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

ORDER PO-1933

Appeal PA-000372-1

Ministry of Health and Long-Term Care

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BACKGROUND:

The Ministry of Health and Long-Term Care (the Ministry) provided the following background information which is useful in understanding the discussion that follows:

> Under the *Health Insurance Act* (*HIA*), the General Manager of the Ontario Health Insurance Plan (OHIP) is responsible for executing the administrative functions of the Plan. This responsibility includes the payment of fee-for-service (FFS) claims to eligible physicians in return for the provision of services insured under the Plan. The Act also provides for a process of selected independent review of FFS claims by the Medical Review Committee (MRC).
>
> The *HIA* sets out the grounds under which the General Manager can refer claims to the MRC for review. The MRC can review a provider's claims for the following reasons:
>
> - the service claimed for was not rendered, either in whole or in part,
> - the service was misrepresented, either deliberately or inadvertently,
> - the service provided was not medically/therapeutically necessary, or
> - the service was not provided in accordance with the accepted professional standards and practice.
>
> The MRC is established by the *HIA* as a committee of the College of Physicians and Surgeons of Ontario (CPSO), but is funded by the ministry as a classified agency of the Ontario government. The MRC operates independently of the CPSO and the ministry in reviewing cases referred to it by the General Manager.
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> In making a referral to the MRC, the General Manager specifies the physician in question, the fee codes of concern and the period of time for the review.
>
> During the course of the review, the MRC may have an inspector visit the physician's practice site(s) and review randomly selected medical records. The inspector will then prepare a report for the MRC who may then decide to invite the physician for an interview. At the interview, the MRC reviews a second set of randomly selected medical records. Following this process, the MRC considers all the information gathered and issues a direction to the General Manager. A direction may require that the physician repay funds for inappropriately submitted claims. MRC directions are binding upon the General Manager.
> ...
>
> In 1996, the *HIA* was amended to improve the consequences associated with an MRC direction to repay funds to OHIP. These consequences included the charging of interest on the repayment amount, charging of an additional amount to cover the cost of the review process, and providing the General Manager of OHIP with discretionary authority to release information pertaining to MRC reviews.

NATURE OF THE APPEAL:

The Ministry received a request from the media under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "the number and names of physicians who inappropriately billed the system as identified by the medical review committee; their places of practice; and the amounts they inappropriately billed individually and collectively." In her request, the appellant explained that a 1996 amendment to the *HIA* had intended to make the names of these individuals public, but that there has been no disclosure since the amendment.

The Ministry identified one responsive record. It consists of a chart listing 17 physicians by name, practice location, referral date to the MRC, the starting and finishing time period for the review of these physicians' billings, the date a final Direction was provided by the MRC, the total gross amount of fees recovered, and the recovery amount for post-May 1996 services. The record also lists the total post-May 1996 recoveries and the total gross recoveries of the 17 physicians.

The Ministry issued a decision to the requester, granting access to the total number of physicians who were reviewed by the MRC and the total amount of funds recovered since 1996. The Ministry denied access to the remaining parts of the record on the basis that disclosure would constitute an unjustified invasion of the privacy of the 17 physicians under section 21(1) of the *Act*. The Ministry referred to section 21(1)(d) of the *Act*, and stated that it did not apply because section 18.1 of the *HIA* is discretionary.

The requester (now the appellant) appealed the decision to deny access, and in her letter of appeal raised the possible application of the public interest override in section 23 of the *Act*.

I sent a Notice of Inquiry initially to the Ministry and the 17 physicians identified in the record (the affected persons). I received representations from the Ministry. I also received representations from two affected persons and a lawyer representing the other 15 affected persons. None of the affected persons consented to the disclosure of information relating to them. I then sent the Notice to the appellant, together with a copy of the Ministry's representations and the non-confidential portion of the representations provided by the lawyer representing the 15 affected persons. I received representations from the appellant, which were then shared with the Ministry and the affected persons. The Ministry and the lawyer provided reply representations.

RECORD:

The only information at issue in this appeal is the undisclosed portions of the chart, as described above.

PRELIMINARY ISSUE:

Responsiveness of the Record

In its representations, the Ministry states that the information relating to one of the physicians identified on the record is no longer responsive to the request. The Ministry explains:

> One of the physician's names has been deleted from the original record because an October 2000 amendment to the review period [for that physician], arising from a settlement, changed the review date such that the review period ended prior to May 1, 1996. Information pertaining to reviews involving services prior to May 1, 1996 therefore cannot be released.

The appellant did not respond to the Ministry's position in her representations.

I do not accept the Ministry's position on this issue. At the time the appellant submitted her request, the billing practices of all 17 physicians were under review by the MRC, and the information concerning these physicians was properly identified by the Ministry as being responsive. If the Ministry had decided to disclose the entire record at the request stage, information relating to all physicians, including the one now identified by the Ministry, would clearly have been included as part of this disclosure. Although subsequent actions by the MRC and this physician may have altered the scope of the MRC's review, in my view, these actions have no bearing on the issue of responsiveness to the request under the *Act*.

Previous orders of this Office have established that in order to be responsive, a record must be "reasonably related" to the request. Former Adjudicator Anita Fineberg discussed this issue in detail in Order P-880, and found:

> … The request itself sets out the boundaries of relevance and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevance" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to the request. While it is admittedly difficult to provide a precise definition of "relevant" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I find that the portions of the record relating to the physician identified by the Ministry were "reasonably related" to the request at the time it was made, and that the date of the request is the proper point at which to consider the issue of responsiveness. It is possible that subsequent events may have an impact on a requester/appellant's interest in records or portions of records, and the scope of a request/appeal may be modified during the course of discussions with the requester or actions taken through mediation. However, in the absence of any agreement by a requester/appellant to alter the scope of a clearly worded request, it is reasonable for institutions to assume that any record initially identified as responsive will remain responsive until such

time as the matter has been resolved, either through acceptance by the requester or disposition on appeal.

DISCUSSION:

PERSONAL INFORMATION

The section 21(1) personal privacy exemption applies only to personal information.

In making a determination as to whether the record at issue in this appeal qualifies for exemption under section 21(1) of the *Act*, three issues must be considered:

1. Does the information fall within the scope of the definition of "personal information"?

2. Is the information concerning the 17 physicians "professional" as opposed to "personal"?

3. If the names of the physicians are severed from the record, would this render the remaining information no longer "personal"

Does the record contain "personal information"?

"Personal information" is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including:

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (h) 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;

The Ministry claims that the information at issue in this appeal falls within paragraph (h) of the definition. It submits:

> In the present situation, the records contain the names of the physicians affected. The information requested is about these individuals specifically and therefore does qualify as their "personal information" under [section] 2(1)(h), for the individual's name appears with other information, such as the physician's practice location and gross amount of funds recovered. …

The affected persons submit that the information fits within paragraph (b) of section 2(1), as it is information relating to financial transactions in which an individual has been involved. They point to Orders P-644 and P-778 in support of their position.

The appellant, on the other hand, submits that the information at issue does not qualify as personal information. She argues:

> The Records do not, in fact, deal with "financial transactions in which the individual has been involved". On the contrary, the Records relate to financial transactions that were voided unilaterally and *ab initio* at the instance of the MRC. That is, the request was for Records relating to individuals that had billed amounts that were inappropriate and, subsequently, ordered by the MRC to be refunded. On this basis, the Records do not fall within the class of records that is described under subparagraph (b) of the definition of "personal information" and therefore, do not constitute personal information as defined under Section 2(1) of the *Act*.
>
> In their submissions, the physicians cite *Order P-644* [Tab 2] and *Order P-778* [Tab 3] in support of their position that the Records contain "personal information" as defined in subparagraph (b) of the definition. In both of these appeals, the records in issue relate to payments by OHIP for services rendered where such services were not challenged by the MRC. In other words, the "financial transactions" were not impugned and therefore fall within the definition under the *Act*.
>
> In the matter at hand, there were no "financial transactions" *per se* in that the amounts paid were reversed. The *Shorter Oxford English Dictionary* defines transaction as "the adjustment of a dispute between parties by mutual concession; compromise; hence an arrangement, an agreement, a covenant". In the present appeal, there was no mutual concession, agreement or covenant. Instead, the Records evidence a number of instances where an invalid transaction was rectified.

The lawyer representing the 15 affected persons responded to the above argument by stating:

> A contract which is found to be void *ab initio* never existed. In contrast, a voidable contract existed but was voided at the insistence of one of the parties.
>
> According to G.H.L. Fridman in his text, *The Law of Contract in Canada*, 4th Ed. (Tab 2):
>
> > *A contract induced by fraud is* voidable *at the election of the defrauded party. It is not void* ab initio*; it is liable to be upset.*

> As stated in the original submissions made on behalf of the physicians, none of the physicians in question were involved in fraudulent billings. As stated by Professor Fridman in the above-quoted passage, "even fraudulent transactions are only voidable but not void *ab initio"*.
>
> Here, the physicians submitted billings and the MRC concluded that there should be either a reduction to reflect the fact that the service, although properly billed, was not sufficiently recorded in the physician's records or that the physician's note for the service rendered more accurately reflected a lesser billing code. Where one of these two circumstances existed in the opinion of the MRC, reimbursement was recommended.
>
> The billings submitted by the physician to OHIP were capable of being affirmed or rejected by the Ministry of Health through its agent, the MRC. Thus, the contract between the physician and the Ministry of Health, at very best, was "voidable", but not void *ab initio*.

In my view, whether the improperly billed accounts are void *ab initio* or merely voidable does not itself determine whether the record contains "personal information". Rather, the question is whether or not the information in the record is "about an identifiable individual", and more particularly, whether the information "relates to a financial transaction in which the individual has been involved".

Past orders of this Office have found that physicians' billings to OHIP constitute "financial transactions" and therefore qualify as personal information under paragraph (b) of the definition of "personal information" in section 2(1) of the *Act* (Orders P-1502 and P-1505). The information at issue in the present appeal is the total amount of billings recoverable by the Ministry from the 17 identified physicians listed in the record, in accordance with Directions given by the MRC after completing its post-1996 billings reviews for these physicians. In my view, the fact that the amounts to be recovered were "inappropriately billed" to OHIP does not mean that they are unrelated to a "financial transaction". On the contrary, the billing/payment processes followed by physicians and the Ministry in the normal course of administering the OHIP system are "financial transactions" in which the physicians have been involved and, in my view, the different but related processes used by the Ministry and certain physicians for recovering improperly billed fees is merely another type of "financial transaction". I find that both of these payment-related processes fall within the scope of paragraph (b) of the definition of "personal information".

Personal vs. professional

The appellant argues that the withheld information does not constitute "personal information", because the information was submitted by the physicians in their professional capacities, "in furtherance of their duty to report to the Ministry of Health on the medical services that they provided".

The affected persons disagree, and submit:

> The identity of the physicians and information with respect to reimbursement is personal to them and can be used to unfairly damage their professional reputations. The information arises in the context of an investigation by the MRC, where the ordered reimbursement relates to a difference of opinion as to the appropriateness of particular services and/or the completeness of record keeping. The information requested can be used to unjustifiably impugn the physician's professional capabilities and integrity.

The Ministry submits that, because the record identifies the physicians by name and reflects the findings of the MRC, the information about the identified physicians should be characterized as their "personal information".

Previous decisions of this Office have drawn a distinction between an individual's personal and professional capacity, and found that where information about an individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's "personal information " (see Orders P-721, P-939, P-1318, PO-1772 and Reconsideration Order R-980015).

The present appeal does not deal with a situation where an employee's conduct has been called into question or where there has been an investigation of an employee's conduct. However, the lawyer representing the 15 affected persons argues that this appeal involves an analogous situation:

> A physician who has been identified by the Ministry of Health as having an anomalous billing pattern receives an initial letter advising that the matter has been referred to the MRC and indicating that the physician's billings are under investigation. An "Inspector" is appointed by the Ministry of Health and attends at the physician's office to review a 40-chart sample for each of the codes under review. In the vast majority of cases, the physician is then: "invited" to appear before a panel of the MRC at the College of Physicians and Surgeons. At this meeting, the physician brings 25 additional charts selected by OHIP for each billing code under review. The MRC reviews the charts gathered by the Inspector and the additional charts brought to the interview and reaches a conclusion as to whether a sample of services billed by the physician were:
>
> (i) rendered to the patient; and
>
> (ii) medically necessary
>
> In the vast majority of cases, the physician can demonstrate that the patient was seen on the particular day for which an account was submitted to OHIP. The second issue, medical necessity, sometimes gives rise to a disagreement between

> the Panel members and the physician as to the physician's exercise of judgment in the circumstances of a particular case. As mentioned above, the Schedule of Benefits allows for an exercise of judgement by the individual physician and it does not dictate specific circumstances in which particular medical services can or cannot be rendered by the physician.
>
> For example, the MRC Panel may look at the presenting complaint as recorded by the physician and conclude that the physician ought not to have billed for general assessment, but should have instead billed for an intermediate assessment.
>
> Alternatively, the MRC may agree that service rendered by the physician was appropriate, but may conclude that the physician's documentation should have been more complete and it may therefore direct that the physician reimburse OHIP for a small percentage of his or her billings to reflect the fact that, although the service was properly rendered, the documentation could have been more complete.
>
> After the interview, the MRC issues a Direction. The Direction may include a reduction in fees paid from the higher billing code to the lower billing code or may reduce the fees paid to the physician by a small percentage to reflect their opinion that the record keeping was incomplete. The MRC may also approve all of the physician's accounts for a particular code.

I accept the affected persons' position on this issue, and find that the MRC's review of a physician's billings is comparable to an internal investigation of an employee's conduct. In my view, the fact that the physician is identified by the MRC as having anomalous billings and then required to submit a random selection of charts for review is evidence that the physician's billing practices are being called into question. Although a physician's accounts may eventually be approved by the MRC, by invoking the review process, the MRC is signalling a concern that takes the situation outside the normal billings process. The physicians are no longer simply being reimbursed by OHIP for services rendered in the normal course. Instead, the physicians are being asked to defend the integrity of their billing histories which, in my view, is sufficient to bring this activity outside the parameters of regular professional capacity and within the scope of "personal information" for the purposes of the *Act*.

Impact of severing the physicians' names

The Ministry submits that, because some of the physicians identified in the record come from geographic communities with relatively small populations, these physicians could be identifiable even if their names are severed from the record prior to disclosure.

The appellant disagrees, and submits that:

> … if the Commission finds that the Records contain "personal information" of the Physicians, we would argue that, in any event, the geographical area of practice of the Physicians should be disclosed as there is no evidence in the submissions of any party to show that by disclosing the geographic area in which the Physicians practice, their identities would be revealed.

The appellant refers to Order P-1389 to support her position. In Order P-1389, Adjudicator Donald Hale dealt with an appeal from a request to the then-Ministry of Health for a list of the names and incomes of the ten highest billing general practitioners in Metropolitan Toronto. During mediation of that appeal, the physicians' names were severed, and the only issue was whether the information that remained (ten total billing figures) would allow the physicians to be identified. Adjudicator Hale found:

> In my view, the Ministry's arguments rely on the unproven possibility that there **may** exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified.

The affected persons submit that the facts in Order P-1389 can be distinguished from the present case:

> In Order P-1389, the appellants sought information with respect to the top 10 billers amongst general practitioners in Metropolitan Toronto. Metropolitan Toronto is made of a population base of approximately 3 million people. The adjudicator took notice of the fact that there would be <u>many</u> general practitioners practising in Toronto with the result that disclosure of information requested would not result in the identification of any individual general practitioner within the geographic area of Metropolitan Toronto.
>
> The foregoing is in contrast to this case, where many of the physicians practise in smaller communities, and, in some cases, towns where there would be very few other physicians. For example, one of the physicians in question practises in a Town with a population of only 25,000 ... It is submitted that the adjudicator in this case may also take notice of the fact that, in smaller communities, there will be many fewer physicians (and perhaps only a very small handful) with the result that disclosure of the geographic region may have the effect of identifying a practitioner.

The affected persons point to Order P-644 as a more relevant precedent. In that appeal, former Adjudicator Fineberg dealt with a situation where the record did not contain the names of physicians but did include the total payments made by the Ministry of Health to physicians for epilation of facial hair services provided by these physicians during a specific period. Adjudicator Fineberg found that the records contained "personal information" because the

physicians, although not named in the record, could be identified because of the small number of physicians billing for this type of service.

In reaching her decisions in Order P-644, Adjudicator Fineberg considered the following representations provided by the Ministry of Health:

> The severed information is considered to be the personal information of all physicians where the total number of physicians is less than five. This is in keeping with the Ministry of Health's Policy 3-1-21 of the manual of Corporate Policy Procedures (copy enclosed) regarding small cell amounts and residual disclosures. This policy states the following:
>
> > "When the processing of anonymized personal health information yields tabulations of less than five (5) in which a possibility exists that an individual could be identified, such information will only be released to the 'agency' head or consultant/researcher and will not be included in the statistical report."
>
> The Ministry goes on to state:
>
> > Physicians refer their patients to specialists and the fact that certain specialist [sic] also performed electrolysis was widely known. In addition, this information would be known to patients the specialist has treated. Therefore, these specialists can be identified in the public domain. The fact that there are so few in each speciality performing electrolysis would reveal or infer financial information about the individual specialists and must be severed under section 21 of the Act.

No similar representations were provided by the Ministry in this appeal.

I am not persuaded by the arguments put forward by the Ministry and the affected persons on this issue. Unlike Order P-644, the information at issue in this appeal pertains to physicians in general, not physicians practicing in a particular specialized field. In addition, neither the Ministry not the affected persons have provided me with specific evidence or argument sufficient to establish a reasonable likelihood that any of the 17 physicians would be identified by disclosing the geographic location of their practice. While I agree with the affected persons that a practice location with a population of 25,000 will include fewer physicians than a larger urban centre, even a city of this smaller size would have a significant number of practicing physicians, certainly more than the figure of "less than five" that the Ministry used as the basis for anonymizing information at the time it provided representations in Order P-644. I also find it relevant that the Ministry did not provide submissions regarding the application of its Policy 3-1-21 (or updated equivalent) in dealing with the anonymization issue in this appeal.

Accordingly, I find that if the physicians names are removed from the record, the remaining information would no longer be "about any identifiable individual", and therefore would not constitute "personal information" for the purposes of the *Act*.

INVASION OF PRIVACY

Because the appellant's request includes the names of the physicians, I will now determine whether disclosure of the record, with the names included, would contravene section 21(1) of the *Act*.

General

Where an appellant seeks access to the personal information of another individual, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In this case, the appellant claims that section 21(1)(d) applies. The Ministry and the affected persons claim that section 21(1)(f) is also applicable. These sections read:

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

In order for section 21(1)(d) of the *Act* to apply, there must be an express statutory authority for disclosing the information (Order P-1635).

Previous orders of this Office have found that the interpretation of the words "expressly authorizes" in section 21(1)(d) of the *Act* closely mirrors the interpretation of similar wording in section 38(2) (see Orders M-292, M-1154 and PO-1640). Investigation Report I90-29P, established the interpretation of section 38(2) as follows:

> The phrase "expressly authorized by statute" in subsection 38(2) of the *Act* requires either that specific types of personal information 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.

The appellant relies on section 18.1(18) of the *HIA* in support of her position that statute of Ontario expressly authorizes disclosure of the requested information. Section 18.1(18) of the *HIA* reads:

> The General Manager may make public the following information relating to the matter under review:
>
> 1. The name and specialty, if any, of the physician or practitioner.
>
> 2. The municipality or geographic area in which the physician or practitioner practiced his or her profession when the services giving rise to the decision of the applicable committee were provided.
>
> 3. The municipality or geographic area in which the physician or practitioner practises his or her profession when the information is made public.
>
> 4. A description of the situation under review. The description must not identify, or enable a person to identify, a patient.
>
> 5. The amount, if any, that the physician or practitioner is required to pay to the Plan.
>
> 6. Such other information as may be prescribed.

In rejecting the application of section 21(1)(d), the Ministry submits:

> The preamble to [section 18.1(18) of the *HIA*] specifically states that the General Manager "may" make public the enumerated information. The term "may" is used rather than the imperative term "shall" to indicate that the General Manager has discretion in disclosing the information as listed. As a matter of statutory interpretation, [the Ministry] submits that a statute must first be given the simple meaning of words …
>
> In interpreting legislation, it is presumed that the legislature uses language carefully so that words are first given their most clear and literal interpretation. Accordingly, it is the submission of [the Ministry] that s. 18.1(18) of the *HIA* permits the <u>discretionary</u> disclosure of the General Manager of the information listed in s. 18.1(18).
>
> The Ministry further submits that disclosure under s. 18.1(18) of the *HIA* cannot be said to be expressly authorized. Since this disclosure is at the discretion of the General Manager, the [Commissioner's Office] may not order release of information which is under the discretion of another individual, so granted under specific legislation. In this instance, the *HIA* authorizes the General Manager the

> discretion to disclose information under s. 18.1(18). The [Commissioner's Office] therefore must not consider releasing information which is subject to discretion under another piece of legislation. Order PO-1232].

In Order MO-1179, Senior Adjudicator David Goodis dealt with a similar issue in deciding whether sections of Ontario Regulation 265/98 made under the *Police Services Act* expressly authorized the disclosure of certain information to a requester pursuant to section 14(1)(d), the equivalent of section 21(1)(d) found in the *Municipal Freedom of Information and Protection of Privacy Act*. In applying the direction set out in Investigation Report I90-20P, Senior Adjudicator Goodis found:

> Since none of the sections of the Regulation cited by the appellant applies, section 14(1)(d) has no application. Even if I were to find that one or more of these sections applied, in my view, section 14(1)(d) would not apply in any event, because these disclosure powers granted by the Regulation are discretionary rather than mandatory in nature. The Regulation is designed to permit chiefs of police or their designates to exercise discretion in each case and to disclose personal information only where they deemed it appropriate in the circumstances. In some cases, even if the conditions for disclosure in the Regulation are met, the chief or designate may determine that the invasion of privacy resulting from disclosure outweighs any benefit and decide not to disclose. If section 14(1)(d) were interpreted in a way that the personal information must be disclosed in the event the conditions in sections 4 or 5 of the Regulation were met, this would undermine the discretionary nature of the power, the intent of the Regulation and one of the purposes of the Act, as set out in section 1(b), to protect the privacy of individuals with respect to personal information about themselves held by institutions.
>
> (See also Orders MO-1264 and PO-1923)

I agree with Senior Adjudicator Goodis' approach and will apply it here. Section 18.1(18) of the *HIA* provides the General Manager with a discretionary power to disclose certain information regarding a physician whose billing practices has been reviewed by the MRC. In this case, it appears that the General Manager has not exercised his or her discretion to release this information. Because the process under section 18.1(18) is discretionary and not mandatory, for the reasons outlined in Order MO-1179, I find that section 21(1)(d) of the *Act* does not apply in this appeal.

Section 21(1)(f)

The Ministry and the affected persons submit that disclosing the names of the physicians, together with the rest of the information contained in the record, would constitute an unjustified invasion of the physicians' personal privacy.

Sections 21(2) and (3) 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 institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that 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) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 21(3)

The Ministry and the affected persons both claim that the record, including the names of the physicians, falls within the scope of the presumptions in sections 21(3)(b) and (f) of the *Act*. The Ministry also relies on the section 21(3)(d) presumption. These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information:
>
> (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;

Turning first to section 21(3)(f), the Ministry submits:

> The Ministry submits that disclosure of the amount over-billed by the physician, then subsequently re-paid is tantamount to the disclosure of information describing the finances and financial activities of the physicians concerned. Also included in the record are direct indications of billing information with a high degree of billing accuracy. [The Commissioner's Office] state in an order that such transactions are "payment to a physician [which] is further characterized as a "financial transaction" and as such "financial transactions are a sub-component of financial activity" [Order P-1502]. The presumption under s. 21(3)(f) therefore applies to the information requested, for the record describes the financial activity of the individuals in question.

The affected persons also rely on Order P-1502, and submit that the record describes the individual physicians' finances because it identifies the amount that each physician was required to reimburse the Ministry. They argue that "[t] he fact that the physician was required to reimburse OHIP for these billings, does not alter the fact that reimbursement information constitutes "financial activity"."

The appellant disagrees. She submits:

> In Order P-1502 …, the Commissioner found that Records revealing billings that were paid to particular physicians fall into this exemption. However, in the matter at hand, the information requested is not income in the hands of the Physicians. Rather, these are funds that were ordered to be returned. Accordingly, the Records in this appeal can be distinguished from those described in Order P-1502 on the basis that the funds in Order P-1502 formed part of the income of the physicians in question.
>
> The [appellant] denies that the mere fact that funds have to be repaid established any indicia as to the Physicians' finances, income, etc. Presumably, the Records do not reveal whether the Physicians had any difficulty in repaying the ordered amounts. It is submitted that any inference that can be drawn is too remote to establish a presumption under s. 21(3)(f) of the *Act*.

In responding to the appellant's representations on this issue, the affected persons submit:

> Whether or not the information requested by the appellant is "income" in the hands of the physicians is irrelevant to the considerations under the *Act*. The *Act* contemplates that personal information includes "information relating to financial transactions …". The *Concise Oxford Dictionary* defines "transaction" as "a piece of esp. commercial business done". Whether or not the physician was ultimately required to repay certain amounts to the Ministry of Health does not detract from the fact that a financial transaction occurred. Thus there is nothing to distinguish this case from the finding by the Commissioner in Order P-1502 that payment to a physician for services rendered is properly characterized as a "financial transaction".

In Order P-1502, Commissioner Ann Cavoukian considered the application of section 21(3)(f) in the context of billings submitted to the then-Ministry of Health by physicians for services rendered under the provincial health system. Commissioner Cavoukian first determined that payments made to physicians for services rendered are properly characterized as "financial transactions" for purpose of the definition of "personal information", and that a "financial transaction" of this nature is a sub-component of "financial activity", a term used in section 21(3)(f). In my view, the Commissioner's decisions in Order P-1502 were based on the characterization of the relationship between the Ministry and physicians in the administration of the OHIP system, not on the accuracy or inaccuracy of a particular "financial transaction". I accept the position put forward by the affected persons in this regard. In the present appeal, I

find that disclosure of the amounts recovered from the physicians in the context of their billings would similarly reveal the physicians' "financial activity" and as such would constitute a presumed unjustified invasion of privacy under section 21(3)(f) of the *Act*.

COMPELLING PUBLIC INTEREST

Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I have found that disclosure of the record, with the physicians' names included, would constitute a presumed unjustified invasion of privacy under section 21(3)(f). The same record with the names severed contains no personal information and does not qualify for exemption under section 21(1). As a result, it is only the physicians' names that are subject to consideration under section 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records; and second, this interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)*, (1999), 118 O.A.C. 108 (C.A.), leave to appear refused (January 20, 2000), Doc. 27191 (S.C.C.).

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The appellant refers to Order PO-1880-I in support of her argument that there is a compelling public interest in disclosure of the requested information. She states:

> In this appeal, an individual sought to correct his OHIP billing records after his physician had been convicted of fraudulently billing the Plan for services that were not provided. The decision sets out a proposed framework on how to correct the Ministry's records in this instance.
> …
>
> To follow up on the concerns of the Commissioner, it is submitted that where [the Ministry] has reliable information showing that certain physicians have submitted erroneous billings for payment, it is of paramount importance that the patients of those physicians are aware that their physician has been found to have submitted inaccurate billings.
>
> In light of the fact that the MRC process involves a review of only a sample of the Physician's billings, it is important to note that the unreviewed billings of the Physicians may also contain further errors. However, the patients in question would have no reason to suspect that their records are inaccurate.

In response, the Ministry submits:

> The Ministry submits that there is no compelling interest to disclose the individual's names in the circumstances of this request. The Ministry is mindful that expenditure of public funds must be open to scrutiny. The question in this case is whether identifying individuals and their specific sums of monies inappropriately billed to the Plan achieves this public accountability. In the circumstances, following medical review Committee investigations, the Ministry submits that there is no compelling public interest in disclosure of the responsive record which clearly outweighs the purpose of the exemption, the protection of personal privacy.
>
> It is the Ministry's submission that disclosure of the number of physicians who have been directed to repay funds and the total amount of repayment fulfils the Ministry's public accountability obligations. Inclusion of the names and linking specific physician names to individual repayment amounts does not further accountability.

I concur with the Ministry's submissions. In Order PO-1880-I, Commissioner Cavoukian was dealing with a case where the information relating to a particular individual was inaccurate due to the fraudulent billing practices of the physician in question. The information at issue in the present appeal does not involve fraudulent billings. Rather, it deals with physicians who were found by the MRC, for a variety of reasons short of fraud, to have erroneous billings and were requested to remit funds back to the Ministry.

The *HIA* has established a scheme to review irregular billings, and has created a quasi-independent body, the MRC, to undertake this review function. That statute also gives the General Manager of the OHIP Plan discretion to release information pertaining to the MRC

reviews, including the identity of physicians. I accept that there is a public interest in the disclosure of information relating to the administration of the MRC review process, and that this public interest has been addressed by the discretionary disclosure scheme established under the *HIA*. As a result of decisions made by the Ministry and the provisions of this Order, the appellant will be provided with almost all of the information concerning the results of the post-May 1996 reviews undertaken by the MRC, including the geographic locations of the individual practicing physicians and the billing amount recovered from each of these 17 physicians by the Ministry. The only information not disclosed is the names of each physician, which I have determined would constitute a presumed unjustified invasion of their privacy. Given the extent of information provided to the appellant, and in deference to the public accountability system established by the *HIA*, I am not persuaded that the public interest in disclosing the names of the physicians is sufficiently "compelling" to meet the requirements of section 23 of the *Act* , and even if it were, that any such compelling public interest would be sufficient to outweigh the purpose of the section 21 personal information exemption claim in the circumstances.

Therefore, I find that the names of the physicians contained in the record do not fall within the scope of section 23 of the *Act* and should not be disclosed.

ORDER:

1. I order the Ministry to disclose the record to the appellant with the exception of the portions highlighted on the copy of the record enclosed with the Ministry's copy of this order, by **September 5, 2001** but no later than **August 31, 2001**.

2. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant.

Original signed by: July 30, 2001
Tom Mitchinson
Assistant Commissioner