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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 73-1995
December 21, 1995

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A decision by the Ministries of Health and Finance and Corporate Relations to refuse access to computer backup tapes containing deleted e-mail

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on September 29, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's request for a review of the decision of the Ministries of Health and Finance and Corporate Relations to refuse access to "deleted" e-mail messages which might exist on computer backup tapes kept for the Ministries by the British Columbia Systems Corporation (BCSC).

2. Documentation of the inquiry process

The applicant, International Helix Biotechnologies Inc., submitted a request on March 2, 1995 for access to "substantive E-mail messages stored in file tapes at BCSC using the combination of following selective descriptors." One of the three descriptors was the time period of September 1, 1994 to the date of the request, another was "e-mail messages originating from the following officials or their offices: [13 names]," and the last was a list of subjects in four groups (Helix, Vancouver Hospital and Science Centre/Vancouver General Hospital, Ministry of Health, and Ministry of Finance and Corporate Relations/Office of the Comptroller General). The applicant also requested a waiver of any fees which might be levied.

The Ministry of Finance and Corporate Relations wrote to the applicant on May 10, 1995 and the Ministry of Health wrote to the applicant on May 15, 1995, both to advise him that the general right of access to records in the custody or under the control of a public body does not extend to deleted e-mail on backup tapes kept by BCSC. The applicant wrote to the Commissioner on May 17, 1995 to ask for a review of the public bodies' decisions. The

Ministry of Health wrote to the applicant on August 2, 1995 to give notice of its intention to argue the matter under section 6(2) of the Act.

3. Issues under review at the inquiry

The issues in this inquiry are whether "deleted e-mail messages" perhaps contained on backup tapes are records under the Act and, if so, whether there is a right of access to them under the Act? Further, does section 6 of the Act affect the retrieval of backup e-mail?

The relevant portions of the Act read as follows:

4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

....

5(1) To obtain access to a record, an applicant must make a written request to the public body that the applicant believes has custody or control of the record.

(2) The applicant may ask for a copy of the record or ask to examine the record.

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Schedule: Definitions

In this Act, "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers, and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

4. The records in dispute

The records in dispute are backup records held by the systems operator, BCSC.

5. International Helix Biotechnologies Inc.'s case

Helix essentially argues that "electronic records maintained as a strategic back-up by the British Columbia Systems Corporation [BCSC] on behalf of other Government Ministries and Agencies fall under the provisions of the Act." (Submission of the Applicant, p. 1) It is especially concerned with e-mail. Its view is that gaps in records Helix has received from the Ministries of Health and Finance and Corporate Relations can and should be supplemented from "substantive documentation" in backup tapes. (Submission of the Applicant, p. 2)

Helix regards deleted e-mail, accessible only on backup tapes, as a record under the Act. It fears that "non-transitory records can be deleted either through accident, inadvertent mistakes, or, in some limited circumstances, outright intent." (Submission of the Applicant, p. 4) It argues that BCSC can simply reproduce records from backup for client Ministries under section 6 of the Act. (Submission of the Applicant, p. 7)

Helix interprets section 6(2)(b) of the Act to require BCSC to retrieve records from backup for the Ministries, since they "are accessible through an established regeneration procedure." (Submission of the Applicant, p. 8)

Helix emphasizes that it is not looking for e-mail records that contain personal information. (Submission of the Applicant, p. 9)

I have discussed below, as I deemed it appropriate, the more detailed submissions of Helix on specific sections of the Act.

6. The case for the Ministry of Health and the Ministry of Finance and Corporate Relations (the public bodies)

The public bodies provided a small element of context for this particular inquiry by suggesting that in the original request for information the applicant appeared to be concerned with the price charged for a particular service by a public hospital, which the applicant also provided at a higher cost. (Submission of the Public Bodies, p. 3)

The public bodies would prefer, for a variety of reasons, that I decide that deleted e-mail is not a record under the Act. Some deleted e-mail may in fact be on a backup tape, but no backup system maintains an index of e-mail. (Submission of the Public Bodies, paragraphs 1, 5, 6)

The public bodies further submit that deleted e-mail is not a record for purposes of the Act, because it has been determined, in accordance with the policy of the B.C. Archives and Records Service, to be a record of a transitory nature. (Submission of the Public Bodies, paragraphs 8, 9, 13, 16)

The public bodies emphasize that backup e-mail records on computer tape require special hardware and software to be read and, even then, they are simply compilations of raw data (in compressed form) rather than records stored in a readable format. The public bodies compare a possible deleted e-mail on a backup tape to a book that may be in a public library but for which the index card is lost. Furthermore, "[i]t could take as much as one full working day to retrieve a single back-up e-mail message." (Submission of the Public Bodies, paragraphs 26-32)

I have discussed below the submissions of the public bodies on the application of section 6 of the Act to the records in dispute.

7. The Freedom of Information and Privacy Association's (FIPA) case as an intervenor

Allan A. Macdonald of Jonathan Baker & Associates, Barristers & Solicitors, prepared the submission for FIPA. For the record, I note that he also served as counsel for the applicant after counsel for the public bodies objected to the contents of its reply submission. This matter is discussed below.

FIPA argues that e-mail <u>are</u> records under the custody and control of the relevant public bodies for purposes of this inquiry. (Submission of FIPA, pp. 3, 4) The distinction between transitory or non-transitory records has no relevance with respect to the status of e-mail as records under the Act: "Neither back-up tapes, nor E mail files on back-up tapes are in the Division 2 list of exceptions. Therefore, the heads of the public bodies in question <u>had no jurisdiction</u> to refuse the applicant's s. 5 request." (Submission of FIPA, pp. 5, 6)

Furthermore, FIPA is of the view that section 6 of the Act "provides no statutory grounds" for refusing the applicant's request, especially since it asked for a record to be "retrieved" not "created." (Submission of FIPA, pp. 6, 7)

FIPA essentially concludes that the heads of the public bodies have no statutory power under the Act to refuse the applicant's section 5 request and that I should set aside these refusals. (Submission of FIPA, p. 8)

8. The submission of the Public Service Employee Relations Commission (PSERC) as an intervenor

PSERC, speaking in the person of Jo Surich, its then Commissioner, took the position that although the government has the technical ability to access deleted e-mail:

> ... it does not necessarily mean that there is a good business or Freedom of Information and Protection of Privacy (FIPPA) case for doing so. The retrieval of backup EM [e-mail] would in most circumstances, and specifically to FIPPA responses, cause great interference for government as a whole, would be contrary to the intentions of the Act, and would be an extremely costly venture for taxpayers. The sole purpose of the EM backup tape is to have a means of replacing the entire system in the event of a disaster.

PSERC is of the view that a piece of e-mail deleted by a user is not a "record" under the Act but data that have been determined to be transitory in nature in accordance with policy developed by the B.C. Archives and Records Service.

PSERC suggests that there is a comparison between telephone conversation and e-mail:

> It is our view that EM should be considered the continuum of documents to conversations with the latter clearly being transitory records. In that we respect employees' rights to privacy on the telephone (i.e., we do not tape and record phone conversations), should an EM conversation be given any less respect? There is no doubt that the backup tapes will contain some highly sensitive political and personal information potentially damaging to individuals and/or third parties. Therefore, it is critical that extreme caution be exercised in the application of the Act to the EM issue.

9. Discussion

Is e-mail a record under the Act?

I have no difficulty in accepting the applicant's submission, supported by FIPA, that e-mail is indeed a record under the Act. (Submission of the Applicant, pp. 2, 9) This means that there must be proper rules in place for the collection, retention, dissemination, and destruction of such records.

While the public bodies in this inquiry wish to make much of the complicating fact that the government uses a number of different platforms for e-mail systems, as many as six for example in the Ministry of Small Business, Tourism and Culture ("by no means representative of poor planning but simple logistics in operating a modern public Ministry"), my only observation is that they are all creating records under the Act, which must be treated as such. (Submission of the Public Bodies, paragraphs 20-22)

Who has custody and/or control of the backup e-mail tapes under the Act?

The applicant submits that while BCSC has the custody of the backup tapes, actual control lies with the respective Ministries. (Submission of the Applicant, pp. 2-4, 7) I agree with the applicant in both a legal and practical sense. As I note further below, BCSC will do whatever the public bodies ask it to do with respect to reconstructing backup tapes of deleted e-mail. The real issue, addressed below, is whether it makes sense for me to require the public bodies to do so under the Act.

Is deleted e-mail a record under the Act?

In general, I accept the basic premise of the public bodies that deleted e-mail is no longer a "record" under the Act. (See Submission of the Public Bodies, paragraphs 8-19)

It seems to me that direct recipients of e-mail make several decisions about the fate of an incoming or an outgoing message, after deciding to read it: either delete it, or print it for storage on a manual file or as a jog to memory for action. The sender makes similar choices, as do those copied with the message by either the sender or the recipient(s). Another option is to leave the "read" record in the memory of the system, so that it can be re-read, printed, or deleted later. Under this scenario, one "record" created under the Act is the printed copy, if it is entered into a document system destined for disposal according to established government rules on such matters. E-mail that is not deleted also exists as such a "record."

The etiquette of e-mail

It is worth emphasizing that the proliferation of e-mail is part of an explosion of digital information that is a distinguishing feature of the last decade of this century. An effective tool when properly used, e-mail can also become the bane of one's existence, since records can be copied and multiplied like the proverbial loaves and fishes. Thus a simple instruction can inform every terminal on a public body's e-mail system that a moose has been seen in a parking lot, or that the driver of a particular vehicle has left his or her lights on. Every such record created has to be dealt with by a recipient in some way.

Normal e-mail systems at present require established users to erase or delete individual items still on the system at periodic intervals, which can be controlled by the individual user or by the system as a default option (i.e., all e-mail is deleted at specified intervals). Since most users have less than five years of experience with the use of electronic mail, various aspects of the etiquette of electronic mail have yet to filter into the consciousness of individuals, whereas the protocols for traditional mail or telephone calls are much better established. In my view, our handling of e-mail records should mirror, and evolve from, how we handle ordinary post. That is, we destroy some mail immediately, because it is junk mail, is not relevant to our professional activities in the workplace, or has no permanent value as a record of the activities of our organization. Other mail we treat as either of temporary or more permanent importance. I think that the same principles should apply to the disposal of electronic mail. If such logical rules of the road are not adopted and followed, e-mail users will have legitimate inclination to avoid the use of an otherwise productive tool. The uncontrolled use of distribution lists for e-mail recipients is a particular problem that requires resolution by prescriptive directives within public bodies covered by the Act. Random or targeted redistribution of e-mail without consent or authorization may come to be regarded as being as offensive as the comparable redistribution of a printed letter or memorandum.

One difference between post and e-mail, however, is that many users are not yet adequately trained to make decisions on disposal of their electronic mail, especially since ease of duplication makes it so easy to copy e-mail to one's co-workers. Thus public bodies need to ensure that protocols are in place to ensure that e-mail is disposed of, or stored more permanently, in a coherent manner under the Act. I am certain that large, complex, and decentralized public bodies will have to develop thorough policies on these issues.

I agree with the following submission of the Public Service Employee Relations Commission:

> We propose that perhaps what is required is a policy decision on EM backup information. This policy would assist in the determination of what is a record versus a transitory document, what the requirements are under FIPPA [the Act], as well as recognizing and respecting the individual needs of each public body.

I believe, generally, that one of the accomplishments of the Act in the longer term will be to reduce the storage of unneeded, unnecessary, and irrelevant paper records with what one hopes will be savings to the taxpayers. Clearly the efficiencies and savings associated with the widespread use of electronic mail should not add unnecessarily to the storage of even more paper and electronic copies of the resulting records.

Access requests for backup e-mail that has been deleted from the system

A consideration for any public body is the fact that at the point of an access request under the Act, e-mail that still exists on an active system is subject to the usual disclosure routines under section 5 of the Act. What this inquiry raises is the somewhat deeper issue of whether e-mail that has been deleted on an operating system, and that only exists in backup held by the systems operator, can be subject to the same rules. (See Submission of the Applicant, p. 4) At least under normal circumstances, my view is that such backup records cannot be so treated under the Act, unless one is dealing with a matter such as a serious issue of law enforcement, where the police are looking for evidence of a serious crime that might be retrieved from anywhere.

My main rationale for the previous paragraph is that the purpose of systems backup for any digital records is the recovery of a system from a major crash, the electronic equivalent of trying to get an office operating again after an earthquake or a fire. It recreates the system to the point in time when the disaster occurred. Such backup for disaster recovery, as I prefer to term it, is not like the normal filing drawers of a public body and should not be accessible under the Act in the same way as a filing cabinet, hard-copy, or computer tape records stored in off-site storage. (With respect to the emphasis on disaster recovery, see Submission of the Public Bodies, paragraphs 23-25, 36. The applicant asserts that if the BCSC backup system can only regenerate complete systems and not recover specific files, then it is obsolete. Fortunately, that is not an issue central to my decision in this particular inquiry. I have to accept the realities of the systems as they currently operate and as described in affidavits submitted to me by the public bodies. Reply Submission of the Applicant, p. 7)

Backup systems for records like e-mail are designed and intended to re-establish a whole system of records in the event of a catastrophe, not for the recovery of an individual item that may be stored therein over a certain time frame. That is why the cost of extracting one record can be so substantial. The public bodies made these points in their affidavits to me. The systems were not designed for that purpose, and there is no legal obligation under the Act that such reconstitution should take place. That is why I am not persuaded to order any public body to have to use backup tapes held by systems operators, such as BCSC, as a method of recovering certain specific records (which may not even exist), such as the applicant in this case has requested me to do. I might add that the applicant has never been clear in its voluminous

submissions to this inquiry as to just what it is looking for in this regard. I also received no evidence that public bodies regularly use BCSC backup tapes to recover unique items that they cannot otherwise locate.

Unauthorized e-mail destruction

I am aware that a policy of unauthorized e-mail destruction by staff of public bodies could have significant negative consequences under the Act. An unethical individual, unmindful of the broad goals of the legislation to promote greater openness and accountability in government, could ensure that his or her e-mail system never produced any "permanent" records, whatever the importance of the contents of an e-mail communication (or any other form of communication) sent or received. Although I prefer to assume that staff will comply with the policy of their public body on this issue, as they do in so many other instances, any policy can be subject to abuse. While much e-mail should be deleted because of its lack of permanent value (setting up a meeting, conveying descriptive information), other e-mail may make significant statements about the strategy of a public body on a controversial issue. I acknowledge that many such matters should and will be automatically duplicated in paper-record systems so that the electronic record can be deleted without loss. My sense is that the more senior the person involved in e-mail communications within a public body, the greater likelihood that a single piece of electronic mail can be consequential. I find the test of printing such a message a useful one with respect to the possible need for retention, but I am not certain whether this would work in a large public body. My sense is that a considerable portion of any public official's e-mail is of a transitory character and can be deleted, but this needs to be demonstrated by empirical data, as has presumably been done for paper records.

Those fearing the demise of recordkeeping because of the advent of e-mail should take some comfort from the existence of both a sender and a recipient, each with a digital copy of the message. Each will have to act to delete and destroy a record for it to disappear from the public record; each may exercise his or her own judgment as to whether a message is of a transitory nature. Thus someone seeking access to e-mail records has more than one likely spot to locate it. I recognize that this is often the case with paper records as well. However, the ease with which e-mail can be copied to third parties complicates this scenario.

Does deleted e-mail exist in backup mode?

The two public bodies informed me that one relevant fact of life for them is that one can never know whether a particular piece of e-mail exists in their backup at BCSC, until one has searched all existing backup tapes, which costs significant amounts of time, effort, and money.

The application of section 6 of the Act

The public bodies ask me to apply the two parts of section 6(2) in this inquiry. They argue that backup tapes are not a machine readable record, are not under the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and that creating a record from them would unreasonably interfere with their operations. Without entering into the detailed submissions on these somewhat arcane points for

the purposes of section 6(2), I do find that that backup tapes are machine readable data and that they are under the ultimate control of the public body. (See Submissions of the Public Bodies, paragraphs 37-41; and Reply Submission of the Applicant, pp. 6, 7, 9, 10) I do recognize that the two public bodies in this case cannot recover or reconstitute backup records without the significant assistance of BCSC.

I have no doubt that if one of these two public bodies ever truly needed a record for its own purposes that it thought might exist in backup mode, then it would spend the time and resources necessary to retrieve it. Fortunately for them, however, I do not find that the Act imposes such an obligation on them in response to this particular access request. The somewhat heroic technical and personnel efforts required for both BCSC and the Ministries to reconfigure each tape and reconstitute it on a system comparable to the one that created it in the first place are beyond the standard obligations to users created under sections 5 and 6 of the Act. For example, "[i]t is estimated that as many as 400 discs would be given to the Ministry of Health for this request alone." I also acknowledge that the significant costs of each such recovery effort, as estimated in affidavits prepared for the public bodies, are far beyond the call of duty for a public body under section 6(1) of the Act.

The applicant will likely not agree with my findings on these points. Its technical critique of the capacity of BCSC to restore files of deleted e-mail is supported by an affidavit from a network systems engineer that is highly critical of certain points advanced in the several affidavits supporting the position of the public bodies. (See Reply Submission of the Applicant, pp. 10-13, 14, 15, and appendix 3) I am not in a position to referee a technical dispute among such experts, where a primary theme is that BCSC should have a better backup recovery system or be able to restore files more quickly, more cheaply, and more easily than it claims it actually can. My sense is that the BCSC backup system employed for these two public bodies is not at the cutting edge of technological innovation, at least compared to the advertising for BCSC's InfoSure system that the applicant also submitted to me. However, I have accepted the affidavits for the public bodies as an accurate representation of current reality for them. There is no statutory requirement in the Act to use cutting edge technology for backup of e-mail systems. A public body must make its own decision as to the best use of public funds with respect to such disaster recovery systems.

The public bodies acknowledge that the problems in meeting this particular request are in significant part technological; that is the way their current backup systems are established, controlled, and configured. They acknowledge that other public bodies may in fact have different backup systems that may be internally controlled and accessible. The following admission by the public bodies may be of some comfort and aid to future applicants for deleted and backed up e-mail:

> Nonetheless, if a public body receives a request for backed up e-mails and if the public body has the ability through its normal computer hardware and software and technical expertise, and creation of the record would not interfere with the operations of the public body, then the record could be produced. (Submission of the Public Bodies, paragraph 41)

My Order may become technologically obsolete, in the short term, if developments in backup technology makes it a relatively simple and inexpensive matter to reconstitute backup tapes. Even at present, adoption of newer methods could facilitate that process. If backup can be reconstituted very efficiently and effectively, there will be more moral pressure on public bodies to make records accessible to requesters.

Learning about backup of e-mail

Public servants should inform themselves of the consequences of deleting or not-deleting e-mail that is of a transitory nature and not printed.

Using current BCSC practice as a model arrangement, an e-mail read and deleted by its recipients is not held on backup. An e-mail left on the system overnight is saved for 28 days in backup and then destroyed. E-mail left on a system over a Saturday night is saved in backup for 90 days. E-mail left on a system over four Saturday nights (or over the scheduled Saturday night) is saved for 11 months. (Submission of the Applicant, p. 6)

The applicant raises questions how the quoted destruction polices of BCSC for e-mail can be squared with the Administrative Records Classification System (ARCS) and Operational Records Classification System (ORCS) established under the *Document Disposal Act*. (Submission of the Applicant, p. 10, and his Appendix 1) However, my own reading of the ARCS rules on transitory administrative records (dated 89/09/01) suggests that they make eminent sense as applied to e-mail. (Submission of the Applicant, Appendix 1; and also Submission of the Public Bodies, paragraph 16)

Ensuring accountability under the Act

In general, I agree with the applicant that:

> ... there is no current system for making decisions about transitory and non-transitory records or about the deletion of records except at the discretion of individual e-mail users .... Thus, there exist precious few controls to check the disposal of important government records either through inadvertence, mistakes or outright intent to eliminate records about government transactions." (Submission of the Applicant, p. 12; see also Reply Submission of the Applicant, p. 13)

The applicant has made the following suggestion, which merits careful consideration:

> ... the present process for determining what is and what is not transitory e-mail [should be] substantially revised to make it much less dependent on the subjective decisions of individual public servants, who have very varying amounts of knowledge about the management of e-mail and their obligations under the *Freedom of Information and Protection of Privacy Act*, and with definite sanctions that apply to willful destruction of non-transitory e-mail records. (Reply Submission of the Applicant, p. 6)

My sense is that PSERC, as quoted elsewhere, would support this initiative.

Helix further contends that accountability for record retention and destruction under the Act should occur, at least in this particular case, through reconstruction of records from backup tapes. (Submission of the Applicant, p. 12) I am not persuaded that this argument carries sufficient weight in this particular review. However, if I learn subsequently that significant public records are being created in electronic format and then destroyed as if transitory in character, then I would have no reluctance to investigate such matters under Part IV of the Act. This relates to my ongoing concern that significant decision-making by all public bodies must be documented in accessible records.

I agree with the applicant that there is a risk of lack of control over the deletion of e-mail: "Mistakes that are now made from inadvertence or misunderstanding of the rules could easily slide into routine avoidance of FOI requirements through the creation of a 'black hole' of deleted e-mail." (Reply Submission of the Applicant, p. 5; see also p. 15) It is the intention of my colleagues and myself to be as vigilant as we possibly can be to prevent such a situation from being tolerated as acceptable practice.

The objections of the public bodies to certain contents in the reply submission of the applicant

Counsel for the public bodies objected to the applicant's alleged inclusion of "new argument or evidence" in its reply submissions, contrary to the procedures that he claims my Office has established for such matters. The applicant retained counsel on this specific point, who argued, persuasively in my view, that the position of counsel for the public bodies is not supported by the law:

> I understand that you [the Commissioner] have made comments in the past to the effect that proceedings before you should not become emasculated by legal machinations. This position is, in fact, the one supported by law, and the procedures which Mr. [Brian] Young [counsel for the public bodies] urges upon you have no place in this context. Unless specifically restricted by a governing statute, an administrative decision-maker entrusted with exercising a statutory power of decision has broad discretion to determine whether to receive further evidence and/or argument in the appropriate circumstances. Legal procedure with respect [to] receiving evidence and/or argument, that is, should not prevent the decision-maker from exercising the full ambit of his or her discretion. (Written Submission from Jonathan Baker & Associates, October 12, 1995, pp. 1, 2)

My previous practice has been to be tolerant of what applicants and public bodies have chosen to offer as evidence and as arguments in reply submissions, and I see no reason to act differently in the present matter, since the public bodies have not been prejudiced. I agree with counsel for the applicant that "laypeople involved in the enterprise should be allowed some generosity with respect to their efforts to attach legal argument to technological arguments which

are opaque, but undeniably important in the creation of public policy." (Written Submission from Jonathan Baker & Associates, October 12, 1995, p. 2)

The "activities" of the agent for the applicant

As seems evident to me from the quantity of paper and detailed argument that I have reviewed in connection with this inquiry, the agent acting for the applicant has made prodigious efforts to support its case with fact and argument. I commend his efforts in this regard to make the Act work for the applicant by exploring a cutting edge matter. His actions, however, have also attracted several protests from counsel for the public bodies, who argued that aspects of his behaviour were unacceptable as he tried to secure information from bodies such as BCSC, during the course of the inquiry, as to how backup systems actually work. The agent then complained that his access to BCSC was restricted. (Reply Submission for the Applicant, p. 9) I see no reason to act upon any of these allegations.

10. Order

I find that the Ministry of Health and the Ministry of Finance and Corporate Relations were not required to create a record under section 6(2) of the Act and thus were authorized to refuse access to the records requested by the applicant.

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Health and the Ministry of Finance and Corporate Relations to refuse access to the records requested by the applicant.

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David H. Flaherty
Commissioner

December 21, 1995