

Decision issued: October 28, 2021

**IN THE MATTER OF  
THE PROFESSIONAL GOVERNANCE ACT, S.B.C. 2018, c. 47**

**AND:**

**IN THE MATTER OF  
MOHAMED MUSSA SWALEHE, P. ENG**

**File No. T20-012**

Date of Hearing: September 28, 2021

Panel: John Wilson, Chair,  
Roz Nielsen, P. Eng.  
Jaswinder Bansal, P. Eng.

Counsel for the Association: Sarah Hanson

Counsel for the Respondent: The Respondent was not represented and did not attend

**DECISION OF THE DISCIPLINE COMMITTEE**

1. This panel of the Discipline Committee (the “Panel”) of the Association of Professional Engineers and Geoscientists of the Province of British Columbia doing business as Engineers and Geoscientists BC (the “Association”) was convened to conduct a hearing concerning Mohamed Mussa Swalehe, P. Eng. (the “Respondent”) pursuant to s. 75 of the *Professional Governance Act*, S.B.C. 2018, c. 47 (the “PGA”).

2. A citation issued on May 18, 2021 (the “Citation”) sets out the allegations against the Respondent. In short, it is alleged that, contrary to s. 30(4) of the *Engineers and Geoscientists Act* (the “EGA”), the Respondent failed to provide the Investigation Subcommittee with information and records requested in the course of an investigation.

3. The charging paragraph of the Citation is set out below:

1. You failed to provide the Subcommittee of the Investigation Committee with a response to the professional conduct complaint made against you regarding the design of a sprinkler system for a medical office unit in a commercial building located at [REDACTED] Surrey, British Columbia (the “Project”), a copy of your complete file for the Project, a detailed explanation of your qualifications relating to sprinkler design, and any experience you have which you believe qualifies you to design sprinkler systems, as requested of you by the Investigation Subcommittee on multiple occasions including:

- a. By letter from Engineers and Geoscientists BC Investigator Jeremy Miller, dated April 7, 2020, sent to your preferred e-mail address ( [REDACTED] );
  - b. By e-mail from Mr. Miller dated April 30, 2020 sent to you at [REDACTED];
  - c. By e-mail from Mr. Miller dated May 15, 2020 sent to you at [REDACTED];
  - d. By e-mail from Mr. Miller dated January 29, 2021 sent to your alternative e-mail addresses ( [REDACTED] and [REDACTED] );
  - e. By e-mail from Mr. Miller dated February 8, 2021 sent you at [REDACTED]; and
  - f. By e-mail from Mr. Miller dated February 19, 2021 sent you at [REDACTED].
2. The conduct as set out above at paragraphs 1(a) – (f) is contrary to section 30(4)(a) of the *EGA* which required that a member being investigated must provide the committee or subcommittee conducting the investigation with any information or records in the possession or control of the member that the committee or subcommittee may require.
  3. In the alternative, the conduct set out above at paragraphs 1(a) – (f) is contrary to section 14(b)(1) of the Engineers and Geoscientist BC Bylaws, created pursuant to the *EGA*, which required that members and licensees shall establish and maintain documented quality management processes for their practices, including, at minimum:
    - (1) Retention of complete project documentation which may include, but is not limited to, correspondence, investigations, surveys, reports, data, background information, assessments, design, specifications, field reviews, testing information, quality assurance documentation, and other engineering and geoscience documents for a minimum period of 10 years;
  4. The conduct set out above at paragraphs 1(a) – (f) is also contrary to section 30(4)(b) of the *EGA*, which required that a member being investigated must answer, within a reasonable time and in the manner specified by the committee or subcommittee, any inquiries of the committee or subcommittee.
4. The *EGA* was repealed in February 2021, and replaced with the *PGA*. Section 36(1)(c) of the *Interpretation Act* [RSBC 1996] c. 238 provides that, where legislation is repealed and replaced, “the procedure established by the new enactment must be followed as far as it can be adapted ... in a proceeding relating to matters that happened

before the repeal". Accordingly, while the Citation relates to events that occurred while the *EGA* was in force, the process concerning the conduct of the Citation is governed by the *PGA*.

5. At the beginning of the hearing, counsel for the Association advised that the Association abandoned paragraph 1(e) and (f) of the Citation, as these communications took place after the repeal of the *EGA*.

**Proceeding in the Absence of the Respondent**

6. The hearing was conducted by video-conference on Zoom on September 28, 2021. The Respondent did not appear at the outset of the hearing.

7. It was therefore necessary to address the matter of service of the Citation upon the Respondent before proceeding any further with the hearing.

8. To address this issue, the Association relied on the evidence of Jeremy Miller, an investigator with the Association; the affidavit of Jano Frandsen, process server, sworn September 20, 2021; and the affidavit of Belinda Lai, legal assistant with counsel for the the Association, affirmed August 12, 2021.

9. Mr. Miller gave the following evidence:

- a) The Association employs a database that contains registrants' personal and contact information. Registrants may access the database to update their contact information.
- b) The change log on the database shows that the Respondent's information was updated on June 18, 2021, changing the street address to [REDACTED]. As well, two email address changes were made that day. An email address of [REDACTED] was altered to [REDACTED]. An email address of [REDACTED] was also altered to [REDACTED]. The username used to make these entries was that of the Respondent.
- c) The Association attempted to have the Respondent personally served with the Citation and notice of the date of the hearing, but without success.

10. The affidavit of Jano Frandsen sworn September 20, 2021 states that Jano Frandsen attempted to personally serve the Respondent with the Citation and a letter indicating the hearing date at the [REDACTED] address on June 2, 2021, but was told by an adult female at that address that the Respondent did not live there. In addition, Jano Frandsen states they attempted to serve the Respondent at three other addresses, without success. Lastly, Jano Frandsen states they telephoned the Respondent on June 22 and September 20, 2021, but on the first date there was no answer and no ability to leave a message. On the second date, a message was left by Jano Frandsen by voicemail.

11. The affidavit of Belinda Lai affirmed August 12, 2021 states that she is the legal administrative assistant to counsel for the Association. She deposes that, on July 20, 2021, she served the Respondent by email at [REDACTED] and [REDACTED] with the Citation and a letter advising that the hearing was set to proceed by Zoom on September 28, 2021. Ms. Lai also deposes that she received no indication that the emails had not been delivered, such as a bounce-back message.

12. Counsel advised the Panel that, on September 13, 2021, she sent the Zoom link for the September 28<sup>th</sup> hearing to these two email addresses.

13. Counsel submitted that the actions above meet the requirements of the *PGA* for delivering notice to a registrant as set out in s. 115 of the *PGA*, and that the hearing should proceed as permitted by s. 78(2).

14. Section 115 of the *PGA* sets out the methods by which notice may be provided to a person. Of note in the present case, the *PGA* permits “electronic transmission”:

115 (1) A notice or any document under this Act may be delivered to a person by personal service of a copy of the notice or document or by sending the copy by any of the following means:

(a) ordinary mail;

(b) electronic transmission, including telephone transmission of a facsimile;

(c) if specified in the superintendent's rules, another method that allows proof of receipt.

[...]

(3) If the copy is sent by electronic transmission, it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(emphasis added)

15. The Association attempted personal service on the Respondent at four locations on five occasions, all of which were unsuccessful.

16. In addition, as set out in the affidavit of Belinda Lai, on July 20, 2021 the Association sent the Citation and notice of the hearing date by email to the Respondent to two email addresses. Those two email addresses were those provided by the Respondent to the Association on June 18, 2021.

17. The Panel was therefore satisfied that notice was delivered in accordance with s. 115(1)(b) of the *PGA*, and that notice was effective as of July 21, 2021.

18. Section 78 of the *PGA* provides that a hearing may proceed in the absence of the respondent if they have been given proper notice. Section 78 provides:

78 (1) This section applies if an applicant or respondent fails to attend or remain in attendance at a discipline hearing under section 75.

(2) If satisfied that the applicant or respondent has been notified of a hearing referred to in subsection (1), the discipline committee of a regulatory body or the panel, as applicable, may proceed with the hearing in the absence of the applicant or respondent and make any order that the discipline committee or panel could have made in the presence of the applicant or respondent.

(emphasis added)

19. As the Panel was satisfied that the Citation and notice of the hearing date had been properly provided to the Respondent, it directed that the hearing proceed.

20. The Respondent did not attend the hearing at any time.

### **The Evidence and Findings of Fact**

21. The Association relied principally on the testimony of Jeremy Miller. His evidence is summarized below.

22. Mr. Miller is a lawyer and an investigator on staff with the Association. He explained that the usual process for addressing complaints is that a complaint is referred to a volunteer technical reviewer who makes a preliminary recommendation about whether the complaint should go to investigation. The Investigation Committee then considers the matter and decides whether the matter will go to investigation and, if so, may instruct staff directly concerning the investigation or appoint a subcommittee to do so. A staff investigator is assigned to the file to carry out the investigation and report to the Investigation Committee, which decides what action to take.

23. The Respondent became a registrant of the Association in 1987. At the time of the complaint which gave rise to the Citation, the Respondent was a registrant in good standing. The Respondent remains a registrant at the time of the hearing.

24. A complaint was made to the Association by email on August 22, 2019, from [REDACTED] [REDACTED] [REDACTED] wrote that the City had received a sprinkler design drawing sealed by the Respondent for a medical office unit on August 14, 2019, which proposed residential sprinklers in a commercial unit. The complaint was that “this fundamental error shows that Mr. Swalehe lacks the competence to undertake the design of fire suppression systems and, consequently, fails to hold paramount the health and safety of the public”.

25. The Association sent a letter to the Respondent to notify him of the complaint and seek his response on September 4, 2019, and sent a follow-up email to the Respondent on

September 16, 2019. The letter was also sent by registered mail to the Respondent at the [REDACTED] address, but was returned.

26. On November 7, 2019, the Association emailed the complainant and asked whether the City of Surrey had had any further communications with the Respondent. [REDACTED] replied on November 12, 2019 they had not, but provided documents that contained several additional addresses associated with the Respondent.

27. The complaint was referred to the Investigation Committee. On December 12, 2019, it resolved to investigate and appoint an Investigation Subcommittee pursuant to s. 30(6) of the *EGA*.

28. After the Investigation Committee resolved to conduct an investigation, Mr. Miller took on general conduct of the file.

29. On April 7, 2020, on behalf of the Investigation Subcommittee, Mr. Miller wrote a letter to the Respondent, referencing s. 30(4) of the *EGA*, and seeking a response to the complaint about his sprinkler design, a copy of his complete file(s) for that project and a detailed explanation of his qualifications and experience in sprinkler system design. The letter set a response date of April 28, 2020. This letter was emailed to the Respondent at [REDACTED], which, according to the Association's database, had been the Respondent's email address since December 15, 2015.

30. No response was received.

31. Mr. Miller sent an email to the same address on April 30, 2020 to follow up, this time requesting a response by May 14, 2020.

32. No response was received.

33. On May 15, 2020, Mr. Miller sent a third email to the same address. He referred to his prior correspondence and reminded the Respondent of his obligations under s. 30 of the *EGA*. Mr. Miller set a new deadline, May 29, 2020, and advised that no further extensions would be granted.

34. No response was received by the stipulated deadline.

35. Mr. Miller then attempted to locate the Respondent.

36. On June 10, 2020, Mr. Miller contacted the Association's accounting department, who advised that the Respondent's annual dues had been paid by credit card online on 12/11/2019, and his membership card had been sent to the [REDACTED] address on January 30, 2020.

37. On June 23, 2020, Mr. Miller instructed a process server to serve the Respondent with a letter of the same date, attaching Mr. Miller's correspondence of April 7 and 30 and May 15, 2020. Mr. Miller gave the process server three possible addresses for the

Respondent: the [REDACTED] address and the two addresses indicated on the documents provided by the complainant in November 2019.

38. The attempted service was unsuccessful.
39. On August 28, 2020, Mr. Miller requested a skip trace investigation.
40. Mr. Miller received a report in the form of an affidavit of Alely Tinampay sworn October 21, 2020 setting out the attempts made to locate the Respondent, and concluding that they are unable to do so.
41. On September 30, 2020, Mr. Miller also wrote to the complainant, who replied there had been no further contact with the Respondent.
42. The matter was then referred to the Investigation Committee. On October 29, 2020, the Committee directed that the Citation be issued.
43. On January 29, 2021, Mr. Miller asked the Association's accounting department whether and by what method the Respondent had renewed his registration. The Respondent had paid his annual dues with a money order on December 17, 2020. A money order does not indicate the address of the individual who funds it.
44. Mr. Miller continued to attempt to contact the Respondent. On January 29, 2021, Mr. Miller sent an email to the Respondent to two other addresses, again attaching the prior correspondence. One address had previously been employed by the Respondent according to the Association database; the second was taken from an email exchange between the Respondent and the City of Surrey.
45. Mr. Miller sent follow-up emails to the Respondent on February 8 and 19, 2021.
46. The Association contacted Vital Statistics to see if there was a death certificate for the Respondent, and received a letter dated April 6, 2021 stating there was no such record.
47. The Respondent remains a registrant but has not at any time responded to the Association's inquiries.

### ***Analysis and Decision***

48. The Association bears the burden of proving the allegations in the Citation on the balance of probabilities (*F.H. v. McDougall*, [2008] 3 S.C.R. 41, para. 40).
49. The Panel accepts the evidence of Mr. Miller as set out above.
50. The original letter to the Respondent sent on the Investigation Subcommittee's behalf requesting information and documents items was sent April 7, 2020. The communications on the later dates all reiterated the request. No response was received at all.

51. The Panel is satisfied that the communications reached the Respondent, as they were sent to email addresses that the Respondent had provided to the Association. There was no provision in the *EGA* requiring delivery by the Association to a street address, and, indeed, the letter sent to the address in the Association's records was returned. The Association made extensive efforts to locate or contact the Respondent, all of which were unsuccessful.

52. The Panel therefore finds, as alleged in paragraph 1(a) to (d) in the Citation, that, despite requests made by or on behalf of the Investigation Subcommittee on April 7 and 30, May 15, 2020 and January 29, 2021, the Respondent failed to provide the Investigation Committee with a response to a complaint regarding his design of a sprinkler system; his complete file for that project, and an explanation of his qualifications and experience regarding sprinkler system design.

53. We turn next to the appropriate finding concerning the Respondent's professional conduct.

54. The Association submits that the Panel may make a finding that the Respondent has contravened the *EGA*, even though the *EGA* has been repealed, based on s. 35(1)(d) of the *Interpretation Act*. That section provides:

35 (1) If all or part of an enactment is repealed, the repeal does not

...

(d) subject to section 36(1)(d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it...

55. The Association referred to *Thow v. British Columbia (Securities Commission)*, [2009] B.C.J. No. 211 (BCCA), where the Court of Appeal ruled that this provision of the *Interpretation Act* ensured that a securities agent licensed under the *Securities Act* remained subject to the legislation in place at the time of his contravention, and not subsequent amendments.

56. The Panel is satisfied that it must conduct the hearing in accordance with the procedures in place under the *PGA*, but must make findings in relation to the *EGA*.

57. It is alleged that the Respondent's conduct in failing to respond to the Association is contrary to s. 30(4)(a) and (b) of the *EGA*. Section 30(4) provides:

30...(4) A member, licensee or certificate holder being investigated under subsection (3) must

(a) provide the committee or subcommittee conducting the investigation with any information or records in the possession or control of the member, licensee or certificate holder that the committee or subcommittee may require,



(b) answer, within a reasonable time and in the manner specified by the committee or subcommittee, any inquiries of the committee or subcommittee, and

(c) appear, on request, before the committee or subcommittee.

(emphasis added)

58. Counsel for the Association advised that the Panel should disregard paragraph 3 of the Citation as it is unnecessary.

59. Counsel referred to several cases which deal with an engineer's obligations under s. 30(4) of the *EGA*, described below.

- a) In *Re Hans Heringa*, December 18, 2019, a panel of the Association's Discipline Committee found that Mr. Heringa had failed to provide the Investigation Committee with a copy of a requested file by stipulated dates and thereby breached s. 30(4) of the *EGA*. The panel rejected Mr. Heringa's argument that the absence of the words "within a reasonable time and in the manner specified" in s. 30(4)(a) allowed him to send the records any "reasonable" time that suited him.
- b) In *Puar v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, 2009 BCCA 487, the Court of Appeal upheld the decision of an Association discipline committee panel. Mr. Puar argued that the Association had no authority to compel him to answer questions, but only to produce "information or records". At that time, the *EGA* did not contain s. 30(4)(b). This argument was rejected and the Court held that the Association had the authority to make inquiries of Mr. Puar.

60. The Panel notes the following comments made by the panel in *Re Heringa*:

40...compliance with section 30(4) of the Act is important not just to ensure that this particular investigation proceeded with dispatch, but also because the Association is a self-governing profession and its primary mandate is to protect the public. The Association relies upon the cooperation and compliance of its members during the investigation process in order to effectively regulation the profession. Counsel for the Association advised that the Panel should disregard paragraph 3 of the Citation as it is unnecessary.

61. The Respondent failed to provide his file or respond in any way to the requests made on behalf of the Investigation Subcommittee, thereby contravening both s. 30(4)(a) and (b) of the *EGA*.

**Determination**

62. The Panel therefore finds, on the balance of probabilities, that the Respondent has contravened s. 30(4)(a) and (b) of the *EGA* as set out in paragraphs 1(a) to (d), 2 and 4 of the Citation. That is, the Respondent failed to provide the Investigation Committee with:

- a) a response to a complaint regarding his design of a sprinkler system;
- b) his complete file for that project; and
- c) an explanation of his qualifications and experience regarding sprinkler system design

as requested on April 7 and 30, May 15, 2020 and January 29, 2021.

63. As the Panel has made an adverse determination, the hearing will be reconvened, by video-conference, to address penalty and costs. The Panel directs that the Association send this decision to the Respondent. The Panel also directs that the Association send notice of the penalty phase of the hearing and its written submissions and any other materials upon which it intends to rely to the Respondent two weeks prior to the date scheduled for the continuation of the hearing.

Dated: October 27, 2021

<original signed by>

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John Wilson, Chair

<original signed by>

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Jaswinder Bansal, P. Eng.

<original signed by>

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Roz Nielsen, P. Eng.