



## Interim Practice Directive 17:

### Sensitive Records

#### 1. Purpose

This practice directive sets the process for identifying and managing potential sensitive records, and for requesting and deciding orders under sections 188 (orders about sensitive records) and 189 (relevance of sensitive records) of the Health Professions and Occupations Act (HPOA).

#### 2. Authority

The Health Professions Discipline Tribunal (Discipline Tribunal) operates under the HPOA. When this practice directive mentions a section number, it refers to a section in the HPOA, unless it says otherwise.

#### 3. Scope and application

This practice directive applies to:

- the parties (the regulatory college and the respondent);
- an affected person; and
- a record holder, if a discipline panel directs the record holder to provide a record to the Discipline Tribunal for private review (see section 5.6 of this practice directive).

This practice directive applies once a discipline panel is appointed to conduct the discipline hearing, including steps taken before the hearing begins. Only a discipline panel may make a production order under this practice directive.

The Discipline Tribunal may vary the process set out in this practice directive in a particular case.

#### 4. Definitions

In this practice directive:

- **affected person** means a person, other than the respondent, whose information is contained in a record.
- **potential sensitive record** means a record, or part of a record, that contains personal or confidential information about an affected person and attracts a reasonable expectation of privacy.



- **record holder** means the person or organization with possession or control of a record.
- **production order** means an order under section 188(4) that authorizes production of a sensitive record, in whole or in part, with or without conditions.

## **5. Process for addressing sensitive records, including production orders**

### **5.1 Identifying and handling potential sensitive records**

A party who identifies a potential sensitive record must:

- flag it as a potential sensitive record as soon as practicable;
- limit access to the record to the minimum required to prepare the application materials; and
- keep the record out of filed materials unless a discipline panel directs otherwise.

A party must not file, serve, or otherwise disclose a potential sensitive record, or its contents, except as authorized by a discipline panel order or direction.

### **5.2 Applying for a production order**

A party who seeks to have a sensitive record produced for the purposes of a discipline hearing (applying party) must apply for a production order before relying on the record in the discipline hearing.

The applying party must include:

- the exact order sought (full record, part of the record, or a summary/redacted version) including any conditions;
- a brief description of the record (what it is, who has it, and the date range or portion sought);
- the issue in the discipline hearing the record relates to, or how the record relates to a witness's competence;
- why the record, or the part sought, has a clear link to a specific issue in the discipline hearing or to witness competence (more than speculation);
- why production is required in the interests of fairness, addressing:
  - the affected person's privacy interest; and
  - the nature and purpose for which production is sought;



- any proposal to limit production (for example, redactions, time limits, summaries, or agreed facts);
- the other party's position, if known; and
- why the application relies on more than the assertions listed in section 189 (assertions that do not establish likely relevance on their own).

If the applying party does not have the record, the application must also include:

- a practical plan for secure delivery to the Discipline Tribunal for private review (for example, sealed delivery by the record holder, indexing, and any date limits sought) (see section 5.6 of this practice directive for more details).

A party must not attach the record unless a discipline panel directs otherwise.

A party must file and serve materials under this practice directive in accordance with Practice Directive 1: Filing and Service.

If a party files material under this practice directive that contains protected information or other confidential material, the party must file a confidential version and a proposed public version in accordance with Practice Directive 4: Privacy, Confidentiality and Disclosure of Records.

### **5.3 Service, notice, and affected-person submissions**

The applying party must serve the application on the other party.

If the applying party knows the identity and contact information of an affected person, the applying party must take reasonable steps to notify the affected person that:

- the applying party seeks a production order; and
- the affected person may request to make submissions to the discipline panel.

If an affected person requests to make submissions, the discipline panel must consider those submissions.

An affected person's submissions may address:

- the affected person's privacy interest in the record;
- the impact of production;
- the nature and purpose for which production is sought; and
- conditions that would mitigate privacy impacts if the panel authorizes production.



#### **5.4 Responses and reply**

A responding party may file a response within the time directed by the discipline panel or the Discipline Tribunal.

The applying party may file a reply only to address new matters raised in the response.

#### **5.5 Determination**

A discipline panel conducting a discipline hearing must consider whether records that may be produced for the purposes of the hearing are sensitive records and, if so, whether a production order under section 188(4) is required to authorize production (in whole or in part, with or without conditions).

A sensitive record must not be produced unless, in the opinion of the discipline panel, the record, or the part to be produced:

- is likely relevant to an issue in the discipline hearing or to the competence of a witness to testify; and
- must be produced in the interests of fairness, considering:
  - the affected person's privacy interest in the record; and
  - the nature and purpose for which a party seeks to have the record produced.

#### **5.6 Private review**

A discipline panel may receive a record in private for the limited purpose of deciding an application under this practice directive.

A discipline panel may give directions about secure delivery, indexing, and handling for private review, including directions to a record holder.

If a discipline panel directs a party or a record holder to provide a record for private review, the person providing the record must deliver it in the manner and format directed.

The person providing the record must not serve the record on any party unless the discipline panel directs otherwise.

#### **5.7 Orders and conditions**

A discipline panel may make a production order that authorizes production of a sensitive record, in whole or in part. A production order may include one or more conditions, including:



- limiting production only:
  - to the respondent's lawyer; or
  - if the respondent has no lawyer, to a person appointed by the discipline panel for that purpose;
- who may access the record and on what terms;
- copying, storage, and onward disclosure;
- redactions, summaries, or use of edited versions;
- how the record may be used in submissions and at the hearing;
- sealing and confidentiality markings; and
- return, retention, and destruction of copies.

### **5.8 Non-compliance**

If a party does not comply with this practice directive or a production order, a discipline panel may:

- refuse to receive the record;
- impose or vary conditions; or
- give any other directions necessary to protect fairness and privacy interests.

## **6. Managing produced sensitive records**

### **6.1 Discipline Tribunal handling**

The Discipline Tribunal must handle produced sensitive records in accordance with any production order, including any conditions about sealing and access.

A production order does not determine whether a record is available to the public. The Discipline Tribunal manages public access and public versions in accordance with Practice Directive 4: Privacy, Confidentiality and Access to Records.

### **6.2 Use in submissions and exhibits**

A party who relies on a produced sensitive record must:

- comply with the production order conditions; and
- use an edited or redacted version if the production order requires or permits it.



### **6.3 Return, retention, and destruction**

A party must comply with any production order condition about:

- retention periods;
- return of records to a record holder or another person; and
- destruction of copies and confirmation of destruction.

