

Lastly, you suggest in your letter that because the investigation of my client is not based on a complaint and that there is no complainant, that no duty of disclosure of the name of the veterinarian who provided the College with the information, is required. It



is our view that regardless of how an investigation is initiated: by media report, at the instigation of the registrar, a complaint by a member of the public, as the result of an investigation into another college member, the fact of the matter is that there is an investigation. Once an investigation into the conduct of a member of the college is authorized, certain procedural rights arise including the right of disclosure.

As noted by Laskin J.A. in *Howe v. Institute of Chartered Accountants of Ontario*, 1994 CanLII 3360 (ON CA) at para. 33:

In general, a professional discipline committee, like other administrative tribunals, is the master of its own procedure and, subject to statutory requirements, need not adhere strictly to all the evidentiary and disclosure rules that apply in court proceedings. But a discipline committee cannot adopt or apply procedures which are contrary to its duty to act in accordance with the requirements of natural justice or to (what in this case amounts to the same thing) its duty to act fairly.

Even though you refer to the process you employed with Dr. McCleary, as an "educational process", he was clearly the subject of an investigation. You state that College staff were directed to "contact each of the other clinics in order to follow up on potential violations of the advertising rules." You confirm that fact in your letter when you state that the, "...College remains committed to acting fairly and impartially in all investigative matters that are brought to its attention."

We renew our request for disclosure of the name of the veterinarian whose investigation by the College resulted in the investigation of our client.

Yours very truly,

therossfirm
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Per:



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