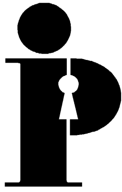

ORDER P-778

Appeal P-9400091

Ministry of Health

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Health (the Ministry) received a request for information located in the Ontario Health Insurance Plan (OHIP) computer database. The request was for access to a list of the names of all Ontario physicians together with the corresponding total number of laboratory tests ordered by each physician during the most recent twelve-month period.

In its decision letter, which the Ministry described as an interim decision, the Ministry indicated that full access would be granted to the information requested and set out two ways in which the information could be provided. A fee estimate in respect of each option was also given. At this time, the requester appealed the fee estimates provided by the Ministry.

The Ministry indicated that Option 1 would require the creation of a special computer program. Due to the demand for computer time, an additional four months, after receipt of the deposit, would be required to develop the program. The record created as a result of Option 1 would set out the physicians' names, the twelve-month period and the total number of laboratory tests ordered by each physician. The appellant has confirmed that the information to be provided by Option 1 is more responsive to the request and that it is no longer pursuing Option 2. Therefore, Option 2 is no longer an issue in this appeal.

During mediation, the Ministry issued a subsequent decision letter, indicating that access to the information requested was denied under the following exemption:

- invasion of privacy - section 21(1)

The appellant then appealed this decision to deny access to the information in addition to the fee estimate which, as I have previously indicated, it had previously appealed.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties.

The information at issue consists of the total number of laboratory tests ordered by each of the physicians named in the report.

In its representations, the appellant states that while the Ministry refers to its decision as an "interim decision", it is a final decision. I will address this issue as a preliminary matter.

PRELIMINARY MATTER:

In its decision letter of January 21, 1994, the Ministry set out the cost estimates for the two options by which it proposed to produce the record. As I have indicated, at that time, the Ministry stated that its "interim decision" was to grant full access to the record.

On May 5, 1994, the Ministry amended its decision and issued a supplementary decision letter which stated "... our revised interim decision is to deny access to the information requested under subsection 21(1) ...". Where an institution denies access to a record, in whole or in part, pursuant to section 26 of the Act, it is required to issue a notice of refusal to the requester setting out the elements enumerated in section 29(1)(b) of the Act.

In this second decision letter, the Ministry indicated the specific provision of the Act under which access was refused, the reason the provision applied to the record and the name and position of the person responsible for the decision. It appears that the Ministry properly followed the requirements under section 29(1)(b) of the Act, with the exception of advising the requester (then already the appellant) of the right to appeal the decision to deny access.

Order 81 provides guidance on the types of situations in which an institution may issue an interim decision. An interim decision may be issued where the responsive records are voluminous or too expensive to produce in order for the Ministry to review and make a decision on access. In such cases, the decision on access is "based on consultations or a representative sample of the record" (Order 81).

In its representations, the Ministry has provided a hand-designed sample of a record produced under Option 1. The "mock" record shows the name of a physician, the relevant twelve-month period and the total number of laboratory tests ordered by that physician. The record in question is capable of being retrieved through the creation of a special computer program.

I acknowledge that the **number** of physicians and the related laboratory tests may be voluminous and that compiling the record necessitates the creation of a computer program. I also accept that the actual preparation of the record may require additional time upon payment of the deposit.

However, as demonstrated on the mock sample of the record, the type of information on which an access decision is to be made is not voluminous. There are only three distinct categories of information on the record (name, time period and number of tests) and only one of these categories, the number of tests, is being withheld under section 21(1) of the Act. Therefore, while this category will appear numerous times on the record to be created, the type of information that the Ministry must review, in order to make its access decision, is the same. In my view, this situation is not one which was contemplated by former Commissioner Sidney B. Linden in Order 81.

The Ministry's decision dated January 21, 1994 sets out the fee estimates and includes a decision on access. In the letter dated May 5, 1994, the Ministry amended its earlier decision and denied access to the record pursuant to section 21(1) with regard to sections 21(2)(e), (f) and (i) of the Act. While I appreciate why the Ministry may have referred to these as "interim decisions", in my view, neither of these decisions is an interim decision. I find that the Ministry correctly processed the request and that the Ministry's decision dated January 21, 1994, as amended by its supplementary decision of May 5, 1994, is a final decision and appealable to the Commission.

I note that the Ministry raised the section 21(1) exemption some four months after its decision letter of January 21, 1994. Previous orders of the Commissioner have established that institutions are permitted to raise new discretionary exemptions only within a limited time-frame (i.e. 35 days after an appeal has been opened). This provides institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In this case, the exemption on which the Ministry relies and which it has raised, albeit four months after its decision letter, is a mandatory exemption. In Order P-257, former Assistant Commissioner Tom Mitchinson discussed the inherent obligation of the Information and Privacy Commissioner to ensure the integrity of Ontario's access and privacy scheme. This obligation includes considering the application of a particular section of the Act not raised by an institution during the course of the appeal or, in my view, where a mandatory section is raised at a later stage in the appeal and disclosure of a record could affect the rights of an individual. For these reasons, I will consider the application of the section 21(1) exemption to the record.

SEQUENCE OF ISSUES TO BE ADDRESSED

The obligation of a head of an institution to provide a reasonable estimate of any amount required to be paid in excess of $25.00, presumes that access, in part or in whole, is intended to be given (section 57(3)). In addition, section 8(1) of Regulation 460 made under the Act, prescribes that in deciding whether to waive all or part of a fee required to be paid under the Act, the head should consider whether the person requesting access to the record is given access to it.

In this case, the Ministry has provided a fee estimate but has also denied access to the record. This means that even if I were to review and uphold the fee estimate and the appellant paid the deposit, the Ministry would still deny access to the record on the basis of section 21(1) of the Act.

In the unique circumstances of this appeal, the issue of fees is rendered moot by the decision to deny access. Fairness and consideration of the cost of the delay to both the appellant and the Ministry dictates a common sense approach in which I first review the Ministry's decision on access. It follows that I will review the fee estimate given by the Ministry only if I do not uphold the Ministry's decision to deny access.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual and includes information relating to financial transactions in which the individual has been involved and the individual's name where it appears with other personal information relating to the individual.

As I have indicated previously, the information at issue is the number of laboratory tests ordered by each named physician on the record. In its representations, the appellant submits that the name of every practising physician in Ontario is published by the College of Physicians and Surgeons and, therefore, the name of a physician in and of itself is not personal information. The appellant also states that the number of laboratory tests ordered by each physician would not reveal the income of that individual. Further, the appellant submits that when a physician orders a test for a patient, it is the laboratory that bills the Ministry. Because no money is exchanged between the physician and the laboratory or between the physician and the patient, the information in the record does not qualify as a financial transaction.

The Ministry submits that the information at issue is information that is submitted to the Ministry for billing purposes. The information is also encoded by the Ministry for the purpose of determining the reimbursement level for each physician ordering laboratory tests. The reimbursement for each test ordered by a physician is based on a formula consisting of the amount of labour, material and supervision (LMS units) required in each test. Payments to the laboratories depend on the number of LMS units that the ordering physician has generated in a particular fiscal year and are made on a sliding scale for tests in excess of 150,000 LMS units per year.

I have carefully reviewed the information in the record and the representations of the parties. I find that the number of laboratory tests ordered by each identified physician over a given length of time satisfies the definition of personal information in section 2(1) of the Act and that this information relates only to individuals other than the appellant.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits disclosure of this information to any person other than the individual to whom the information relates, except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining this issue. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances which are relevant in the circumstances of the case.

In my view, none of the presumptions listed under section 21(3) of the Act apply to the information in the record.

The Ministry submits that the following factors outlined in section 21(2) weigh in favour of the non-disclosure of the information in the record:

- unfair exposure to pecuniary or other harm - section 21(2)(e)
- highly sensitive information - section 21(2)(f)

- unfair damage to reputation - section 21(2)(i)

It is the Ministry's position that since payments for laboratory tests are based on the LMS formula, this information could be used by laboratories to discriminate against the high-LMS physicians and would jeopardize the identified physicians' ability to provide their patients with expeditious and appropriate diagnosis and care and could expose their practices and livelihood to risk.

The Ministry also submits that the potential exists for misinterpretation of the significance of the number of tests ordered. This could lead to unfair inferences that certain doctors are abusing the system, thus unfairly damaging their reputations. The Ministry submits that the foregoing makes the information in the record highly sensitive and that disclosure would cause excessive personal distress to the physicians named.

In its representations, the appellant submits that none of factors listed in section 21(2) of the Act apply to the circumstances of this appeal. In response to the factors raised by the Ministry, the appellant submits that the Ministry's decision letter relies on potential coercion not actual harm (section 21(2)(e)). With respect to section 21(2)(f), the appellant denies that disclosure of the information in the record would allow the physician's total billings to be inferred, thereby revealing the individual's actual income. The appellant also states that disclosure of the information would not unfairly damage the reputations of the individuals named in the record as there is not sufficient information to determine what level of LMS units would constitute an abuse of the system. The appellant states that only another physician could properly interpret the information and disclosure would not be an unjustified invasion of personal privacy of the named physicians.

I have carefully reviewed the representations of the parties in conjunction with the information in the record and I find as follows:

1. The only evidence before me relates to the factors raised by the Ministry. These factors as listed in sections 21(2)(e), (f) and (i) all weigh in favour of non-disclosure of the personal information in the record.

2. I find that while the appellant has argued against the application of the factors raised by the Ministry, all of which weigh in favour of non-disclosure, it has not submitted representations outlining any factors, in section 21(2) or otherwise, which favour the disclosure of the personal information in the circumstances of this appeal.

3. Accordingly, absent any evidence weighing in favour of disclosure, I find that the mandatory exemption provided by section 21(1) of the Act applies to the personal information in the record.

Because of the manner in which I have disposed of this issue, I do not need to address the issue of the fee estimate.

ORDER:

I uphold the decision of the Ministry.

Original signed by: October 13, 1994
Mumtaz Jiwan
Inquiry Officer