

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 89-1996
March 4, 1996**

INQUIRY RE: Information sought by an applicant from the Motor Vehicle Branch of the Ministry of Transportation and Highways relating to the medical basis for the refusal of a driving licence

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on January 24, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review in which an applicant sought access to a letter written about him by a physician, as well as notes produced by the Motor Vehicle Branch's (MVB) medical consultant which pertain to the same matter. The Motor Vehicle Branch refused access to the information on the basis of section 19(1)(b) of the Act. It is now also relying on section 19(1)(a).

2. Documentation of the inquiry process

On August 24, 1995 the applicant requested from the public body "all information from all files and departments. Must receive all original records and documents. Also, all records from all other ministries of government." In response, the Motor Vehicle Branch provided a copy of his file. However, it refused access to two records.

On October 24, 1995 the applicant contacted the Office of the Information and Privacy Commissioner and requested a review of the public body's decision not to disclose the records. The ninety-day period expired January 24, 1996.

3. Issue under review at the inquiry

The basic issue is whether the medical information upon which the Motor Vehicle Branch made its decision about the applicant, including the identity of the physician who provided the information, should be disclosed to the applicant.

The relevant portions of the Act are as follows:

- 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
- (a) threaten anyone else's safety or mental or physical health, or
 - (b) interfere with public safety.

Under section 57(1) of the Act, the Motor Vehicle Branch bears the burden of proving that the applicant has no right of access to the records or part thereof.

4. The records in dispute

The records in dispute consist of a letter from a physician and a page of notes written by the Motor Vehicle Branch's medical consultant.

5. The applicant's case

The applicant claims that the letter in dispute is from a physician he has never met: "I have contacted every physician I have seen and all of them have confirmed that they have never written a letter to the motor vehicle branch." He further argues that the medical information that Motor Vehicle Branch has relied on is incorrect.

If the applicant is to see another medical specialist in order to obtain clearance to get a driver's license, he wants assurances that the physician he approaches is not the same as one he had previously seen. He also wishes to take this written medical assessment to the new doctor.

I have discussed below the applicant's specific arguments on aspects of section 19.

6. The Motor Vehicle Branch's case

The Motor Vehicle Branch emphasizes that when its staff contacted the physician about the letter in dispute:

The physician stated that he did not want his letter disclosed. The physician forwarded the letter as he believed he was required to do so. The letter was written on the understanding that it would be confidential. The physician was concerned about his own safety as well as the safety of others. (Submission of the Motor Vehicle Branch, paragraph 4.3)

The Ministry's essential argument follows:

The Public Body strongly believes that releasing the Record will reasonably be expected to threaten the safety of the physician or a staff member of the physician's. The physician has provided evidence of the potential for threats and is the one best able to assess the Applicant's condition. Release will also likely interfere with the safety of the public. (Submission of the Motor Vehicle Branch, paragraph 5.2)

The specific arguments of Motor Vehicle Branch concerning the application of section 19 appear below. It generally asks me to uphold its decision to refuse access under this section.

7. Discussion

The Ministry added a section 19(1)(a) argument prior to the commencement of this inquiry and informed the applicant and my Office of its intentions. (Submission of the Motor Vehicle Branch, paragraph 1.04) My general practice has been to accept such "late" arguments, provided there is no prejudice to the other party. Despite the objection of the applicant, he has had an opportunity to respond to the public body's submission on section 19(1)(a). Thus I conclude that he has not been prejudiced by the additional argument. (Reply Submission of the Applicant, p. 1)

One of the applicant's reasons for requesting access to the physician's letter is so that he can bring a complaint before the College of Physicians and Surgeons concerning the allegedly false letter and also sue the physician for libel. I presume that there are procedures of the College that would facilitate a complaint of this sort. A court might well order disclosure of the letter by the Motor Vehicle Branch, if the applicant launched a libel action. My Office is not the most appropriate source for this information for such purposes.

The applicant claims that he has never been told by a physician that he should not drive because of a medical condition, and that the Motor Vehicle Branch has never allowed him to take a driving test. These are matters outside of my jurisdiction under the Act. The applicant can address these matters directly with the Motor Vehicle Branch. (Reply Submission of the Applicant, p. 2)

Readers of orders like this one may sometimes wish for a fuller explanation of what is transpiring. Considerations of the privacy of individuals and the confidentiality of information often make it impossible for me to share details with the public that would clarify various situations. *In camera* submissions are a particular problem in this regard.

Section 19: Disclosure harmful to individual or public safety

The applicant states that disclosure of the physician's letter to him could not interfere with the public safety:

In all the years I have been driving there is no record or history where I have ever caused an accident and I have never been a danger to anyone on the road. The Motor Vehicle Branch has a record of this. If one were to do a proper inquiry with the police, they would conclude there is no threat to public safety. It is a fact

that I have been living in the Vancouver area for over 17 years and that I have never ever harmed anybody. (See also Reply Submission of the Applicant, pp. 3, 4)

The Motor Vehicle Branch's partial response to this assertion is that the applicant has never had a valid driving license in this province, so there is no record of accidents to examine. (Reply Submission of the Motor Vehicle Branch, p. 1)

The Motor Vehicle Branch emphasizes that its staff made the initial decision on the risk of harm occurring from the licensing of the applicant. The process included a number of conversations with the physician concerned:

The physician has been active in the assessment and treatment of the Applicant. The physician is aware of how this Applicant's illness may cause a negative reaction to certain events. In particular the physician is aware of how the Applicant may react when the Applicant sees the Record. (Submission of the Motor Vehicle Branch, paragraphs 5.4 to 5.6)

The Motor Vehicle Branch emphasizes that a decision to remove driving privileges is "only made after extensive investigation and consultation." (Reply Submission of the Motor Vehicle Branch, p. 1)

Section 19(1)(a): The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health

The Motor Vehicle Branch's basic position on this section is that access to a record may be refused "if there is a reasonable expectation of threats to anyone's safety, mental or physician health." It reached this decision in the current inquiry on the basis of the letter from the physician and conversations with him: "The Public Body submits that the potential for harm has been demonstrated and the safety of the physician should be of primary concern." (Submission of the Motor Vehicle Branch, paragraphs 5.8 to 5.12)

As I have indicated in previous Orders, I prefer to act cautiously with respect to issues of harm raised under section 19. In this particular case, I have carefully considered both the physician's concerns, as outlined by the Motor Vehicle Branch, and the diagnosis and descriptions of behaviour patterns provided in the records in dispute. Based on an analysis of this information, I support the Ministry's decision to withhold the information under section 19(1)(a).

Section 19(1)(b): The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to (b) interfere with public safety.

The Motor Vehicle Branch emphasizes that it is the professional judgment of the physician that the applicant, as a driver, would be a threat to public safety. Such physicians will refuse to write such letters voluntarily if they are disclosed under circumstances comparable to

the present case. (Submission of the Motor Vehicle Branch, paragraphs 5.13 to 5.16) In fact, section 221 of the *Motor Vehicle Act* makes such reporting mandatory for “every legally qualified and registered psychologist, optometrist and medical practitioner.” The criterion is that “in the opinion” of such a professional a patient “has a medical condition that makes it dangerous to the patient or to the public for the patient to drive a motor vehicle.” (Submission of the Motor Vehicle Branch, paragraph 5.19) The Motor Vehicle Branch argues that this mandatory provision “implies confidentiality.” However, the current letter in dispute was not written under the direct obligations of section 221. (Submission of the Motor Vehicle Branch, paragraphs 5.20 and 5.21)

I conclude that section 19(1)(b) is not relevant to the circumstances of the present inquiry, because the disclosure of the contents of the records in dispute would not in itself interfere with the public safety, unless it somehow resulted in the applicant being licensed to drive. The physician is protected in this case by section 19(1)(a).

Order No. 28-1994: The standard of proof

Although the Motor Vehicle Branch states that it cannot obtain a letter from the physician in this case for purposes of this inquiry, it urges me to follow the principles set out in a letter received from a physician in Order No. 28-1994, November 8, 1994, which I decline to do.

I am more comfortable with the Motor Vehicle Branch’s reliance on the standard of proof that I advanced in the above Order with respect to the prospect for possible violence and hostile behaviour following disclosures under the Act. (See Order No. 28-1994, p. 8) I continue to wish to act prudently under circumstances where there is a realistic prospect of hostile behaviour and actions directed against informants to public bodies and/or risk to public safety if such an individual is licensed to drive. The Motor Vehicle Branch argues that it has established the prospects of such risk “on the balance of probabilities” and on the basis of “detailed and convincing evidence.” (Submission of the Motor Vehicle Branch, paragraphs 6.05 and 6.07) I have also reviewed an *in camera* submission and affidavit from the Motor Vehicle Branch that deal with these matters of risk. I find that the Motor Vehicle Branch has met the standard of proof for harm under section 19(1)(a).

The need for a summary

The applicant asked me to consider disclosure of at least the text of the physician’s letter without his name. He also asked for similar treatment of the medical consultant’s report. (Reply Submission of the Applicant, p. 1) The reality in the present inquiry is that the text of the physician’s letter cannot be disclosed without significantly increasing the risk that the applicant will recognize the person who has written it. The applicant further states that the Motor Vehicle Branch has offered him a summary of the records in dispute; that might be a useful partial solution to the applicant’s concern. (Reply Submission of the Applicant, p. 2) The Motor Vehicle Branch confirms that the applicant turned down the summary that was offered to him. (Reply Submission of the Motor Vehicle Branch, p. 1)

The applicant claims that the information that the physician may have reported about him is six or seven years old and that his track record since then belies the physician's apparent claims. He believes that he should now be allowed to take the road test that he began to prepare for in 1989. (Reply Submission of the Applicant, pp. 3, 4) Again, I cannot confirm or deny these facts without revealing information that should not be disclosed to the applicant in the circumstances of this case. I take comfort in the fact that the applicant can submit new, relevant medical information if he wishes to continue to contest the Motor Vehicle Branch's unwillingness to allow him to drive.

Motor Vehicle Branch's contact with the reporting physician

I am concerned about the lack of information submitted to this inquiry concerning the physician's level of contact with the applicant and also with the lack of a direct submission from the physician concerning his views. The affidavit from the Manager for Motor Vehicle Branch is essentially reporting hearsay evidence. In future cases of this type, I would prefer an affidavit containing direct evidence from the health care professional who made the report, unless it is physically impossible to secure one.

A repeat recommendation

In Order No. 28-1994 I invited the Motor Vehicle Branch to develop a set of guidelines to set forth fair information practices with respect to protecting, or revealing, the identity of any individual who writes to the Superintendent of Motor Vehicles about medically-unfit drivers. This was to be done to ensure compliance with Part 3 of the Act. (Order No. 28-1994, p. 11) I strongly urge the Motor Vehicle Branch to proceed to develop policy guidelines for this purpose and offer the assistance of my Office in such a process.

8. Order

I find that the Motor Vehicle Branch is authorized to refuse access to the records in dispute under section 19(1)(a) of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Motor Vehicle Branch to refuse access to the information in dispute to the applicant.

Under section 58(4), I make it a term of this Order that the Motor Vehicle Branch supply the applicant with a summary of the records in dispute without identifying the name or other identifying particulars of the physician who wrote the original letter. The Motor Vehicle Branch must provide my Office with a copy of the summary in order to ensure that the applicant receives all of the information he is entitled to under the Act.

David H. Flaherty
Commissioner

March 4, 1996