

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 316-1999  
July 22, 1999**

**INQUIRY RE: A decision by the Ministry of Health and Ministry Responsible for Seniors to refuse to confirm or deny the existence of a record**

**Fourth Floor  
1675 Douglas Street  
Victoria, B.C. V8V 1X4  
Telephone: 250-387-5629  
Facsimile: 250-387-1696  
Web Site: <http://www.oipcbc.org>**

**1. Description of the review**

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 3, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by an applicant for review of a decision by the Ministry of Health and Ministry Responsible for Seniors (the Ministry) to refuse, under section 8 of the Act, to confirm or deny the existence of records requested by the applicant.

**2. Documentation of the inquiry process**

On November 30, 1999 the applicant requested “any and all correspondence received by the Ministry of Health...[from a specific applicant]...the time period for this request is April 8, 1998 to November 30, 1998.” The Ministry responded on January 6, 1999 stating it was “unable to confirm or deny the existence of the records you have requested.” The applicant requested a review of this decision on January 26, 1999.

**3. Issue under review and the burden of proof**

The issue under review is the application by the Ministry of section 8(2)(b) of the Act to the request from the applicant. The relevant provisions read as follows:

*Contents of response*

- 8(1) In a response under section 7, the head of the public body must tell the applicant

- (a) whether or not the applicant is entitled to access to the record or to part of the record,
- ...
- (c) if access to the record or to part of the record is refused,
  - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
  - ....
- (2) Despite subsection (1)(c)(i), the head of a public body may refuse in a response to confirm or deny the existence of
  - ...
  - (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Section 57 is silent with respect to a request for review of a public body's decision under section 8(2) of the Act. I decided in Order No. 260-1998, September 3, 1998, that the public body is in the best position to discharge the burden of proof under this section.

In its initial submission, the Ministry asserts that the applicant should have the burden of proof where the issue is the application of section 8(2)(b) of the Act (i.e., the public body's refusal to confirm or deny the existence of a record containing personal information of a third party, if disclosure that the information exists, or does not exist, would be an unreasonable invasion of a third party's personal privacy).

In this inquiry, however, the issue is simply the Ministry's decision to refuse to confirm or deny the existence of a record, not a public body's decision to deny access to records containing third party personal information. Therefore, I believe the Ministry is still in the best position to discharge the burden of proof under this section.

#### **4. The applicant's case**

The applicant is seeking information about "a self-proclaimed pro-choice researcher," who apparently supplies "copies of his alleged findings to media and governmental leaders." The applicant states that he has previously received materials from the Ministry that it had received from this third party. The Ministry's submission is that it in fact withheld information from these materials on the basis of sections 19 and 22 of the Act. He also submitted evidence that this person's work is available via the Internet. The Ministry's appropriate response is that "[t]here is nothing in the Act that supports the proposition that, because an individual chooses to make public comments in some instances, their privacy should not remain protected in other contexts."

## 5. The Ministry of Health's case

The Ministry's submission included *in camera* submissions and affidavits that I have reviewed and accepted but am unable to discuss publicly.

The Ministry submits that the applicant has clearly singled out the third party and is attempting to monitor any correspondence between the Ministry and the third party, particularly with respect to the Women's Health Bureau, which takes the lead within the Ministry with respect to abortion-related issues.

The Ministry identifies the applicant as "an acknowledged opponent to the provision of abortion services" and offered persuasive evidence on this point. (Submission of the Ministry, para. 4.13) In fact, two previous Orders, which have some direct relevance to the present inquiry, dealt with this particular applicant. (Order No. 18-1994, July 21, 1994; Order No. 116-1996, August 26, 1996).

The Ministry submits "that the evidence in this inquiry demonstrates that any requirement on the Public Body to confirm or deny the existence of the requested information will unfairly expose the third party to harm and would be an unreasonable invasion of the Third Party's personal privacy." It urges me to act prudently in this matter, as I have done in similar circumstances in the past. See Order No. 18-1994, p. 4.

## 6. Discussion

### *Section 8(2)(b): Unreasonable invasion of a third party's personal privacy*

An Order of the Ontario Information and Privacy Commissioner describes concisely the issue to be determined in this inquiry:

As noted above, the Police rely on section 14(5) as their basis for refusing to confirm or deny whether any responsive records exist. This section states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(5), the Police are denying the requester the right to know whether a record exists, even if one does not.

For this reason, in relying on section 14(5) the Police must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. The Police must establish that

disclosure of the mere existence or non-existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Order M-737, March 20, 1996, re Windsor Police Services Board, p. 1)

The applicant submits that section 8(2)(b) cannot apply to the records in dispute, since “the privacy rights of the third party are not being violated by merely informing me if there is additional material.”

I would further submit that some of the material that [the third party] has previously supplied to the public body and government is in serious error. Despite this, members of the government have used material supplied by [the third party] to make statements in the BC Legislature. Given this influence, it is erroneous to suggest that a section 8 privacy right applies.

The applicant also seeks to argue that the information he is requesting is not the ‘personal information’ of the third party: ‘The public body has not provided evidence as to what personal information will be disclosed in confirming or denying the possession of political research material.’

I am satisfied that the Ministry has established that disclosure of the mere existence or non-existence of the requested records would convey information to the applicant, and that disclosure of this information would be an unreasonable invasion of a third party’s personal privacy.

I find on the basis of the evidence that the Ministry has submitted, including its *in camera* submissions, that it is authorized to refuse to confirm or deny the existence of the records requested by the applicant.

## **7. Order**

I find that the head of the Ministry of Health and Ministry Responsible for Seniors is authorized by section 8(2) of the Act to refuse to confirm or deny the existence of records requested by the applicant. Under section 58(3)(a) of the Act, I require the head of the Ministry of Health and Ministry Responsible for Seniors to refuse to confirm or deny the existence of records requested by the applicant. However, since the Ministry has already done so, I find that the Ministry has complied with this Order and discharged its responsibility under section 8.

---

David H. Flaherty  
Commissioner

July 22, 1999