OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 323-1999

INQUIRY REGARDING VANCOUVER GENERAL HOSPITAL AND HEALTH SCIENCES CENTRE'S REFUSAL TO DISCLOSE ABORTION SERVICES INFORMATION

David Loukidelis, Information & Privacy Commissioner
August 26, 1999

Order URL: **http://www.oipcbc.org/orders/Order323.html**
Office URL: http://www.oipcbc.org

Summary: The applicant submitted an access request to the Vancouver Hospital and Health Sciences Centre for records showing the number of abortions performed at the hospital for the calendar years 1997 and 1998. Access was denied under s. 19(1) of the *Freedom of Information and Protection of Privacy Act*. No evidence to support reasonable expectation of threat under s. 19(1). Refusal not authorized.

Key Words: threaten - mental or physical health - safety - reasonable expectation

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8, 19(1) and 25(1)(b)

Authorities Considered: B.C. - Order No. 7-1994, Order No. 18-1994; **Ontario** - Order P-1499; **Alberta** - Order 96-004

1.0 INTRODUCTION

This case revolves around the provision of abortion services. Vancouver General Hospital and Health Sciences Centre ("VGH") provides health care, including abortion services, to the public. The applicant is opposed to abortion and has taken public stands on that issue. (It appears, for example, that the applicant has published commentary about abortion issues on the Internet on a number of occasions.)

Earlier this year, by a letter dated March 10, the applicant asked VGH "the amount of abortions performed" at VGH "during the calendar years 1997 and 1998." This request - which VGH treated as a request for access to records under the Act - was rejected by VGH. On March 29, VGH's FOI Coordinator wrote to the applicant and said "the information you requested is sensitive in nature, and is not able to be disclosed." The

letter went on to refer to s. 19 of the *Freedom of Information and Protection of Privacy Act* ("Act"), and said it "advises that" VGH may "refuse to disclose information if the disclosure could reasonably be expected to threaten anyone else's safety or mental or physical health, or interfere with public safety". This rejection resulted in an April 8 request by the applicant for review, under s. 52(1) of the Act, of VGH's decision not to disclose the requested data. Because the matter was not settled in mediation, it went to inquiry under s. 56(1) of the Act.

There are two pages of records involved in this case. Each record shows the total number of abortions performed at VGH in each of 1997 and 1998. The totals are also broken down by month, with the total number of abortions performed in each month being shown in the record.

For the reasons given below, it is my view - based on the evidence in this case - that s. 19(1) does not apply to the information in dispute and that VGH was not authorized to refuse to disclose that information to the applicant.

2.0 ISSUE

The only issue in this inquiry is whether VGH was authorized, under s. 19(1) of the Act, to refuse to disclose the information requested by the applicant. Section 57 of the Act requires VGH to discharge the burden of establishing that it was authorized to refuse to release the information in question. The applicant argued that release of the information was in the public interest within the meaning s. 25. This issue need not be addressed.

3.0 SUBMISSIONS BY THE PARTIES

3.1 VGH's Submissions

At page 2 of its reply submission, VGH summarized its position in the following passage:

> The refusal to disclose was made on the basis of attempts to provide safety and access to patients and providers, and not a comment on the applicant's opinion or his right to hold that opinion. If a request were under made [*sic*] concerning another service and similar safety concerns were as clear and present as in this situation, the right and responsibility VHHSC [*sic*] to apply the law would be exercised consistently, in the interests of our patients and providers.

In its initial submissions, VGH set out its reasoning in the following passage (at p. 2):

> VHHSC is concerned that the release of the information could reasonably be expected to precipitate the following events, the inextricable sequence of which we believe should be prevented by upholding the use of section 19 in this case. That sequence of events is summarized as follows, and is detailed below:
>
> 1. Publication in widely available media, specifically to an audience firmly opposed to abortion;

2. Which will reasonably be considered a call to action to protest against patients and providers at VGH;
3. Which will reasonably be acted upon by protestors, the motivations and boundaries of which are unknown and unpredictable;
4. Which will cause patients and providers to fear for public safety in general, and their safety in particular, thereby undermining the Access To Abortion Services Act and meeting the test of the Freedom of Information and Protection of Privacy Act to deny access;
5. There is a public interest in protection of patients and providers from interference and intimidation;
6. The applicant is a documented supporter of the tactics of an American group apparently advocating violence and harassment.

VGH's submissions elaborated on, and provided documents said to support, the argument just quoted. This "inextricable sequence" argument by VGH - which gave a much more elaborate basis for VGH's decision than did its rejection letter to the applicant - is dealt with below.

3.2 Applicant's Submissions

In the applicant's initial submissions, it was said that VGH had previously released to *BC Report* data on the number of abortions performed at VGH in 1996 and during part of 1997. The applicant's submissions set out these figures. To the applicant, this meant the s. 19(1) argument advanced by VGH was "moot" (p. 1). The applicant also contended that VGH "readily admits providing therapeutic abortions" (p. 2). The applicant also asserted, at p. 2, that other similar public bodies have provided such data. Last, the applicant argued that s. 25(1)(b) of the Act applies to disclosure of the requested information.

In reply to VGH's submissions, the applicant in essence contended that VGH could not support its allegations as to the motives and actions of the applicant as they relate to the s. 19(1) argument. The applicant also made a number of allegations against VGH regarding live births following abortions. This latter aspect of the applicant's arguments is not germane to the issue at hand.

4.0 DISCUSSION

This is not the first time requests for access to records involving abortion services have been the subject of an inquiry under the Act. Order No. 7-1994 and Order No. 18-1994 focussed on s. 19(1) of the Act and the safety of individuals involved in providing abortion services to the public. In those cases, however, my predecessor was faced with requests for the names of individuals. Based on the evidence in those cases, it was decided that s. 19(1) authorized refusal of access to the requested personal information. On the evidence before me, I have concluded the present case differs from the orders just mentioned. Before explaining this, some analysis of the relevant elements of s. 19(1) is in order.

4.1 Analysis of Section 19(1)

Section 19(1) requires the head of a public body to be satisfied there is a reasonable expectation that disclosure of the requested information will threaten anyone else's mental or physical health or their safety or interfere with public safety. A reasonable expectation of a threat to health or safety requires something more than mere speculation. By importing into s. 19(1) the concept of 'reasonable expectation', the Legislature signalled its intention that speculation will not suffice to justify withholding of information. When faced with the reasonable expectation criterion - wherever it appears in the Act - the head of a public body must decide if a reasonable person who is unconnected with the matter would conclude that release of the information is more likely than not to result in the harm described in the relevant section of the Act. There must be a rational connection between the requested information and the harm contemplated by the Act, in this case as set out in s. 19(1).

An important aspect of s. 19(1) is the requirement that disclosure of the information could reasonably be expected to "threaten" anyone's health or safety or public safety. The reasonable expectation must be of a threat, or risk, to mental or physical health or to safety. As was said in Ontario Order P-1499 (December 8, 1997) - a decision to which I refer further below - the "harm must not be fanciful, imaginary or contrived but rather one which is based on reason" as shown in "sufficient evidence" submitted by the public body (p. 3). In Alberta it has been said the evidence must establish that the "threat and disclosure of the information are connected" (Order 96-004, p. 4). In Ontario, it is said that the connection must be "logical". See Ontario Order P-948 (June 30, 1995).

To state the obvious, the Act treats abortion-related cases no differently than other s. 19(1) cases (*e.g.*, a case where an abusive person is tracking a former spouse). There is no presumption in s. 19(1) that information related to abortion services automatically qualifies for protection under that section. The evidence of each case must be examined carefully in deciding whether a reasonable person would conclude that disclosure is more likely than not to threaten someone else's mental or physical health or safety or public safety. Without in any way commenting on VGH's decision here, there should be no pre-judgement of the issue because of the context.

This does not mean, however, that the head of a public body should ignore important factual background in cases such as this. It cannot seriously be disputed there is ongoing controversy and debate about abortion services in British Columbia. More to the point, it is common knowledge - of which I take official notice - that health care professionals who provide abortion services have been subjected to threats, intimidation and violence (including attempted murder). There is also evidence of this before me. Where an access request is made for general or personal information related to abortion services, a decision-maker can legitimately rely on this factual background as one factor in reaching his or her decision.

It should be emphasized, however, that this is only one of many factors that may be relevant in such cases. Among other things, the nature of the information being sought,

the circumstances affecting the public body or third party individuals, the identity of the requester and evidence as to possible uses of the information, are all factors that may be relevant to the decision in a given case.

As was acknowledged above, my predecessor dealt with s. 19(1) in the context of abortion services. At p. 4 of Order No. 18-1994, David Flaherty said he preferred to "act prudently in such matters". I agree that deliberation and care are desirable in making decisions where abortion services are involved and in other s. 19(1) cases. Section 19(1) deals with important interests, *i.e.*, the health and safety of third parties. I do not believe, however, that David Flaherty's recognition of the need to act "prudently" in such cases contemplated the application of a different standard of proof. Section 19(1) is to be applied using the standard of proof articulated above.

4.2 Discussion of this Case

The essence of VGH's argument in this case is quoted above. I have carefully considered VGH's submissions and supporting material, but for the following reasons do not agree that s. 19(1) applies in the circumstances of this case.

Nature of the Requested Information

Again, the information in issue here is not personal information about health care providers or information about security arrangements at VGH. There is no evidence before me to support the view that this information could be used to identify those associated with abortion services, or where they live, or to identify women who have had an abortion at VGH or who may seek one there.

Knowledge that Abortions are Performed at VGH

Consistent with the above comments about the importance of the circumstances of each case, it is relevant to my decision that it is already publicly known that VGH offers abortion services. The material submitted to me by both parties clearly establishes this. The evidence also indicates that an "access zone" has been established at VGH under the Abortion Services Access Zone Regulation, B.C. Reg. 337/95. That regulation was made under the *Access to Abortion Services Act*. It is already known to the applicant and, to my mind, the general community that VGH offers abortion services. (Public knowledge that abortion services are offered by VGH is established, at the very least, in the evidence before me consisting of the applicant's Internet writings, the nature of VGH's decision here on the access request and the evidence as to the existence of an access zone having been established at VGH under the *Access to Abortion Services Act*.)

VGH has submitted no evidence to suggest that release of its 1996 and 1997 data has resulted in any of the threats articulated in s. 19(1). (Nor is there any evidence to suggest that release by other hospitals of such information - as opposed to other factors - has resulted in any specific harm or threats to health or safety. Release of such information by other hospitals is alluded to in the material before me.) Nor did VGH file affidavit

evidence from any individuals as to harm they believed might arise if the requested information were released.

To support its case for harm under s. 19(1), VGH submitted a number of extracts from various Web sites and newspapers. Some of the Web site extracts were taken from a Web site to which the applicant has apparently contributed. VGH quoted passages from various pieces written by the applicant to support VGH's case for harm under s. 19(1).

VGH argues these various extracts establish, first, that the applicant is an activist and a "catalyst in the anti-abortion community" (p.2). VGH goes on to say, at p. 2, that the applicant's writing "can be interpreted to be a catalyst for action" of some kind not specified by VGH. This is "most clearly articulated", VGH says, in an October 1997 piece in which the applicant comments on the death of an individual VGH describes as an "anti-abortion advocate" (p. 2). VGH's submissions then set out the following partial quote from the applicant's piece:

> ... [the deceased was] not the type one would expect to go out and "make a difference". But he did, and he won. He beat the BC Government's bubble zone ... His faith and his stand for truth are the legacy he leaves us. *Now go out, all of you, and do likewise.* [Emphasis added by VGH]

VGH then submitted that this passage justifies the following conclusion:

> The applicant incites unlawful action to challenge the AASA, making it clear that unlawful acts - i.e. challenging a law by breaking it - are condoned and advocated.

The full passage from which the above extract was taken is as follows (any missing words were missing in the print submitted by VGH):

> Another pro-life hero died this past month. Alone. ... [He] was a quiet and unassuming sort of chap. Not the type you would expect to go out and 'make a difference.' But he did and he won. He beat the BC Government's bubble zone the work of a feminist judge who was not interested in logic and truth could overturn it. ... [He] now lies with his parents in a cemetary in England and his soul now rests in the Hands of God.
>
> His faith and his stand for truth are the legacy he leaves us.
>
> Now go out, all of you, and do likewise.

A passing comment is necessary about the conclusion drawn by VGH from the above passage. VGH says this passage incites unlawful action, *i.e.*, to challenge a law, the *Access to Abortion Services Act* ("AASA"), by "breaking it". I note that s. 14(2) of the AASA makes it an offence to contravene any of the AASA's prohibitions against certain activities within an access zone such as that established at VGH. The prohibited activities include sidewalk interference, protest, harassment, intimidation or attempted

intimidation of a doctor or other person involved in providing abortion services, and the recording of images of any person. Unlike VGH, I am not so sure the above passage, taken as a whole, can be characterized as incitement by the applicant to others to commit an offence under the AASA. In any case, anyone who violates the AASA faces fine or imprisonment; the AASA also offers a number of other mechanisms to deter or punish unlawful conduct.

Returning to VGH's submissions, the materials provided by VGH also contain media stories about threats by activists to videotape United States abortion clinics, evidence of a bomb scare at another British Columbia hospital where abortions are performed and Internet instructions from the United States on how to "legally disrupt Planned Parenthood's business in your town". VGH also included a January 15, 1999 story from the 'Hamilton Spectator' regarding "anti-abortion hate packages" sent to that newspaper, and a letter delivered to VGH in 1998, by unidentified persons.

Having reviewed all of VGH's material with care, I am unable to agree that it supports the "inextricable sequence" articulated by VGH, *i.e.*, by which release of the requested information as to numbers of abortions performed can logically be connected to a harm identified in s. 19(1). Again, s. 19(1) requires there to be a "reasonable expectation" that disclosure of the information in issue is likelier than not to lead to the identified harm. I cannot conclude there is such a reasonable expectation of harm, in the particular circumstances of this case, flowing from disclosure of the requested information. VGH's materials attest to the general context in which abortion services are provided, *i.e.*, a climate where violence, intimidation and threats do occur. But the materials do not, in my view, support the position advanced by VGH respecting release of this statistical information.

This is not to say the s. 19(1) test can never be met in cases involving such information. The situation might be different if, unlike the case here, it is not publicly known that a particular hospital or clinic provides abortion services. If public confirmation of that fact alone could, in the circumstances, be reasonably expected to threaten anyone else's health or safety, s. 19(1) could well apply. This result may be even more likely if the hospital or clinic is in a small community and has minimal security arrangements available to it. The evidence in such cases would, of course, be determinative.

In reaching my decision I have considered Ontario Order P-1499, above. That case involved a request made to the Ontario Ministry of Health for 1994 data involving 77 clinics and hospitals. The applicant sought the number of abortions performed, broken down by facility. The applicant also sought information about the patients, including: county of residence; marital status; number of previous spontaneous and induced abortions; age and varieties of any complications. For reasons not apparent in Order P-1499, the Ministry released all of the patient information, but declined to release data on the number of abortions performed at each facility. This refusal was upheld on appeal to the Assistant Information and Privacy Commissioner for Ontario.

The following passage appears at p. 4 of that decision:

> Having carefully considered all representations, I find that the Ministry and affected parties have provided sufficient evidence to establish that disclosure of the record could reasonably be expected to endanger the life or physical safety of individuals associated with the abortion facilities. My decision is not based on the identity of the appellant's organization or its activities, but rather on the principle that disclosure of the record must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the pro life movement, including those who may elect to use acts of harassment and violence to promote their cause. Although I acknowledge that similar information has previously been disclosed, I also accept the Ministry's position that the more abortion-related information that is made available, such as the numbers associated with each facility, the more likely specific individuals will be targeted for harassment and violence.

Of course, I do not have the benefit of knowing what evidence of harm was before the Assistant Commissioner in Order P-1499. It may be, for example, that it was not known that some of the health care facilities in question provided abortion services. Some of the facilities may have been vulnerable because of their location or lack of security arrangements. After careful consideration, I find that the reasoning expressed in the above passage does not apply in light of the evidence before me. It bears some emphasizing, again, that VGH is already known to provide abortion services and the applicant has already publicized this on the Internet.

Last, I should underscore the fact that British Columbia Order No. 18-1994 dealt with a request for the names of individuals associated with a specific health clinic that provided abortion services. Order No. 7-1994 dealt with a similar request. Requests for the names or other identifying information of individuals are very different from the present case, where only statistics as to the number of abortions are in issue. The question is whether *disclosure of the requested information* here - annual statistics - could reasonably be expected to threaten third party health or safety, or public safety, where it is already known VGH offers abortion services.

4.3 Release In the Public Interest

The applicant argued that s. 25 of the Act applies here and requires VGH to disclose the data. Section 25(1)(b) requires, among other things, a public body to disclose information if disclosure is "clearly in the public interest". VGH disagrees and says that s. 25 does not apply. Given the conclusion I have reached regarding s. 19(1), the s. 25 issue need not be addressed. If it were necessary to decide the issue, however, I would agree with VGH that s. 25(1)(b) does not apply here.

4.4 Comments on VGH's Decision Letter

Although it is not part of my decision in this matter, I have some comments to make about VGH's response letter in this case and about public body response letters generally. Section 8(1)(c) of the Act says that if access is denied, the head must, in responding to the applicant, tell the applicant "the reasons for the refusal" and the provision of the Act on which the refusal is based.

The response letter in this case basically repeated the language of s. 19(1) of the Act and added a reference to the sensitivity of the requested information. In my view, reference to the Act's sections and to the sensitivity of the requested information does not meet the requirements of s. 8(1)(c). I recognize it is often difficult to fulfill the statutory duty to give reasons without risking disclosure of protected information. But s. 8 of the Act requires that effort to be made. I encourage public bodies to be as complete as is possible in providing reasons in their response letters, while at the same time avoiding inadvertent disclosure of protected information. It should be noted that, among other things, provision of reasons in some cases may persuade an applicant not to seek a review of the decision, thus avoiding added costs to the public body in responding to the request for review.

Public bodies should also remember that s. 8(1)(c) contains further requirements respecting the content of access responses. VGH's response in this case did not fulfill all of those requirements. Again, I encourage all public bodies to ensure that their s. 8 responsibilities are met in each case.

5.0 DECISION

Having considered the evidence in this case, and the applicable law, I have decided for the reasons given above that VGH was not authorized in this case to refuse to disclose the two records in dispute. VGH is therefore ordered, under s. 58(2)(a) of the Act, to disclose the records to the applicant.

August 26, 1999

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David Loukidelis
Information and Privacy Commissioner for
British Columbia