

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Immediate Response Units

Should regulators have an “immediate response unit” of staff ready to intervene in a crisis situation? Many professional regulators view themselves as responding to concerns after-the-fact with a fair process that precludes immediate intervention. However, one wonders if an immediate regulatory response is sometimes appropriate.

This month national news stories again repeated the story of 25 boxes of personal health information found in a dumpster at the Golden Mile Shopping Centre just outside of Regina. It was learned that a total of 150 boxes of health records, involving personal health information on about 2,682 patients had been sitting in an unlocked basement storage area of the mall. Some of the boxes had been there for years. Workers, labourers, staff of Golden Mile Shopping Centre and a large crowd of more than 3,600 persons, who toured the basement where the patient files were stored in an unlocked space, had access to them.

The most striking feature of the story was not the scale of the privacy breach. Rather what is most memorable is the image of Information and Privacy Commissioner

Gary Dickson and two assistants “dumpster diving” to secure the information on the same day that his office was notified of the situation. The immediate response demonstrated a visible commitment to his office’s protection of privacy mandate.

One wonders whether there are parallel situations for professional regulators. One incident, that still makes this writer cringe, occurred a quarter of a century ago. A staff person of a professional regulator received a report that a member was intoxicated and impaired at his office with clients scheduled. The regulatory staff person jumped into her car, drove to the office, persuaded the member to go to hospital and drove him there herself. I was glad to have been told of the story after-the-fact as I certainly would have counselled against the intervention. Today she would probably be disciplined by her employer for such a breach of boundaries and legal procedures. But the operation was a complete success and served everyone’s interests.

Clearly there are limits that need to be respected. Abuse of regulatory powers is of concern (e.g., using formal investigative powers to enter the office when there really is a collateral purpose to the visit). Of course, any hint of threat (e.g., do this or else) can

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affect subsequent regulatory proceedings. Failing to follow fair legal processes can jeopardize later proceedings. In some circumstances there may be an obligation to advise the member that he or she is not required to comply with the “suggestions” of the regulator. There may be legal liability if the recommendations or actions of the regulator cause damage to the member’s practice or to third parties.

Nevertheless, there may still be situations where immediate action is justified in the public interest. The Golden Mile situation is an excellent example, where confidential information or dangerous materials are abandoned in a public place. My anecdotal illustration, of a member who is obviously ill and apparently at risk of harming themselves or others is another good example (so long as it is done in the right way).

Another illustration may be where otherwise confidential information is released to the responsible government authorities (e.g., the police, public health) or even the public in general where there is a substantial risk of significant public harm. While there is a risk of “defaming” the member, breaching a duty of confidentiality or being accused of tainting subsequent regulatory proceedings, in an obvious case the courts will often provide immunity for the action. (In addition, failing to make the disclosure carries its own, probably higher, risks of liability.)

The key is to plan for the eventuality in advance. This planning would likely involve the following:

1. Assigning senior staff the responsibility of making the decision.
2. Training those involved as to what they can and cannot do and how to act in a manner that fosters success and mitigates risk. For example, the immediate response unit would be taught to explain to the member that they are there to help the member make a wise choice and that they are not using their compulsory legal authority.
3. Consideration should be given to openly (not surreptitiously) recording the proceedings. This step brings home the seriousness of the situation to the member while protecting the unit from inaccurate recollections. Obviously in some circumstances recording the events may be counter-productive (e.g., it may escalate the situation).
4. Having a written policy supporting the activity, even if the policy cannot address the specifics of every eventuality.

Who says regulating a profession is boring?

For more information about the Golden Mile privacy case, see: www.oipc.sk.ca/Reports/IRH-2011-001.pdf.