

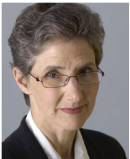
REGULATORY COLLEGES TACKLE TRANSPARENCY — CLIENT ALERT

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Information Sharing in Professional Regulation: What Does the Public Need to Know?

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Background

Since the publication of a series of investigative reports relating to regulatory colleges in a Toronto newspaper, there has been a lively debate over the level of transparency with which regulatory colleges operate.

Regulatory colleges have responded by tackling the issues raised directly. Notably, in 2012, a group of six health regulatory colleges¹ formed the Advisory Group for Regulatory Excellence (AGRE). AGRE has established eight transparency principles to serve as a framework for decision-making. Following a public consultation process, AGRE developed a two-phased approach to implementing transparency:

1. As part of the first phase, AGRE set out general recommendations to enhance the accessibility of existing public information. It also proposed that health regulatory colleges make public the names of non-members who are practising illegally and additional information with respect to disciplinary proceedings, relevant criminal findings of guilt, and bail conditions.
2. As part of the second phase, AGRE proposed that health regulatory colleges make public the names of former members, health facility privileges, relevant criminal charges, known licenses in other jurisdictions, and known discipline findings in other jurisdictions. It also proposed that health regulatory colleges make public certain screening outcomes from the Inquiries, Complaints and Reports Committee (ICRC), such as agreements and undertakings, specified continuing education or remediation programs (SCERP), and cautions.

1. The following six health colleges participated in AGRE: Royal College of Dental Surgeons of Ontario, College of Nurses of Ontario, College of Optometrists of Ontario, Ontario College of Pharmacy, College of Physicians and Surgeons of Ontario, and College of Physiotherapists of Ontario.

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The Eight AGRE Transparency Principles

1. 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 improving patient choice and increased accountability for regulators.
3. Any information provided should enhance the public's ability to make decisions or 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 and 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.

The Request from the Minister of Health and Long-Term Care (Minister)

Until recently, this transparency debate has centred on the extent of information that health regulatory colleges make available to the public about their members. This debate has demonstrated the challenges in balancing the policy goal of transparency, on the one hand, and that of fairness to members, on the other.

On October 4, 2014, Minister Eric Hoskins wrote to health regulatory colleges, asking that they address the issue of transparency on a broader scale. Specifically, he called on health regulatory colleges to enhance the public's understanding of their role and decision-making. He commended the work of the AGRE and encouraged health regulatory colleges to build on that foundation. In addition, he requested that health regulatory colleges consider and develop new measures to increase transparency and report back publicly by December 1, 2014 on the specific steps that would be taken.

Responses of the Health Regulatory Colleges to the Minister

The health regulatory colleges have responded individually to the request of Minister Eric Hoskins and have posted their responses online. Many of them have re-affirmed their commitment to build upon AGRE's work and to continue to implement transparency by a two-

phased approach. They have also identified a number of measures that have been or will be implemented. These measures include:

- online posting of council meeting dates, agendas and minutes;
- online posting of annual reports;
- online posting of inspection results;
- online posting of discipline hearing dates and locations;
- re-design of the online public register and college websites to increase accessibility of information, including improvement of search capabilities;
- development and improvement of public consultation processes;
- online description of the role of the college and its committees;
- increased communication with stakeholders, including the public;
- proactively addressing public interest concerns on college websites and social media outlets (e.g. how to apply for registration, how to launch a complaint, etc.);
- public "question period" incorporated into council meetings;
- undertaking of a governance review;
- membership engagement;
- plain language writing; and
- accessibility and French language interpretation services.

Future Considerations

The Minister's request to health regulatory colleges was an important reminder that transparency is a broader objective, which requires not only disclosure but also education. Health regulatory colleges have responded by agreeing to enhance the accessibility of information to the public.

As health regulatory colleges move forward in 2015 to implement transparency initiatives, they will need to continue to implement this holistic transparency framework, and to consider the difficult issues associated with disclosure of member information.

Health regulatory colleges will need to address the issue of disclosure of members' criminal records or bail conditions. In considering this issue, health regulatory colleges should think about how to define these terms to ensure that the additional information is relevant to an individual's membership status.

Additionally, health regulatory colleges should consider the issue of making public ICRC screening outcomes. They will need to consider which ICRC screening outcomes will be included on the public register. Would all outcomes be listed, or only those that are serious? If the latter, then how will colleges define what is serious? Further, some of these screening outcomes may relate to a member's health status. In addition to any restrictions under their governing legislation, health regulatory colleges may have a duty under the *Human Rights Code* not to make this information available to the public, if they cannot establish that doing so is necessary to the fulfillment of their public protection mandate.

Finally, health regulatory colleges should consider the effect of public disclosure of ICRC screening outcomes on their own decision-making. Traditionally, screening outcomes have been viewed as educational. In upholding ICRC decisions related to cautions, reviewing courts have pointed to the fact that cautions are "remedial in nature" and therefore distinct from sanctions and that they are not recorded in the public register or publicised.² If cautions and other screening outcomes are made publicly available, will they be subject to increased judicial scrutiny? Health regulatory colleges may need to consider increasing procedural protections afforded to members at the screening stages to avoid judicial criticism.

Health regulatory colleges are taking important steps to ensure that they are being transparent and accountable to the public. However, in so doing, they should consider how to balance these principles with fairness to their members.

2. *Ren v. College of Massage Therapists of Ontario*, 2014 ONSC 2758 at paras. 13-15 (Div. Ct.); *Fielden v. Health Professions Appeal and Review Board*, 2013 ONSC 4261 at para. 10 (Div. Ct.); *Banner v. College of Physicians and Surgeons of Ontario*, 2012 ONSC 5547 at para. 10 (Div. Ct.); *Botros v. Beadle* (2007), 228 O.A.C. 75 at para. 29 (Div. Ct.); *Silverthorne vs. Ontario College of Social Workers and Social Service Workers* (2006), 206 O.A.C. 375 at para. 16 (Div. Ct.).

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