OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-18

INQUIRY REGARDING A DRIVER LICENCING RECORD

David Loukidelis, Information and Privacy Commissioner
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Summary: Applicant requested copy of an unsolicited letter to the Ministry about applicant's possible health problem that could affect her driving ability. Ministry released letter to applicant, but severed personal information that would reveal identity of the letter's author. Ministry entitled to withhold letter writer's identity under s. 15(1)(d) and required to withhold that personal information under s. 22(1), but not entitled to withhold it under s. 19(1)(b).

Key Words: Confidential source of law enforcement information – personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(d), 19(1)(b) and 22(1); *Motor Vehicle Act*, ss. 29 and 92.

Authorities Considered: B.C: Order No. 28-1994; Order No. 32-1995. **Ontario:** Order P-208.

Cases Considered: *Galaske* v. *O'Donnell*, [1994] 1 S.C.R. 670; *Buhlers* v. *British Columbia (Superintendent of Motor Vehicles)* (1999), 65 B.C.L.R. (3d) 119 (C.A.); *R.* v. *Tri-M Systems Inc.* (1998), 38 M.V.R. (3d) 265 (B.C.S.C.); *Garrity* v. *British Columbia* (1997), 38 B.C.L.R. (3d) 207 (B.C.S.C.); *R.* v. *Claughton* (1988), 27 B.C.L.R. (2d) 347 (B.C.S.C.).

1.0 INTRODUCTION

In May of 1999, the Superintendent of Motor Vehicles ("Superintendent") received a letter that expressed concern about the fitness to drive of the applicant in this case. The letter described the applicant as "an elderly lady between 75 to 80 years of age", who had "on two different occasions", been "attended to by neighbors when she has suffered from what appears to be epileptic seizures". The letter went on to say that on both occasions the applicant apparently had "refused any medical attention". The letter expressed

concern that the applicant might "be driving her car when another seizure occurs and would endanger anyone near her at the time". It asked whether there were any "regulations that would require the applicant to seek medical testing to ascertain if it is safe for her to be driving?" As a result, the applicant was ordered by the Superintendent, under s. 29 of the *Motor Vehicle Act* ("MVA"), to undergo a medical examination by a physician, to determine her continued fitness to drive. That examination disclosed no medical condition that then called the applicant's ability to drive into question. Based on the medical examination, the Superintendent took no further action.

In June of last year, the applicant made a request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for the "complete details of this unsolicited report and the identification of the person/persons who submitted it". In the applicant's view, this information formed part of her personal file and appeared "to contain misleading, erroneous, or false information, which needs to be addressed".

The Ministry of Transportation and Highways ("Ministry") – of which the Superintendent's office forms a part – responded to this access request on June 24, 1999. The Ministry disclosed a severed version of the unsolicited letter. The Ministry withheld information that it believed could, within the meaning of s. 15(1)(d) of the Act, "reveal the identity of a confidential source of law enforcement information". It withheld the same information as personal information the disclosure of which would, the Ministry believed, be an unreasonable invasion of third party personal privacy within the meaning of s. 22(1) of the Act. (It appears from the material before me that the Ministry disclosed a second version of the letter to the applicant, with more information being released in that version.) By a letter dated July 21, 1999, the applicant requested a review, under s. 52 of the Act, of the Ministry's decision.

On November 30, 1999, the applicant wrote to the Superintendent and requested, under s. 29 of the Act, that the Superintendent correct personal information of the applicant in the custody of the Superintendent. This request did not form part of the applicant's request for a review of July 21, 1999, nor did the issue form part of the notice of written inquiry this Office issued on January 10, 2000. The applicant made s. 29 arguments in her initial submission, as did the Ministry in its reply submission. I have not considered any of that material, since the s. 29 issue is not properly before me and has nothing to do with this inquiry.

By a letter dated January 19, 2000 to the applicant – well after its original decision – the Ministry informed her that it had "decided to also apply section 19(1)(b) of the Act as grounds for severing information in the record that was previously provided to you". This letter was sent almost literally on the eve of the deadline for the parties' delivery of initial submissions in this inquiry. As a result of this late move by the Ministry, this Office extended the deadline for delivery of reply submissions in order to give the applicant an opportunity to respond to the Ministry's new s. 19(1)(b) argument. Because the applicant has had a reasonable opportunity to be heard on that issue, I have (with some reluctance) decided to consider it.

2.0 ISSUES

The following three issues are raised in this inquiry:

1. Was the Ministry authorized by s. 15(1)(d) of the Act to refuse to disclose information?

2. Was the Ministry authorized by s. 19(1)(b) of the Act to refuse to disclose information?

3. Was the Ministry required by s. 22(1) of the Act to refuse to disclose personal information?

Under s. 57 of the Act, the Ministry bears the burden of establishing its ability to invoke ss. 15(1)(d) and 19(1)(b), while the applicant bears the burden of proof on the s. 22(1) issue.

3.0 DISCUSSION

3.1 Confidential Source of Law Enforcement Information – Section 15(1)(d) of the Act permits a public body to refuse to disclose information if the disclosure could reasonably be expected "to reveal the identity of a confidential source of law enforcement information". The Ministry says it was authorized under this section to withhold information that would disclose the identity of the individual or individuals who wrote the letter in issue here. (I will, for convenience, refer to the third party or parties who wrote that letter as the "author", but my use of the singular in no way indicates whether one or more individuals wrote the letter.)

Applicant's Submissions

It is best to deal first with the applicant's main arguments. In her initial submission, the applicant argues that since the letter's "contents have been proven false, and groundless and therefore did not require any necessary involvement by a law-enforcement body", s. 15(1)(d) cannot be used to withhold information. She says that her "main concerns" have to do with the

> … possibility and likelihood of future actions by the third parties, or complainants, of similar or like nature, as well as the perpetuation of the harassment and intimidation that has been on-going for a long period of time, by certain individuals.

The applicant says that she wishes only to

> ... return to the normal enjoyments to which I am entitled, the peaceful sanctity of my home and garden, and the freedom to come and go on the public road system,

> in reasonable safety without unwarranted and deliberate interference from certain individuals, and without fear for my personal safety.
>
> My life long professional advisors, my family physician and lawyer, are appalled at this unspeakable situation which has been allowed to develop without hindrance or discouragement, but rather with protection of the participants.

The applicant also questions how the Ministry "can justify the process of eliminating drivers, by the use of informants and with undue protection of said informants". She argues that the Ministry should not be entitled to "arbitrarily accept all such information as necessarily true, correct and complete, nor that all victims are guilty until proven innocent" (emphasis in original).

The applicant argues that all "participating parties involved in this unsolicited letter should be fully accountable for their actions, the intent, and statements made" and says that the statements in the letter "reflect intimidation, and harassment, with discriminatory overtones". The applicant alleges that the letter had been sent "not with concern for public safety, but rather for personal and self-serving interests".

As the Ministry points out in its submissions, and its affidavit evidence, it has taken no further action regarding concerns about the applicant's fitness to drive. The Ministry required the applicant to submit to a medical examination, which she did. When that examination disclosed no concerns about her ability to drive, the Ministry closed the matter and took no further steps. I do not think the evidence supports the applicant's allegations about the motives or intentions of the author. Nor is it apparent to me how the letter can be said to "reflect intimidation, and harassment, with discriminatory overtones". I have no doubt that the applicant may have found it upsetting or intrusive to have to submit to a medical examination on the Superintendent's direction. As a result of the examination, of course, the applicant's fitness to drive was confirmed.

In any event, the applicant's accusations about the ill-will she says underlies the letter could not, even if true, force the Ministry to disclose information to which it has properly applied s. 15(1)(d) and in respect of which it has exercised its discretion against disclosure.

Is Law Enforcement Information Involved Here?

The threshold question the Ministry must answer is whether the disputed information qualifies as "law enforcement information" for the purposes of s. 15 (1)(d). Schedule 1 to the Act says "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 says the Superintendent's actions in response to the letter qualify, for the purposes of paragraph (b) of the law enforcement definition, as "investigations that lead or could lead to a penalty or sanction being imposed". The Ministry concedes that those investigations could not lead to a "penalty" being imposed; it concedes the word "penalty" describes "a measure imposed on an individual where the goal is to punish the individual for having committed an offence" under any statute, regulation or by-law. By contrast, says the Ministry,

> … [i]nvestigations into driver fitness undertaken by the Superintendent can lead to measures imposed on individuals, including licensing action, such as restriction, suspension, or revocation. The goal of the Superintendent in taking licensing action is to protect public safety – the goal is not punishment. The public body submits that investigations into driver fitness undertaken by the Superintendent should be viewed as possibly leading to public-safety-related sanction.

The Ministry also argued that a "sanction" is a

> … measure imposed on an individual where there has been no offence committed, but some measure must be imposed for other reasons.

I have decided, for the reasons that follow, that the Superintendent's actions in responding to the author's letter qualify as "law enforcement" investigations within the meaning of paragraph (b) of the Act's definition of "law enforcement".

The Ministry's argument does not refer to any MVA provisions relevant to the Superintendent's authority to investigate a driver's fitness or the Superintendent's power to take steps to prevent those who are incapable of driving from doing so. My review of the MVA reveals, however, that the Superintendent is authorized by the MVA to take steps that could lead to a driving prohibition where the Superintendent considers a driver is not fit to drive. Under s. 29 of the MVA, the Superintendent may

> … require a person to whom a driver's licence has been issued to attend at a time and place for one or both of the following purposes:
> …
>
> (b) to be otherwise examined as to the person's fitness and ability to drive and operate motor vehicles of the category for which he or she is licenced.

As well, section 92 of the MVA provides that if

> (b) the superintendent considers that a person is unable or unfit to drive a motor vehicle or to hold a driver's licence of a certain class,
>
> then, with or without a hearing and even though that the person is or may be subject to another prohibition from driving, the superintendent may

> (c) prohibit the person from driving a motor vehicle, or
>
> (d) direct the Insurance Corporation of British Columbia to
>
> (i) cancel the person's driver's licence and to issue a different class of driver's licence to the person, or
>
> (ii) cancel the person's driver's licence without issuing a different class of driver's licence to the person.

The courts have acknowledged that a driver's licence is a privilege that can be removed by the state. As Brenner J. (as he then was) noted in *R.* v. *Tri-M Systems Inc.* (1998), 38 M.V.R. (3d) 265 (B.C.S.C.), at paras. 27-28, the Supreme Court of Canada has consistently held in a series of cases that

> … driving a motor vehicle in Canada is a privilege which must be exercised in accordance with the regulatory scheme that the legislation chose to put in place.

See, also, *Galaske* v. *O'Donnell*, [1994] 1 S.C.R. 670 and *Buhlers* v. *British Columbia (Superintendent of Motor Vehicles)* (1999), 65 B.C.L.R. (3d) 119 (C.A.).

I am satisfied, based on my review of the MVA, that steps taken by the Superintendent under that statute to investigate concerns about the applicant's fitness to drive qualify as "investigations" that lead or could lead to the "sanction" of a driving prohibition or licence cancellation. First, as my predecessor indicated in Order No. 32-1995, an investigation by a regulatory agency that could lead to a penalty or sanction may qualify as law enforcement even if no prosecution or other proceedings are ever initiated or completed. The steps taken by the Superintendent in response to a letter such as that in issue here qualify as an investigation for the purposes of the Act, since those steps entail the Superintendent's examination of, or inquiry into, a state of affairs relevant to the exercise of his or her duties under the MVA respecting the fitness of a driver.

Second, the Legislature clearly intended the two words in the phrase "penalty or sanction" in s. 15(1)(d) to have different meanings. As a practical matter, removal of the privilege of driving a motor vehicle may entail significant consequences for an individual. Examples of such consequences include loss of employment, loss of mobility, the inability to maintain social contacts and an increased reliance on others for mobility. Because of those consequences, a driving prohibition or licence cancellation under s. 92 can be regarded as having an element of sanction, in the ordinary sense of the word.

For the purposes of s. 15(1)(d) itself, such consequences can be seen as a "sanction" for failure to adhere to the MVA's implicit requirement that a driver be fit to drive. One of the purposes of the MVA is public safety on the roads. One way in which the MVA accomplishes this is by providing a mechanism that allows the Superintendent to remove from the road those who are not fit to drive. An individual who operates a motor vehicle

while unfit to do so is clearly in conflict with the legislative scheme of the MVA. I am supported in this view of the MVA by s. 92 itself and also by s. 25(3) of the same Act, which entitles the Superintendent to require driver's licence applicants to submit to medical examinations to determine their fitness or ability to drive. The general scheme of Parts 1 and 2 of the MVA also supports this view. Some support for it can also be drawn from the decisions in *Garrity* v. *British Columbia* (1997), 38 B.C.L.R. (3d) 207 (B.C.S.C.) and *R.* v. *Claughton* (1988), 27 B.C.L.R. (2d) 347 (B.C.S.C.).

It follows, in my view, that information that causes the Superintendent to investigate someone's fitness to drive qualifies as "law enforcement information" for the purpose of s. 15(1)(d) of the Act.

Is the Author A Confidential Source of Law Enforcement Information?

The next issue is whether the author is a "confidential source" of law enforcement information for the purposes of s. 15(1)(d). First, I think the letter's author is a source of law enforcement information because the letter provided the Superintendent with reason to investigate the applicant's fitness to drive. As it turned out, the applicant was found to be fit to drive when examined. But that does not change the fact that the author was the catalyst for the Superintendent's investigation into the applicant's fitness at the time.

In arriving at this conclusion, I am mindful of what my predecessor said about such information in Order No. 28-1994. In that case he doubted that a physician's letter calling into question someone's ability to drive was sufficiently detailed about possible specific violations of law for the physician to qualify as a source law enforcement information. In my view, the author of the letter in question here qualifies as a source of law enforcement information for the reasons just given.

As to the confidentiality of that source, the Ministry provided evidence, in the form of an affidavit sworn by the Superintendent, Mark Medgyesi, that it is the

> … long-standing practice of my Office, and of its predecessor the Motor Vehicle Branch, to treat such concerns [about someone's fitness to drive] as having been conveyed in confidence if the source is a member of the public, or, in other cases, if the source is [*sic*] requests confidentiality.

As the Ministry points out, in the letter the author expressly requests anonymity. In light of the evidence as to how the Superintendent's office treats such information and of the request for anonymity in the letter itself, I have no hesitation in concluding that the author qualifies as a confidential source of law enforcement information under s. 15(1)(d).

This case is distinguishable from Order No. 28-1994 on the confidentiality issue. In that case, David Flaherty noted there was "no explicit evidence" before him

> … 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.

He noted that there was an "unstated expectation of confidentiality" in that case and that he preferred "as much explicitness as possible" to support claims of confidentiality. Of course, s. 15(1)(d) is not limited to cases where confidentiality is explicitly agreed to or explicitly requested; the section is silent on whether confidentiality is to be implicit or explicit. It may well be easier for a public body to establish confidentiality, of course, if it has an explicit confidentiality policy in place, but there is, strictly speaking, no requirement in s. 15(1)(d) for such a policy. In any case, as is noted above, this case differs from Order No. 28-1994 because the letter here contains an explicit request by the author for anonymity, *i.e.*, a request that the author's identity be kept confidential. That fact, coupled with the evidence as to the Superintendent's policy of keeping identity confidential, is sufficient to establish the necessary element of confidentiality.

Would Disclosure Reveal the Confidential Source?

The last s. 15(1)(d) issue to be addressed is whether disclosure of the information withheld by the Ministry would reveal the author's identity. Of course, disclosure of the author's name would reveal the author's identity. The Ministry has gone further in this case. It says that, in the peculiar circumstances of this case, disclosure of information that would reveal whether one or more individuals signed the letter would permit the applicant to draw an accurate inference of the identify of the author.

In my view, the author's submissions to the Ministry – made in the context of the Ministry's s. 23 third party consultation and placed before me in this inquiry – provide independent support for the Ministry's position. This, and the other material submitted by the Ministry, establishes in this case that the Ministry was authorized to withhold information in the record that would reveal whether one or more individuals is or are responsible for the letter. There is a reasonable basis, in the special circumstances of this case, for concluding that disclosure of the withheld information would reveal the identity of the author.

3.2 Unreasonable Invasion of Personal Privacy – The Ministry says it is required by s. 22(1) of the Act to refuse to disclose personal information to the applicant, because disclosure would be an unreasonable invasion of the author's personal privacy. Section 22(1) of the Act is mandatory; it requires a public body to "refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy".

The Ministry argues that, in addition to the author's name and address, information that would reveal the number of individuals responsible for the letter would, in the circumstances of this case, reveal the author's identity. In this case, the Ministry says, that information qualifies as personal information of the author for the purposes of s. 22(1). The Ministry has not relied on any of the presumed unreasonable invasions of personal privacy under s. 22(3), but says that two of the relevant circumstances enumerated in s. 22(2) weigh against disclosure of personal information in the disputed record.

Information which reveals the number of individuals involved in a matter may in a rare case qualify as "recorded information about an identifiable individual", as is required by the Act's definition of "personal information". This would engage the s. 22(1) analysis. In light of my finding on the s. 15(1)(d) issue, however, it is not necessary for me to deal with that question in this case.

As regards the name and address of the author, I find that the Ministry is required by s. 22(1) to withhold that personal information. I have arrived at this conclusion bearing in mind that that personal information was, for the reasons given above, supplied in confidence within the meaning of s. 22(2)(f) of the Act. This circumstance weighs against disclosure of that personal information to the applicant. No other circumstances have been brought to my attention that would favour disclosure of that personal information to the applicant. She has not persuaded me, among other things, that she needs that personal information for a fair determination of her rights.

3.3 Interference With Public Safety – As was noted above, late in the game, the Ministry advanced s. 19(1)(b) as a further ground for withholding the severed information. That section provides that a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to "interfere with public safety".

The Ministry says s. 19(1)(b) applies because the Superintendent's ability to discharge his responsibility under the MVA for ensuring the fitness of all licenced drivers would be interfered with if the information is disclosed. The Ministry says that if the identity of anyone who writes to the Superintendent with such concerns cannot be protected, it "fears that an important source of information will be lost". Although the Ministry acknowledges that the Superintendent has "other means to protect public safety, these other means are less effective, less timely, and more costly to drivers", since they rely on a pro-active program of regular medical examination by the Superintendent of a broader class of drivers. According to the Ministry, the loss of any source of confidential information will, on a system-wide basis,

> … very clearly interfere with the Superintendent's ability to protect the public. Valuable sources of information will dry up and the Superintendent will not receive the information he needs in order to take measures to ensure public safety.

This is a 'chilling' argument, *i.e.*, the Ministry says its inability to preserve a confidential source of information *in this case* will dissuade others from coming forward in other cases.

In my view, s. 19(1)(b) does not apply here. I agree with the Ministry that use of the word "interfere" in the section indicates that the Legislature intended a different threshold to apply than would be the case if the word 'harm' had been used. Still, it is my view that the section requires a more direct connection between the disclosure of information and interference with public safety itself. In this case, the Superintendent deposed that he feared disclosure of the author's identity here might deprive him of one of several possible

means of discharging his responsibilities under the MVA. I am not persuaded that disclosure here would have the system-wide chilling effect the Superintendent says it would have. In any case, such a possible impact on one method by which the Superintendent discharges his statutory duty to protect public safety is, in my view, sufficiently remote that the necessary reasonable expectation of interference with public safety itself has not been established.

4.0 CONCLUSION

For the reasons given above, I make the following orders:

1. Under s. 58(2)(b) of the Act, I confirm the Ministry's decision, under s. 15(1)(d) of the Act, to refuse to give the applicant access to the information withheld by the Ministry.

2. Under s. 58(2)(c) of the Act I require the Ministry to refuse, under s. 22(1) of the Act, to give the applicant access to personal information of the author.

3. Under s. 58(2)(a) of the Act, and subject to the order in paragraph 2, I require the Ministry to give the applicant access to the information withheld by the Ministry under s. 19(1)(b).

June 29, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia