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

# ORDER PO-1701

Appeal PA-980329-1

Ministry of Health

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

## NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Health (the Ministry). The request was for access to information related to the complaint he had made to the Ministry about a particular doctor fraudulently over-billing OHIP.

The Ministry denied access to all of the responsive records under sections 14(1)(d) (law enforcement) and 21 (invasion of privacy) of the Act.

The appellant appealed the Ministry's denial of access.

I sent a Notice of Inquiry to the Ministry and the appellant. The doctor was not notified of this appeal at the request of the appellant. Representations were received from the Ministry only.

## RECORDS:

The records at issue in this appeal consist of :

1. Memorandum dated August 11, 1998
2. Letter to the doctor from the Ministry dated May 29, 1998
3. Submission Review/Approval form
4. Ministry "Bulletin"
5. Memorandum dated May 25, 1998
6. Letter to the doctor from the Ministry dated April 29, 1998
7. Memorandum dated April 2, 1998
8. Letter to the doctor from the Ministry dated April 6, 1998
9. Letter to the doctor from the Ministry dated February 19, 1998
10. "Provider Complaint Report"

During mediation, the appellant stated that he was not seeking access to the patient information contained in Records 2, 6 and 9. Accordingly, this information is not at issue in this appeal.

## PRELIMINARY MATTER:

### LATE RAISING OF DISCRETIONARY EXEMPTION

On January 7, 1999, the Commissioner's office provided the Ministry with a Confirmation of Appeal, indicating that an appeal from the Ministry's decision had been received. The Confirmation also stated that, based on a policy adopted by the Commissioner's office, the Ministry had 35 days from the date of the Confirmation (i.e. until February 11, 1999) to raise any new discretionary exemptions not originally claimed in its decision letter.

The policy referred to in the Confirmation was originally brought to the attention of the Ministry in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions During an Appeal", distributed by the Commissioner's office to all provincial and municipal institutions in January 1993. The objective of the policy is to provide government 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 in the disclosure of information is prejudiced.

The Ministry's decision letter specifies that section 14(1)(d) was applied to "sever the identity of a confidential source in a law enforcement investigation". The Ministry also made note of the exemptions claimed for each record directly on the records, and the only place section 14(1)(d) appears is on Record 10 (the Ministry's recording of the appellant's complaint). In addition, the Mediator's report specifies that section 14(1)(d) was applied only to Record 10. However, the Ministry submits in its representations that section 14(1)(d) applies to all of the records at issue.

The Ministry's representations provide no explanation as to why it did not expand its application of this exemption during the permitted 35-day period, or why I should allow this expanded exemption claim at this late stage of the appeal.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Ontario Court (General Division) Divisional Court in the judicial review of Order P-883 (Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

In the absence of any representations from the Ministry on this issue, and in light of the obvious inherent prejudice which would accrue to the appellant in delaying the adjudication of this appeal if the Ministry is permitted to expand its application of a discretionary exemption claim at this late stage, I find that this is not an appropriate case to allow the Ministry to expand its application of section 14(1)(d). In my view, the Ministry had ample time to review the records and confirm the discretionary exemptions it wanted to rely on as the appeal proceeded through the mediation stage of the process.

## DISCUSSION:

### REASONABLENESS OF SEARCH

During mediation, the Mediator pointed out that Record 8 contains a reference to a letter from the doctor dated March 16, 1998. The Mediator asked the Ministry to search for this record. The Ministry stated that it searched the relevant file but could not locate the record in question.

In cases where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that records do not exist, it is my responsibility to insure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

The Ministry submits that in reviewing the responsive records located in the Ministry's initial search, the Ministry noticed the absence of the letter. An immediate request was made to the Provider Services Branch to locate this missing letter and a second search was initiated by the Manager of the Monitoring and Compliance Unit. The Manager confirmed that this particular investigation file appeared not to be complete and, at the same time, Provider Services Branch assured the Freedom of Information and Protection of Privacy Office that they had received a copy of all that could be located at that time. The Ministry submits that the most probable reason for the absence of the letter from this particular investigation file is a misfiling.

I am satisfied that the Ministry's search for records responsive to the request was reasonable in the circumstances.

## LAW ENFORCEMENT

### Law Enforcement

Section 14 of the Act requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act. [Order P-188]

The requirement in Order 188 that the expectation of harm must be "based on reason" means that there must be some logical connection between disclosure and the potential harm which the institution seeks to avoid by applying the exemption. [Order P-948]

Section 14(1)(d) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

The Ministry submits:

> In applying subsection 14(1)(d) to the entire record at issue, the Ministry seeks to maintain the confidentiality of all sources of the information with respect to the investigation into the billing practices of the doctor named in the appellant's request. Among these sources is the appellant himself, as well as the doctor under investigation.

As discussed above, the only record in respect of which this exemption will be considered is Record 10, the Ministry's recording of the appellant's complaint.

A number of previous orders have found that finding a presumed unjustified invasion of privacy with respect to personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (see Orders M-444, M-613, M-847, M-1977 and P-1263, for example). These orders all determined that finding that a presumed unjustified invasion of privacy applied and denying access to information which the appellants provided to the institutions would, according to the rules of statutory interpretation, lead to an "absurd result". I find that the same reasoning applies in this case, where the Ministry seeks to protect the identity of a confidential source, or information furnished by the confidential source, where the source is the appellant himself.

In my view, to apply section 14(1)(d) to Record 10 (the appellant's complaint) would lead to an absurd result. Accordingly, I find that this exemption does not apply.

Within its submissions on section 14(1)(d), the Ministry also indicates:

> Even though some of the information in the record at issue was originally supplied by the appellant, and parts of it may qualify as his own personal information, to disclose it would nonetheless reveal that, in response to the appellant's complaint, a file on the named doctor has been opened by the Monitoring and Compliance Unit o f the Ministry's Provider Services Branch.
> ...
>
> Furthermore, any evidence at all that an investigation has been undertaken into the named doctor's billing practices would ... violate that doctor's privacy. Thus, even the disclosure

> of document 10 (the appellant's complaint as recorded in the Monitoring and Compliance Unit of Provider Services Branch) would reveal that an investigation file had been opened.

In my view, the fact that an investigation file was opened was revealed to the appellant when the Ministry issued its decision letter indicating that exemptions had been applied. Had the Ministry wished to conceal the fact that an investigation file had been opened, it could have refused to confirm or deny the existence of records under either section 14(3) or 21(5) of the Act. Disclosure of this information at this time cannot violate section 14(1)(d).

**INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

It is the Ministry's position that the entire record at issue contains the personal information of the doctor named in the appellant's complaint. The Ministry argues that because the record owes its very existence to the complaint, and given the nature of the complaint (that the doctor's billing practices were suspect and possibly fraudulent), that the information fits the definition of "personal information" found in section 2(1) of the Act.

Having reviewed the records, I am satisfied that, with the exception of Record 4, they all contain the personal information of the doctor. Records 2, 6 and 9 also contain the personal information of other individuals, but the appellant has confirmed he is not seeking access to this information. Additionally, Record 10 contains the personal information of the appellant.

Record 4 is a Ministry Bulletin regarding revisions to physicians' schedule of benefits and other requirements. This record, despite the fact that it appears in a file documenting the Ministry's investigation of the doctor, does not contain the personal information of any identifiable individual. Because this record does not contain personal information, it cannot qualify for exemption under section 21 of the Act.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the

information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

The Ontario Court of Justice (General Division) (Divisional Court) determined in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption.

The Ministry submits that sections 21(3)(a) (b), (d) and (f) apply to the information at issue. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

As stated above, previous orders have found that applying a presumption to personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (see Orders M-444, M-613, M-847, M-1977 and P-1263, for example). These orders all determined that finding that a presumed unjustified invasion of privacy applied and denying access to information which the appellants provided to the institutions would, according to the rules of statutory interpretation, lead to an "absurd result". Accordingly, I find that none of these presumptions apply to Record 10, which is the Ministry's recording of the appellant's complaint.

With respect to the remaining information, the Ministry argues that section 21(3)(b) applies, because the records document the investigation of the appellant's complaint by the Monitoring and Control Section of the Ministry's Provider Services Branch.

Section 43(1) of the Health Insurance Act provides:

> No person shall knowingly obtain or attempt to obtain payment for or receive or attempt to receive the benefit of any insured service that the person is not entitled to obtain or receive under this Act and the regulations.

Having reviewed the records and the Health Insurance Act, I am satisfied that the remaining records were compiled and are identifiable as part of an investigation into a possible violation of law, specifically the Health Insurance Act, and the presumed unjustified invasion of privacy under section 21(3)(b) has been established. Accordingly, these records are exempt under section 21(1) of the Act.

## ORDER:

1. I find that the Ministry's search for records responsive to the appellant's request was reasonable, and I dismiss this aspect of the appeal.

2. I uphold the Ministry's decision not to disclose Records 1-3 and 5-9.

3. I order the Ministry to disclose Records 4 and 10 to the appellant by sending him a copy by **August 26, 1999**.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: August 5, 1999
Holly Big Canoe
Adjudicator