Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-867

Appeal P-9300388
(Rehearing)

Ministry of Health

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BACKGROUND:

On November 30, 1993, I issued Order P-590. This order disposed of the issues arising in an appeal of a decision of the Ministry of Health (the Ministry) made under the Freedom of Information and Protection of Privacy Act (the Act). In this decision, the Ministry denied access to the version codes associated with the health numbers of three patients of the requester physicians.

A version code is a one or two upper case alpha character located in the lower right hand corner of a health card. The code is assigned to a health number whenever a replacement card is issued. Replacement cards are issued when a registered person turns 65, requests a new card to reflect a name change or correction, or reports that his or her original card has been lost, stolen or damaged. There is no connection between the assignment of a particular version code and the reason for its assignment - version codes are assigned on a completely random computer-generated basis. Essentially, the concept of the version code is simply a method to make any replacement card different from the original.

In Order P-590, I concluded that the version codes did not constitute the personal information of the patients as defined in section 2(1) of the Act. Accordingly, I found that their disclosure could not result in an unjustified invasion of the personal privacy of these individuals pursuant to section 21(1).

The Ministry had also claimed that access should not be provided to the version codes as to do so would result in its paying fraudulent claims. In this regard, it relied on the exemptions in sections 18(1)(c) and (d) of the Act. I found that the Ministry had not provided me with any evidence to establish a clear and direct linkage between the disclosure of the requested version codes and the harm described in these sections.

Accordingly, I ordered the Ministry to disclose the patient version codes to the appellant physicians.

The Ministry applied to the Divisional Court for judicial review of my decision. On June 24, 1994, the Divisional Court issued its decision. The Court quashed Order P-590 and stated:

> The matter is remitted back to [the Inquiry Officer] to reconsider in regard to section 18 at the level of these two doctors and the circumstances peculiar to their requests and the ministry's concerns in response to these precise requests and to now consider the application if at all, of s. 21 of the Act.

Prior to the rehearing, counsel for the appellants indicated that one of his clients was no longer pursuing this matter. Thus, counsel remained on record as representing one of the physicians as well as the Ontario Medical Association (the OMA) which had participated in the original appeal.

Counsel for both the appellant and the Ministry agreed that they would exchange their written representations. They also agreed that they wished to make oral submissions and did not object to doing so

in the presence of other counsel. Accordingly, I exercised my discretion under section 52(13) to allow the parties to make representations in the presence of each other.

I heard oral submissions from counsel on October 6, 1994. At the conclusion of those submissions, counsel for the appellant requested that the Ministry counsel provide him with some further factual information, which occurred on October 17, 1994. Upon receipt of this material, counsel for the appellant advised me that, in his opinion, there was no need for a further rehearing in this matter. This response was copied to counsel for the Ministry who has not contacted me further. Accordingly, I am satisfied that I have been provided with all relevant and necessary materials in order to make my decision in this matter.

DISCUSSION:

PRELIMINARY ISSUE:

In her written submissions, counsel for the Ministry indicated that the appellant physician already has the information he requested, i.e. the version codes of his two patients. She, therefore, submitted that the appeal was moot.

Counsel for the appellant acknowledged that his client was in possession of his patients' version codes. It was his position in his written submissions, however, that this fact had:

> ... no bearing on the fundament [sic], underlying and recurring issue before [me], namely, to establish standards or criteria by which determinations can be made as to whether disclosure of a version code would or would not result in economic harm in any particular circumstance.

In her oral submissions, Ministry counsel abandoned her argument that the appeal was moot. Rather, she challenged my jurisdiction to rehear this matter on the basis of two paragraphs of the appellant's written submissions. She points to his position as set out above, as well as to a passage in his submissions which states that the issue before me under section 18, as dictated by the Court is to "... define those circumstances where a physician is entitled to disclosure of the version code because there is no reasonable expectation of economic harm".

It is the Ministry's position that what the appellant's counsel is requesting that I do falls outside of the direction of the Divisional Court. In effect, she says that the appellant is asking me to create a new policy scheme for disclosure of version codes, something for which I lack jurisdiction both under the Act and the Divisional Court directions for a rehearing. She maintains that my jurisdiction is limited to making a decision on the requests for the two version codes which have been made under the Act.

The position of counsel for the appellant was that the Ministry's arguments went to the scope of my decision rather than my jurisdiction to rehear the matter. He argued that his client is pursuing his right to access

information under the Act, and has never abandoned this position. He maintains that the two passages in his written submissions referred to by Ministry counsel go to his position on matters for me to consider when I decide on the basis or criteria for granting or denying access to his client.

I do not accept the Ministry's position. Counsel has not identified legal impediments to me assuming jurisdiction in this matter. I agree with the appellant's counsel that the Ministry's concerns are really directed towards the scope of my decision rather than whether I may legally hear this matter in the first place. This order will not, as counsel suggests, be analogous to an "advance ruling" in an income tax case. This order will dispose of the issues before me. As a result it may have some precedential value, but that does not mean that I have made a general policy statement which is beyond my jurisdiction.

Accordingly, I have determined that I have the jurisdiction to rehear this matter according to the principles set out in the decision of the Divisional Court.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In its decision on this issue, the Divisional Court stated:

> It is ... entirely unreasonable to conclude the version code is not, when viewed in context, an "identifying number, symbol or other particular assigned to [any] individual" and that it is not "recorded information about an identifiable individual" within the meaning of ss. 2(1)(c) ... The determination [that the version code does not constitute "personal information"] is therefore quashed.

Given this decision, counsel for the appellant has indicated that he believes it is not now open to his client to argue that the version code does **not** constitute the personal information of his client's patients.

I agree. Accordingly, I find that the requested information constitutes the personal information of individuals other than the appellant.

Once it has been determined that a record contains personal information, section 21 of the Act prohibits the disclosure of this information except in certain circumstances, listed under section 21(1). It is the position of counsel for the appellant that sections 21(1)(a), (d) and (f) are relevant in the circumstances of this rehearing. These sections state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a)

There is no doubt that a version code is a record to which individual patients are entitled to have access. Accordingly, the application of this section in the circumstances of this rehearing turns on whether it can be said that the appellant's patients "consented" to the disclosure of this information.

Counsel for the Ministry submits that consent must always be in writing. Moreover, she maintains that there can be no consent if the individual who received the medical treatment is not the individual to whom the personal information, the version code, relates. Counsel for the Ministry did not elaborate on her position vis a vis the factual situation in this case in which, as admitted by the Ministry, the individuals who received the service are, in fact, the persons named on the health card.

Counsel for the appellant does not maintain that the patients explicitly consented in writing to the disclosure of their version codes. He does, however, advance two arguments in support of his assertion that his clients' patients can be said to have consented to the disclosure of their version codes to their physician.

He characterizes his first argument as "technical". He states that according to the language of section 21(1) of the Act, a prior "request" must be in writing but it is not necessary for a prior consent to be in writing. On this basis, he argues that it is reasonable to expect that any patient would agree that in applying for a health card number and receiving a medical service, he or she has consented to the release of the version code to the physician who has provided the medically necessary service.

In my view, I need not decide whether the "prior consent" described in section 21(1)(a) of the Act must be in writing or not. The issue turns on whether the individuals can be said to have consented to the disclosure of the version codes taking into account all of the circumstances of this case.

In this regard, counsel for the appellant submits that if consent need be in writing, this requirement has been met because these individuals have applied for a health card. In order to register for and obtain a health

number, an individual must apply in writing by completing the form entitled "Registration for Ontario Health Coverage".

However, counsel does not explain how completion of this form can be said to constitute consent by the applicant, or future patient, to the disclosure of his or her health card number, including the version code, to a treating physician. Nowhere on this form, or indeed in the appellant's submissions, is there an indication that individuals who complete this form and receive medical services know or ought to know that their health numbers or version codes could be disclosed. The form itself contains no reference to health numbers or version codes. It is difficult to imply a person's consent to the disclosure of information where there is no evidence that the person has any knowledge or understanding of **what** information may be disclosed.

Moreover, as far as counsel's comments about the reasonable expectations of patients regarding disclosure are concerned, I do not think that they can be taken to find "consent" to disclosure within section 21(1)(a) of the Act. A typical patient involved in a "health service transaction" may know and understand that when he or she provides a health care provider such as a physician with a health card number, the information on the card may be disclosed by the physician's office to the Ministry in order that the provider be paid for services rendered. Thus, one might be able to imply consent to the disclosure of the health card information by the physician to the Ministry by virtue of the patient's action in showing his or her card to the health care provider's office staff.

However, I do not believe that the reverse is also true, i.e. that the patient's action as described above can be interpreted as implying consent to the disclosure by the Ministry to the physician of the information on the patient's health card.

Moreover, the Ministry states that the form entitled "Health Number Release" is the document which reflects written consent by a patient to the disclosure by the Ministry of his or her health card number to the health care provider. I agree that this document provides a patient with a means of providing explicit written consent to the disclosure of a health card number and version code by the Ministry to a health care provider.

Accordingly, I find that consent to disclosure cannot be implied in the circumstances of this case. Thus the exception in section 21(1)(a) of the Act does not apply.

Section 21(1)(d)

Counsel for the appellant submits that there are two pieces of provincial legislation which expressly authorize the disclosure of the version codes.

He first points to section 2(2) of the Health Card Numbers and Control Act, 1991 (the "HCNCA") as

supporting this proposition. The relevant portions of this legislation state:

> (1) No person shall require the production of another person's health card or collector use another person's health number.
>
> (2) Despite subsection (1), a person may collect or use another person's health number for purposes related to the **provision of provincially funded health resources to that other person**. In addition, a person who provides a provincially funded health resource to a person who has a health card or health number,
>
> (a) may require the production of the health card; or
>
> (b) may collect or use the health number for purposes related to health administration or planning or health research or epidemiological studies.
>
> [emphasis added]

The term "provincially funded health resource" is defined in section 1 of the HCNCA as:

> ... a service, thing, subsidy or other benefit funded, in whole or in part, directly or indirectly by the Province that is health related or that is prescribed by the regulations.

Counsel maintains that medically necessary services rendered under the Health Insurance Act (the "HIA") satisfy this definition. Thus, he asserts that the HCNCA expressly authorizes the disclosure of the patient's version code, as part of this individual's health number, to treating physicians, such as the appellant. In this regard, he states that the terms "collect" and "use" should be interpreted to mean that the physician may "collect" the information from the Ministry.

The Ministry's position is that this legislation is only relevant to the collection of health card numbers from, and the production of these numbers by, patients, i.e. as recorded on individuals' health cards, to the treating physician. However, she maintains that the HCNCA is irrelevant to the disclosure by the Ministry in response to a request under the Act. According to counsel for the Ministry, merely because physicians have the right to "collect" the version codes in certain circumstances, does not mean that the Ministry is required to disclose this information. Counsel for the Ministry also notes that freedom of information legislation does not apply to the private sector, including physicians.

It could be argued that if a person has a statutory power to collect information from another person, the second person, by extension, has a statutory power to disclose that information. In effect, this is the position of counsel for the appellant. If section 21(1)(d) of the Act did not contain the word "expressly", I might find that argument persuasive. However, given this inclusion, it is my view that the authority to

disclose must be clear and explicit. It is not sufficient that the power may be implied.

In Compliance Investigation Report I90-29P, the following comments were made about the interpretation of the phrase "expressly authorized by statute" as found in section 38(2) of the Act:

> The phrase "expressly authorized by statute" in subsection 38(2) of the Act requires either that specific types of personal information collected be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in a form or in the text of the regulation.

In Order M-292 I applied this interpretation to the phrase "expressly authorizes" as it is found in section 14(1)(d) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent of section 21(1)(d) of the provincial Act. I also adopt this approach in the present case.

This strict interpretation is consistent with one of the fundamental purposes of the Act, namely to protect the privacy of individuals with respect to personal information about themselves held by institutions [section 1(b)]. The power to disclose the version codes under section 2(2) of the HCNCA is **not** explicit, although it may be implied. Thus, this legislation does not contain the requisite express statutory authority for the purposes of section 21(1)(d) of the Act.

Counsel for the appellant next refers to section 38(2)(c) of the HIA as being an additional piece of provincial legislation expressly authorizing the disclosure of the information at issue in this rehearing.

The relevant provisions of section 38 state:

> (1) Each member of the Medical Review Committee, every practitioner review committee, the Medical Eligibility Committee and the Appeal Board and each employee, thereof, the General Manager and each person engaged in the administration of this Act and the regulations shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties pertaining to insured persons and any insured services rendered and the payments made therefor, and shall not communicate any such matters to any person except as otherwise provided in this Act.
>
> (2) A person referred to in subsection (1) may furnish information pertaining to the date or dates on which insured services were provided and for whom, the name and address of the hospital and health facility or person who provided the services, the amounts paid or payable by the Plan for such services and the hospital, health facility or person to whom the money was paid or is payable, but such information shall be furnished only,

...

(c) to the person who provided the service, his or her solicitor or personal representative, the executor, administrator or committee of the person's estate, his or her trustee in bankruptcy or other legal representative;

Counsel's position is that section 38(2)(c) prescribes that a person who provides insured services, like the appellant physician, is entitled to receive information pertaining to the date or dates on which the insured services were provided and for whom. He indicates that this information includes the health number and the version code.

As I stated above with respect to the HCNCA, it is my view that the authority to disclose must be clear and express. It is not sufficient that the power may be implied from the legislation authorizing disclosure.

The Ministry's position is that these provisions of the HIA are discretionary. That is, the exception in subsection (2) states that "A person referred to in subsection (1) **may** disclose ..." Counsel for the Ministry maintains that this provision provides the legal vehicle for the Ministry to submit back to physicians information relating to patient health numbers and version codes which they have provided to the Ministry when submitting Ontario Health Insurance Plan (O.H.I.P.) claims. It does not, in her view, require disclosure of patient version codes to physicians. Thus, it cannot be characterized as legislation expressly authorizing the disclosure of the requested information.

Section 38(2)(c) of the HIA is very unclear with respect to the nature of the information which may be disclosed. This vagueness results from the use of the words "information **pertaining** to". Based on this terminology, it could be argued that section 38(2)(c) does not expressly authorize the disclosure of any information whatsoever.

At best, I think it can be said that section 38(2)(c) only expressly authorizes the disclosure of information which **directly** relates to "information pertaining to the date or dates on which insured services were provided and for whom ..." To say that the health card number and the version code **directly** pertain to the above is expanding the phrase "expressly authorizes" to an unacceptable degree. In my view, health card numbers and version codes are qualitatively different types of information from that enumerated in the statute.

In summary, I find that section 38(2)(c) of the HIA does not expressly authorize the disclosure by the Ministry of the version codes to the appellants. Because of this finding, I need not consider the Ministry's position that any disclosure under this section is discretionary. Accordingly, the exception found in section 21(1)(d) of the Act does not apply to the personal information at issue.

Section 21(3)

Counsel for the Ministry claims that disclosure of the version codes would result in a presumed unjustified invasion of personal privacy pursuant to sections 21(3)(a) and (c) of the Act which state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

Medical History - Section 21(3)(a)

I will first consider the "medical history" issue as set out in section 21(3)(a) of the Act.

The Ministry claims that disclosure of the version code would result in a presumed unjustified invasion of privacy in that it could allow access to a medical or psychiatric history, diagnosis or treatment. Counsel submits that someone who had obtained another individual's invalid health card could request the new version code, and with the correct version code, could then request the medical information relating to this person.

During the rehearing of this matter, counsel for the appellant requested further information from the Ministry to explain, among other things, how and in what circumstances, disclosure of the version codes could allow access to the types of information set out in section 21(3)(a) of the Act.

In response to these questions, counsel for the Ministry provided the appellant and myself with a copy of a document entitled "Request for Personal Information from the Claims Reference File (CREF)". The CREF is a personal information databank held by the Ministry containing, among other things, the following personal information: a patient's health number, name, date of birth, sex and insured medical service history.

The document indicates that CREF information may be obtained through a formal access request under the Act or through a request made to the health insurance division of the Ministry. In both cases, the request must be in writing.

As far as processing CREF requests are concerned, the document notes that the identity of the individual making the request must be verified by comparing the information provided by the requester with the personal information held on the databank. The requesting individual is asked to provide his or her health card number, date of birth, address and any other relevant documentation to establish his or her identity.

The appellant's position is that the version code, in and of itself, does not "relate" to any of the types of information described in the presumption. He submits that knowledge of the version code does not indicate anything about the matters listed in the section. Based on the plain meaning and purpose of the wording of the section, he submits that neither a health number nor the version code falls within the types of information listed in the presumption.

Counsel for the appellant goes on to state that section 21(3)(a) requires that the personal information **itself** relate to the matters set out in the presumption. His position is that the presumption is not satisfied if the personal information could merely be used to obtain **additional** information such as that in section 21(3)(a) of the Act.

The version code is an alpha character and the health number is a 10-digit series of numbers. On its face, this information does not contain information within the categories described in section 21(3)(a).

In order to address the appellant's arguments, it is necessary to recall the basis on which the Divisional Court found that the requested version codes constituted "personal information" within the meaning of section 2(1) of the Act. As I have previously stated, the Court reached this conclusion on the basis that "when viewed in context, [the version code is] an 'identifying number, symbol or other particular assigned to [any] individual'". The Court stated:

> The version code is an alpha character addition to an individual's health card number and **results in a new designation unique to that individual.** Its uniqueness is why the code was developed, at least in part, as a response to fraudulent claims and the need for enhanced card control ... [my emphasis]
> ...
>
> This language does not leave it open to suggest the definition only embraces a number or symbol assigned to an individual that leads to other personal information.

The Court thus appeared to link the requested version codes with the health card numbers and concluded that, in that context, the version code was an identifying number which constitutes personal information. In my view, by including section 2(1)(c) as part of the definition of personal information, the Legislature recognized that such numbers, in and of themselves, constituted personal information, even though there is arguably no "descriptive" information apparent on the face of these numbers.

The inclusion of such numbers in the definition of "personal information" is relevant when considering the argument of the appellant's counsel with respect to the application of section 21(3)(a). While in most cases, it will be necessary for the personal information to contain the actual medical history, etc., of the individual for the presumption to apply, that is not the case for personal information which is an identifying number or symbol. It will always be the case with respect to such information that one has to use the number to access other information. The question then becomes whether the version code, in its context as an addition to a

health card number, can be said to "relate" to the types of medical information described in section 21(3)(a) of the Act.

The word "relates" is defined in Black's Law Dictionary as:

> To stand in some relation; to have bearing or concern; to pertain; to refer; to bring into association with or connection with.

The word "relate" may be contrasted to some of the other terms used in section 21(3) to list the other types of information to which the presumption applies. Sections 21(3)(f), (g) and (h) of the Act use the words "describes", "consists of" and "indicates" respectively. "Describes" means "state the characteristics of". "Consists of" may be defined as "be composed of; have its essential features as specified". "Indicates" may be defined as "make known; show".

In my view, these three terms all describe a closer nexus between the personal information referred to in the first line of section 21(3) and the types of information enumerated in the various subsections. I believe that these terms are used to reflect the type of relationship that the appellant's counsel maintains should exist between the two types of information. That is, that the personal information **itself** must "describe", "consist of", or "indicate" the matters set out in the presumption. In other words, that the personal information is "about" the matters set out in the presumptions.

However, when the term "relates" is used, as it is in section 21(3)(a), there need only be a connection or an association established between the information. This means that, contrary to the position of the appellant, it may be that the information set out in the presumption is, in his words, "additional" information which is related to the personal information in the opening words of section 21(3). This is especially true where, as in this case, the personal information is an "identifying number or symbol".

When one considers the version code, in the same context as the Divisional Court, it follows that one must conclude that the fact that it allows one to obtain access to the information described in section 21(3)(a) is sufficient to establish the application of the presumption.

The appellant maintains that, even adopting the above argument, the Ministry's concerns about a fraudulent cardholder obtaining medical information about another individual are not present in this case as his clients are the physicians who provided medically necessary service for his patient. The physicians seek the version codes in connection with payment for these services.

Previous orders of the Commissioner's office have held that the identity of the requester is not a relevant consideration when determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy (Orders M-96 and P-578).

In Order M-96, former Assistant Commissioner Tom Mitchinson concluded:

> In my view, a requester's status cannot be a relevant factor in determining whether disclosure of personal information will constitute an unjustified invasion of personal privacy. Disclosure of a record under Part I of the Act, is, in effect, disclosure to the world and not just to the requester, and I find that the status of the Federation, or the relationship of the Federation to its members, is not a relevant consideration.

This decision was recently upheld by the Divisional Court in an unreported decision Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al. (20 December 1994), Toronto, 407/93 (Ont. Div. Ct.).

The appellant has also argued that a version code and a health number are not sufficient to enable an individual to access the medical information of another individual. In addition, he submits that the Ministry has failed to establish that the information contained in a CREF file concerns an individual's medical history, diagnosis etc. At most, he states that such information relates to claims processing information.

It is true that providing a health number and version code will not automatically allow an individual to access a CREF file. However, this form of identification is necessary for access to even be considered by the Ministry. Part of the contents of these files, as described by the Ministry, is "an insured's medical service history" which, in my view, constitutes at least a portion of that individual's medical history.

To summarize, the version code can be said to relate to the types of information described in section 21(3)(a) of the Act. As an identifying number, in association with the rest of a health card number, the code can be used to access that portion of the CREF dealing with an individual's medical history. It is possible that an individual who is not the person to whom this information relates may obtain the necessary information to enable him or her to obtain the very sensitive medical information of another person by accessing the CREF databank.

The circumstances of this appeal are unique. Based on the Divisional Court's finding that the version codes, in association with health card numbers constitute personal information, and the previous discussion, I find that disclosure of the requested version codes satisfies the presumption in section 21(3)(a) of the Act.

Counsel for the appellant does not submit that the public interest override in section 23 applies to rebut the presumption. On this basis, I conclude that the release of the version codes would result in an unjustified invasion of the personal privacy of the appellant's patients and the mandatory exemption in section 21(1) of the Act applies.

Because of the manner in which I have disposed of this issue, I need not consider the application of sections 21(3)(c), 21(2) or 18(1)(c) and (d) of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: February 17, 1995
Anita Fineberg
Inquiry Officer