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**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 28-1994**
**November 8, 1994**

**INQUIRY RE: A Request for Access to the Identity of the Author of a Letter to the Motor Vehicle Branch of the Ministry of Transportation and Highways**

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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, British Columbia, on July 8, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for release of information in a record in the custody or under the control of the Motor Vehicle Branch (the Branch) of the Ministry of Transportation and Highways (the Ministry). The request was made by an individual (the applicant) affected by a decision of the Superintendent of Motor Vehicles.

On January 10, 1994 the applicant requested from the Ministry copies of all records in his file. The Ministry complied on January 28, 1994 but withheld certain records on the basis that disclosure could affect the interests of certain third parties. The Ministry advised the applicant that these third parties were being given an opportunity to make representations under the Act prior to any final decision about disclosure. Ultimately, all records were released, with the exception of certain parts of a letter (the letter) from a physician who had written to the Medical Consultant at the Branch expressing concerns about the applicant's ability to drive safely.

The applicant now wants to know the identity of the physician who wrote the letter, since he believes that it was central to the decision by the Superintendent of Motor Vehicles to prohibit the applicant from driving a motor vehicle in British Columbia. The record is a one-page, typewritten document. Because of concern for his or her own physical safety, the physician has objected to the release of information in the letter that would permit the applicant to confirm the physician's identity. On that basis, the Ministry released most of the text of the letter (which revealed the physician's rationale

for being concerned about the applicant's ability to drive safely), but refused to release the information that would permit the applicant to identify the physician.

The applicant, by way of letter sent by fax to the Office of the Information and Privacy Commissioner (the Office) on April 11, 1994, requested a review of the Ministry's decision to withhold the information sought. The review subsequently proceeded to inquiry under section 56 of the Act.

The initial preparation time for this inquiry was short--about two days. This was a result of the near-expiry of the ninety-day period mandated by the Act. The Portfolio Officer who handled the matter believed that it had been settled with the applicant. This explains why earlier efforts to schedule the inquiry were not made.

I was concerned about the notice period, because the physician involved was not available to provide direct evidence. I was also concerned that the information provided in the written submissions left unanswered a number of questions which I viewed as critical to a fair determination of the issues raised in this review. I concluded that I required more information in order to adequately discharge my duties as Commissioner. Therefore, I advised the parties of my concerns in a letter dated August 15, 1994 and requested further evidence and submissions by September 15, 1994, with further time for preparation of replies. The parties accepted this process.

I asked a series of specific questions about how information was customarily received about drivers who were thought to be unfit to drive for various reasons. The parties were given approximately one month to prepare further submissions. These were circulated to all other parties for supplementary comments and argument. I also received further affidavit material, a portion of which was submitted on an *in camera* basis. Each party had ample opportunity to provide both supplementary submissions and replies.

## 2. Documentation received in the inquiry process

Under sections 56(3) and 56(4) of the Act, the Office initially invited written representations from the applicant and the Ministry. As the third party was then unavailable, a letter sent to the Ministry prior to this review process, separate from the letter at issue in this inquiry, was entered in evidence as an exhibit to an affidavit submitted by the Manager of Information and Privacy for the Motor Vehicle Branch. Both the applicant and the Ministry submitted written representations. The exhibit was submitted on an *in camera* basis, since its disclosure would reveal the identity of the physician. I accepted the *in camera* submission in accordance with my treatment of similar materials in Order No. 12-1994, June 12, 1994. I also accepted, on an *in camera* basis, an "argument" advanced by the Ministry in its rebuttal of the applicant's original submission.

The Office of the Information and Privacy Commissioner provided the parties to this inquiry with a one-page statement of facts (the fact report), which was accepted by the parties as accurate for the purpose of conducting the inquiry.

**3. The applicant's case**

The applicant argues that he has been given no information to determine on what basis there has been a determination of reasonable expectation of threat to anyone's safety or mental or physical health as a consequence of the requested disclosure. The applicant submitted that "there must be a demonstrable and concrete set of circumstances established which shows that safety would be jeopardized by reason of disclosure of information before such disclosure should be denied." In addition, the applicant has no history of violence against his health practitioners.

In the applicant's view, "when professionals undertake to inquire and report into a matter, undoubtedly for remuneration, and when the results of that report are likely to cause the subject of the report to be unhappy, the professional in question must be prepared to deal with a certain amount of anger on the part of the subject of the report."

In his rebuttal argument, the applicant reiterated his view that to be deprived of the privilege of driving "on the basis of anonymous complaints which are not disclosed to the applicant would be depriving the applicant of due process in this quasi judicial decision-making process.... [I]t is equally in the public interest that those deprived of the right to drive are able to make informed submissions to the Motor Vehicle Branch based on a full knowledge of all of the facts with which the Ministry is armed in coming to such a decision."

In his supplementary argument, the applicant argued against the Ministry's application of the section 15(1)(d) exception in the Act on the ground "that law enforcement ought not to be expanded to include all activities by public bodies making any decisions in respect of a citizen."

**4. The Ministry's case**

The Ministry's first argument is that it did not receive reasonable notice of the hearing, especially since it had the burden of proof in this matter. This meant that the Ministry was originally unable to obtain affidavit evidence from the medical practitioner, who was unavailable at the time his or her evidence was sought. The *in camera* exhibit from the medical practitioner (submitted with the Ministry's original argument July 7, 1994) is one that he or she had written earlier in 1994. In its supplementary submission on September 15, 1994, the Ministry submitted an affidavit sworn by the physician on September 9, 1994. I accepted this evidence *in camera*.

In its initial submission of July 7, 1994, the Ministry denied access to the information in dispute under section 19(1)(a) of the Act. This section allows a public

body to refuse to disclose information to an applicant, if the disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health.

According to the Ministry, the applicant in this case suffered injuries in a serious motor vehicle accident; since then he has had other accidents. The author of the letter in dispute is a qualified medical practitioner who is familiar with the applicant's medical history, so the Ministry considered his or her views very seriously.

The Ministry states that the medical practitioner "expressed grave concerns" about his or her physical safety if the complete letter were to be released to the applicant. According to the Ministry, the medical practitioner "based this concern on the medical condition of the applicant."

The Ministry also drew attention to the sensitive and emotional issues surrounding the common belief that persons have an unconditional right to drive a motor vehicle: "When this right is taken away, especially in the case of someone who is described as having 'psychological problems', the Ministry believes that there is a real risk of harm to the medical practitioner in question."

The Ministry added that the medical practitioner has informed the Motor Vehicle Branch that he or she will not supply similar information in future, if identifying information in this letter is released: "Clearly, it is in the public interest to ensure that doctors, family members and others continue to inform Motor Vehicle Branch when someone they know is unfit to drive. Many of these informants will not continue to supply this information if they know that their names will be released to their patient or family members."

A copy of the earlier 1994 letter to the Ministry from the medical practitioner was attached as an exhibit to an affidavit from a Ministry employee. This letter was written in response to the Ministry's notification that it intended to disclose information to the applicant. Certain passages from this letter give a sense of the medical practitioner's concerns about disclosure: "I would say that I have quite strong objections to confidential information that is given to you by me with reference to patients who we feel are serious hazards on the road being disclosed to them. In particular, in this case ... if [the applicant] comes into possession and knows the name of the person who has recommended that he should not drive, I have little doubt that he may well resort to possible violent methods against me personally as he will hold me responsible for the fact that he is not allowed to drive."

In the same letter the medical practitioner also stated that "it is quite wrong, when we give you evidence of incompetence to try and help keep death off the roads of British Columbia, that the law regards this as unprivileged information, and that the patient may receive copies of confidential medical reports given to you." After stating that he or she would not furnish such information in future if the present information was disclosed, the

medical practitioner added that: "I am not going to put myself in the position where I am going to be hassled by patients who have been given evidence about their files."

In its September 15, 1994 submission, the Ministry raised section 15(1)(d) of the Act as grounds for refusing access to the disputed information:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
> ....
> (d) reveal the identity of a confidential source of law enforcement information,
> ....

The Ministry argued that the physician who supplied the letter was a "confidential source." Part of this argument is that it has "been the policy of the Motor Vehicle Branch for over 20 years never to disclose the identities of those persons who inform that Branch that people are unfit to drive."

The reason for this policy is that the Branch cannot possibly investigate all drivers in the province and is therefore dependent on individuals who volunteer information about people who should not be driving. It is in the public interest that people continue to inform the Motor Vehicle Branch if patients, friends, or relations are unfit to drive. Confidentiality has been the norm in the past specifically to protect the individuals who do inform the Branch about unfit drivers and to ensure that others who might report in future are satisfied that their identities will be protected.

The Ministry further argued in its supplementary argument that the information supplied by the medical practitioner was "law enforcement information" as that term is defined in Schedule 1 of the Act:

> "law enforcement" means
>
> (a) policing, including criminal intelligence operations,
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
> (c) proceedings that lead or could lead to a penalty or sanction being imposed;

The Ministry submitted that "the definition of 'law enforcement' includes activities by public bodies to enforce compliance or remedy non-compliance with standards, duties and responsibilities under statutes and regulations."

In this particular case, the letter in dispute led to an "investigation" into the applicant's driving record, which then led to the revocation of the driver's license. I was informed in an affidavit from the Ministry's Information and Privacy Coordinator that

this driving record was “one of the factors that was considered....” (Affidavit of the Manager of Information and Privacy, paragraph 3)

## 5. The practices of the Superintendent of Motor Vehicles

The Director, Operations Support for the Motor Vehicle Branch, provided answers to a list of questions I posed to the Ministry, which are relevant to this inquiry. The Superintendent has a variety of ways of obtaining information about potentially dangerous drivers. Two relevant ones are as follows:

> A written statement from family members, colleagues at work or anyone with a concern about safety can trigger an investigation.
> Physicians are compelled under the *Motor Vehicle Act* to report a patient with a medical condition that makes it dangerous to drive when the physician knows the patient is continuing to drive after being warned of the danger. In other instances, physicians are encouraged to report voluntarily. (Affidavit, Exhibit A)

The Branch begins an investigative action in the form of a road test or a medical examination only when concerns are expressed in writing. Its medical consultants communicate verbally with doctors in order to obtain clarification of written reports. Investigative procedures involving the police, such as reports to the Branch arising from a traffic incident or accident, are completely separate proceedings. There are no formal rules or statutory requirements that apply to these reports beyond the requirement, in section 25 of the *Motor Vehicle Act*, for the Superintendent to examine the fitness of drivers. (Affidavit of the Manager of Information and Privacy, Exhibit A)

With respect to assurances of confidentiality, the Motor Vehicle Branch “has never revealed the identity of the source of an unsolicited report. The intention of the policy was to protect the individuals concerned and also to encourage reporting.” With respect to physicians, the British Columbia Medical Association’s publication, Guide for Physicians in Determining Fitness to Drive a Motor Vehicle (Vancouver, 1989), which is simply printed and distributed by the Motor Vehicle Branch, states in paragraph 1.5 that the name of the reporting physician is never released. The same policy was in place in the 1973 edition.

The Branch stated that it remains common practice to withhold information identifying the writer of such a report. However, since proclamation of the Act, the Branch “engages in third party consultation before determining whether or not to disclose records which would identify the writer of an unsolicited report. It is important to note that action is not taken on the basis of these reports. They merely act as a trigger for investigative action, e.g. a driver may be requested to take a road test or to undergo a medical examination from the doctor of their choice.” (Affidavit of the Manager of Information and Privacy, Exhibit A)

Finally, the Branch informed me that "[t]he third party's letter was not the basis for the cancellation of [the applicant's] driving licence. The letter was just one piece of information considered. The Superintendent also considered the recommendations of our medical consultant; past medical examinations; [the applicant's] past driving and accident record, which included probationary periods, a court prohibition and five accidents; material provided by ICBC and Crown Counsel and the concerns of family members."

## 6. The medical practitioner's affidavit

In the *in camera* affidavit submitted with the Ministry's supplementary argument on September 15, 1994, the medical practitioner stated that when he or she treated the applicant, he or she had access to other medical information about him. He or she also had direct experience of the applicant's anger against various people involved in the applicant's life. He or she now fears that if his or her name is disclosed, the applicant may harass him or her and even pose a threat to his or her physical safety. It was also the physician's "clear understanding" when he or she wrote the letter in dispute that his or her name and identifying information would be kept confidential. He or she concludes that: "If I had known that [the applicant] might be able to find out who had written about him, I would never have written the letter." I note that the physician provided his or her reporting letter to the Ministry on a voluntary, as opposed to a mandatory, reporting basis.

## 7. Discussion

### *The lack of notice to the public body*

In some requests for review, parties may be given relatively short notice of an inquiry date, due to the ninety-day time period prescribed in section 56(6) of the Act. However, as soon as a complete request for review has been received by my Office, all parties are notified of the last day of the ninety-day period. During the mediation stage of a review, the Portfolio Officer is working with the parties, and the issues are developing. Thus, even a relatively short notice period during the final stages of the settlement process should not, in my view, put the public body, or any other party, at a substantive disadvantage.

In any event, there has been no prejudice to the Ministry in this case. As described above, all parties accepted my proposed process and were given ample opportunity to present supplementary evidence and submissions.

### *The right to raise further exceptions under the Act*

In its supplementary argument of September 15, 1994, the Ministry argued for its right to raise further exceptions under the Act on the basis of my letter to the parties of August 15, 1994. Under the specific procedures followed in this inquiry, I agree with the Ministry, which stated in its supplementary argument that "[f]urther exceptions should be accepted from any party, so long as notice is given to the other party and that party is

given a reasonable opportunity to respond." I have done so in the present case. Counsel for the applicant did not oppose the Ministry raising further exceptions in his supplementary argument.

***The section 19 argument***

This inquiry considered the application of section 19(1)(a) of the *Freedom of Information and Protection of Privacy Act*. Section 19(1) reads:

> 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.

In the present case, I am persuaded, on the basis of the medical practitioner's affidavit and a copy of a medical report by a specialist that was available to him or her when he or she chose to write to the Superintendent of the Motor Vehicle Branch, that the medical practitioner had legitimate reasons to write the letter, based on experience with and direct knowledge of the applicant, just as he or she now has legitimate reasons to fear a vengeful response if his or her identity is revealed. I make this particular determination on the basis of section 19(1)(a).

However, counsel for the applicant argued that there is no evidence that his client is "a violent individual." Further:

> As we are unable to see the physician's Affidavit, we are unable to determine his basis for believing that [the applicant] is violent. Unless the Doctor is able to satisfy the Information and Privacy Commissioner that in fact he is aware of our client's actual violent behaviour, as opposed to a potential, or hearsay evidence in regard to such a matter, in our submission, the Branch's request for withholding of this information ought to be denied.

In matters of this sort, it is my responsibility to review the written evidence, as I have done in the present case, and come to a determination whether a third party opposing disclosure has legitimate grounds for fearing a hostile response from an applicant. Because I intend to act prudently with respect to possible violence and hostile behaviour following disclosures of information under the Act, (see my Order No. 18-1994, July 21, 1994), the standard of proof that I require is a balance of probabilities. Further, I do not require that the proof of violence be actual as opposed to potential.

***The section 15(1)(d) argument***

I have concerns about the applicability of section 15(1)(d) in this case. It is not clear, on the evidence before me, whether the doctor meets the standard of a "confidential source of law enforcement information" under this section. I also am not comfortable with the view that the information about the applicant supplied by the medical practitioner is "law enforcement information" within the meaning of section 15 (1)(d) and Schedule 1 of the Act. The information provided by the physician did not detail unique knowledge of past or present violations of law, nor did it set out specifics of how a law would be violated in future. Rather, the letter provided a number of concerns regarding an individual's ability, or lack thereof, to meet a standard prescribed by law.

My views in the previous paragraph are partially supported by the government's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (1993) (the Manual), Section C.4.6, p. 17, which was prepared by the Information and Privacy Branch in the Ministry of Government Services. The Manual states:

> A 'confidential source' is someone who has provided information to a public body with the assurance that his or her identity will remain secret. There must be evidence of the circumstances in which the information was provided to establish whether the source is confidential.

In the present case, there is no explicit evidence before me that the information in dispute was provided and received in confidence, although the Motor Vehicle Branch states that it treats the sources of all voluntary reports as confidential. As I have said in previous orders, I prefer as much explicitness as possible to support such claims. In particular, there should be a mutual expectation between the parties at the time of the information collection that the information is being given and received in confidence. Marking a record as submitted "in confidence" would be a positive step. In this case, there was an unstated expectation of confidentiality.

Essentially, I do not consider the circumstances of this case appropriate for an authoritative interpretation of the breadth of section 15(1)(d).

***The basis for the Motor Vehicle Branch's decision***

The Ministry states that the letter in dispute was only one piece of information considered with respect to the denial of a driving license. The applicant disputes this point, asserting that the letter to him from the Deputy Superintendent of Motor Vehicles on November 18, 1993 stated that the reason for the denial was that "you suffer from a medical condition."

> The decision was not based on a past driving and accident record, a court prohibition or 5 other accidents, material provided by I.C.B.C., Crown Counsel and concerned family members, .... It was based upon

> medical information alone. In regard to the medical information, the medical consultant to the Motor Vehicle Branch acted upon the results of the examination completed by the physician in question. We have received no other disclosure of past medical examinations. Although the Ministry can say that the letter was not the basis for the decision, in so far as the decision was to deny a license based on medical conditions..., the letter from the physician in question appears to have been the key piece of evidence. (Applicant's supplementary argument, September 20, 1994, p. 6)

This difference of opinion and emphasis between the parties presents a minor quandary, from which I emerge to accept the Ministry's interpretation of why it acted in the present case. Although I have not seen the November 18, 1993 letter, I have reviewed the results of a medical examination that the medical practitioner relied upon in part in writing the letter in dispute. I am not attempting to pass judgment on the merits of the Ministry's medical assessment. Rather, I am looking at what information was considered and how it was considered. Moreover, in its final reply on September 23, 1994, the Ministry specifically stated that the November 18, 1993 letter was a result of an October 22, 1993 Driver Medical Exam Report prepared by a physician in Nelson, which has already been disclosed to the applicant.

***The reporting of medically-unfit drivers***

It should be noted that the B.C. Medical Association's (BCMA) policy concerns the reporting of medically unfit drivers. The statutory obligation to report to the Superintendent arises under section 221 of the *Motor Vehicle Act* with respect to a "patient" who a) "in the opinion of the medical practitioner, has a medical condition that makes it dangerous to the patient or to the public for the patient to drive a motor vehicle and b) continues to drive a motor vehicle after being warned of the danger by the psychologist, optometrist or medical practitioner." It is in these circumstances that "[t]he name of the reporting physician is never released." (Guide for Physicians in Determining Fitness to Drive a Motor Vehicle, p. 2, paragraph 1.5) Moreover, the Superintendent normally insists that a Driver's Medical Examination Report be completed by a person's family physician and a driving test be conducted by a Motor Vehicle Branch Driver Examiner. (*Ibid*)

In this case, affidavit evidence submitted *in camera* by the physician indicates that the applicant was made aware, by way of a warning from another physician, of the risk he presents to himself and others as a motor vehicle driver.

The applicant insisted in his supplementary argument that under the *Motor Vehicle Act* "[t]here is no assurance, statutory or otherwise, given to a physician that information will be kept confidential and in the circumstances, although the Doctor may have believed that that was the case, he was in fact in error in law and disclosure ought to be made." It seems to me that these assertions fly in the face of the BCMA's policy

quoted in the two paragraphs above. In preparation of the guidelines on disclosure that I ask for below, this matter of disclosure of the names of letter writers should be fully clarified to cover both normal and exceptional circumstances and professional and non-professional writers, especially since I believe such information should normally be disclosed to an applicant, absent the specific circumstances of the present case.

I accept the Ministry's submission that doctors who write letters under section 221 have expectations of confidentiality, that the fact that the obligation to report is sometimes mandatory offers more reason for keeping the information confidential, and that the Ministry, because of lack of resources, depends on doctors to comply voluntarily with this requirement. This determination is, I believe, consistent with the intent of section 19(1)(b) of the Act, in referring to public safety.

A June 30, 1994 decision of the Ontario Court of Appeal in Toms v. Foster, [(1994), 14 O.J. No. 1413, Action No. C9869] lends considerable relevance to this discussion of the reporting burden on doctors. Two physicians were held negligent for failing to report their patient to the Ontario Ministry of Transportation and Communications as unfit to drive under a provision comparable to the section 221 requirement in British Columbia. Although evidence at trial suggested that doctors rarely report their patients under this section, a jury held the physicians individually responsible for a portion of the civil liability of almost one million dollars for the accident in which their patient caused serious bodily harm to two victims.

## 8. Recommendation

I recommend that the Motor Vehicle Branch develop a set of guidelines, in accordance with Part Three of the *Freedom of Information and Protection of Privacy Act*, that will set forth fair information practices with respect to protecting, or revealing, the identity of any individual (including health-care professionals) who writes to the Superintendent of Motor Vehicles about medically-unfit drivers. This recommendation reflects my concerns that the current Guide for Physicians in Determining Fitness to Drive a Motor Vehicle (1989) may not conform with the current standards as expressed in the Act. Thus I urge the Motor Vehicle Branch to review this document carefully and develop a new set of guidelines.

## 9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Transportation and Highways not to disclose the information in dispute to the applicant.

David H. Flaherty
Commissioner

November 8, 1994