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

ORDER PO-2204

Appeal PA-030152-1

Ministry of Health and Long-Term Care

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 Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- The amounts that the top 10 billing general practitioners/family doctors in Toronto billed OHIP [Ontario Health Insurance Plan] in the most recent fiscal year.
- The fee codes of the top 10 items that each individual doctor billed most frequently and a brief description of those codes.
- The gross amount paid in the most recent fiscal year next to each of the 10 fee codes for every one of the 10 doctors.

The Ministry identified one responsive record. Before responding to the requester, the Ministry notified the 10 doctors whose information appears on the record (the affected parties) pursuant to section 28 of the *Act*, seeking submissions on whether the information should be disclosed. Six affected parties responded to the Ministry's notice, all of them objecting to disclosure.

The Ministry then issued a decision letter to the requester, granting access to the total fees paid to each of the 10 doctors. The Ministry denied access to the fee codes, the itemized fee payments, and billing service descriptions. The Ministry took the position that this information constitutes "personal information" of the individual doctors, and qualifies for exemption under section 21(1) of the *Act* (invasion of privacy). The Ministry identified the presumption against disclosure in subsection 21(3)(f) in support of the exemption claim.

The requester, now the appellant, appealed the Ministry's decision.

The appeal was streamed to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry, initially, setting out the issues and seeking representations. The Ministry responded with representations. I then sent the Notice to the 10 affected parties, five of whom also provided representations. Finally, I sent the Notice to the appellant along with the non-confidential portions of the Ministry's representations. The appellant chose not to submit representations.

RECORDS:

The record consists of a six-page document titled "Top-10 Billing GPs in Toronto: Fiscal Year 2001/02 – Sorted by After Threshold Payments."

The severed information consists of listings of the top ten medical procedures most frequently billed for each of the 10 doctors, including the fee schedule code for each procedure, the number of times each procedure was billed, the total fee paid for each type of procedure, and a brief description of the procedure itself. The record does not identify the doctors by name.

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information that qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an **identifiable** individual, including information related to financial transactions in which the individual has been involved [paragraph (b)].

The record at issue in the appeal does not identify any individual by name. Accordingly, the undisclosed information can only qualify as "personal information" if I am persuaded, based on the content of the record itself and the evidence and arguments put forward by the Ministry and the affected parties, that there is a reasonable expectation that the individual can be identified from the information contained in the record (Order P-230).

Ministry's representations

The Ministry submits:

> In respect of section 2(1)(b) respecting financial transactions of the individual, it was found in Order P-316 that the reasonable expectation of identification is based on a combination of information sought and otherwise available. Further, in respect of section 2(1)(c), respecting identifying numbers or particulars, Order P-651 held that those who are familiar with the circumstances in the records may be able to identify the individual in question. And, in Order P-1208, the requester's link to the publicity surrounding the information being requested cannot be rendered non-identifying merely by severing the subject's name. As regards section 2(1)(h) there is found to be personal information where the individual is identifiable to the requester. Mere deletion of the subject's name does not make the requested information not "personal information" about the identifiable individual (Order 27). Notwithstanding that the individual's name is not being sought by the requester, the uniqueness of the financial transaction information from OHIP discloses a medical practice profile that can identify the individual.
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> ...
>
> The information sought 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's Policy 3-1-21 of the Manual of Corporate Policy Procedures regarding small cell counts and residual disclosure. This Policy states the following: "when the processing of anonymized personal health information yields tabulations of less than five in which a possibility exists where an individual person could be identified, such information will only be released to an agency head or consultant/researcher and will not be included in the statistical

> report". Further, specialists can be identified in the public domain, where smallness in number is capable of revealing or inferring financial information identifying the individual. As quoted in Order P-644, former Commissioner Tom Wright, in Order P-230, stated "if there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under section 2(1) as personal information". The Inquiry Officer in Order P-644 agreed with this approach and adopted it for purposes of that Appeal.

Affected parties' representations

Affected party 1 points to the statement in Order P-230, and submits that there is a reasonable expectation that he/she could be identified through disclosure of the record because he/she is the only general practitioner who specializes in a particular area of medicine in the Toronto area. Affected party 1 submits that the area of specialization distinguishes him/her from other colleagues and peers and makes him/her identifiable through the billing profile.

Affected party 2 also relies on the statement in Order P-230, and submits that he/she is identifiable from the listing of the top ten services that he/she performs because he/she is one of the few general practitioners in the Toronto area that works in this field of medicine. Affected party 2 provides a detailed description of his/her practice, including normal hours of work and work habits that, in his/her view, are well known to colleagues, peers and patients, and would lead to a reasonable expectation that he/she would be identified through disclosure of the withheld portions of the record.

Affected party 3 submits that, based on the billings listed on the record, his/her area of specialization would be clear. According to affected party 3, once this area of specialization is identified, the combination of other services listed on the record would render the information identifiable to him/her because this combination is "extremely specific".

Affected party 4 submits that the information contained in the record could be used, in combination with other information, to identify his/her practice, due to the small number of doctors having the same billing profile, and the fact that he/she is one of only two doctors in Toronto who perform a specific procedure identified in the records.

Affected party 5 submits generally:

> I have reservations about this release of Private Information. My main concern is the negative connotation this implies when released to the news media. In my [specified number] of years as a physician in Ontario, this publication of information on physicians income has always implied that the said physician was dishonest in his/her reimbursement from the Ministry. I feel that if the person/persons seeking this information feels that there has been some wrong doing that aspect should be reassessed prior to release of information. Some unpleasant occurrences have happened to physicians in the past because of the release of this information.

Finding

The comments of former Commissioner Tom Wright in Order P-230 are the starting point for any discussion of "personal information" where no individual is named or otherwise specifically identified on the face of a record. In order to satisfy the definition of "personal information" in these circumstances, there must be a reasonable expectation that an individual can be identified from the information in the record.

Former Adjudicator Irena Pascoe dealt this issue in Order PO-1880. The record at issue in that appeal was the top ten items that the top billing general practitioner in Toronto billed for, the number of times the doctor billed those ten items and a brief explanation of those items. Adjudicator Pascoe found that the information contained in the record did not fall within the definition of "personal information". She reviewed a number of previous orders and made the following findings:

> In Order P-644, former Adjudicator Anita Fineberg considered the Ministry's policy which dealt with "small cell counts". In that order the information at issue was the classification of physicians practising certain specialities who also performed electrolysis. In this regard, the Ministry made the following submissions:
>
> > 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*.
>
> Former Adjudicator Fineberg considered the comments made by former Commissioner Wright in Order P-230 and applied that approach in Order P-644. She concluded that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals.
>
> In another appeal (Order P-1137), however, which again dealt with the Ministry's "small cell count" policy, she took a different approach to the issue. She stated:
>
> > In Order P-230, Commissioner Tom Wright stated:
> >
> > > If there is a reasonable expectation that the individual can be identified from the information,

> then such information qualifies under subsection 2(1) as personal information.

Based on the submissions of the Ministry and adopting the test set out above, I concluded in Order P-644 that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. Accordingly, I concluded that the information at issue was personal information.

In this appeal, the Ministry argues that the numbers constitute personal information solely on the basis that they are in groups of less than five. Unlike the information provided in Order P-644, the Ministry has not indicated how disclosure of the fact that there was one hemophiliac in a particular province who contracted HIV and who made a claim could possibly result in the identification of that individual. For example, for one of the provinces, the number of hemophiliac HIV infected individuals is the same as the number of such individuals who have filed a claim against the province. This number has been disclosed because it is greater than five.

In my view, disclosure of the information in Record 135 could not lead to a reasonable expectation that the individuals could be identified. Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 has no application. Record 135 should be disclosed to the appellant in its entirety.

In Order P-1389, Adjudicator Donald Hale dealt with another appeal involving the Ministry. In that appeal the information at issue consisted of the total billing amounts relating to the ten highest billing general practitioners in Metropolitan Toronto. In considering the Ministry's representations on the issue of whether the requested information was about "identifiable individuals", Adjudicator Hale stated:

> The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.
>
> ...

> 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 from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an **identifiable** individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the *Act* [original emphasis].

With respect to the current appeal, although the Ministry refers to a number of previous orders and correctly identifies the conclusions reached in those cases, the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, although the Ministry refers to Order P-316 and states that "the reasonable expectation of identification is based on a combination of information sought and otherwise available", it does not provide any evidence as to what the "otherwise available" information might be. Similarly, in referring to Orders P-651, P-1208 and 27, the Ministry does not provide any specific information as to how it would be possible to identify the affected person given the circumstances of this particular case.

Although the Ministry takes the position that the record at issue discloses a "medical practice profile" that can identify the affected person, the Ministry does not provide any further information or explanations in this regard. I have carefully reviewed the record at issue. Although it does contain a brief description of each of the top ten medical services that were rendered, these descriptions are derived from the OHIP Schedule of Benefits and are very general in nature. Even though the record contains information relating to the top ten services that were rendered, as well as the number of times these services were rendered, based on the material before me, I am not persuaded that the affected person can be identified from this information.

Also, although the Ministry is relying on its "small cell count" policy, it is not clear from the Ministry's representations as to how this policy is applicable in the circumstances of this case. The only information provided by the Ministry is that "there may be less than five providers of abortion services in a geographical area". The Ministry does not, however, provide any evidence to show that this is in fact the case in the Toronto area, which is the subject of the request. Moreover, neither the Ministry nor the affected person has provided any evidence as to the likelihood of there being a small number of physicians in the Toronto area performing the types of services and/or the number of services that are identified in the record at issue.

> Unlike in Order P-644, where former Adjudicator Fineberg concluded that, given the small number of physicians that performed certain types of services and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals, the Ministry and the affected person have not provided me with a sufficient basis on which to reach this conclusion in the present appeal.

In the circumstances of the current appeal, I find that that the Ministry's representations, on their own, are not sufficient to establish a reasonable expectation that any individual could be identified through disclosure of details associated with their billings. The Ministry's representations are virtually identical to those submitted in Order P-1880. Like this previous appeal, the Ministry relies on its "small cell count" policy, but fails to explain how it applies in the circumstances of this case. Unlike Order PO-1880, the Ministry does not even identify the type of practice specialty that could be subject to the "small cell count" policy. It is significant to note that Adjudicator Pascoe rejected the Ministry's position regarding the application of the "small cell count" policy for physicians providing abortion services on the basis that there was "no evidence as to the likelihood of there being a small number of physicians in the Toronto area performing the types of services and/or the number of services" identified in the record at issue in that appeal. Adjudicator Pascoe's decision was upheld on judicial review by the Divisional Court and the Court of Appeal [*Ontario (Attorney General)* v. *Ontario (Information and Privacy Commissioner)* [2002] O.J. No. 4300 (C.A.)].

Therefore, I must turn to the content of the record itself, as well as the representations provided by the various affected parties, in order to determine whether specific billings information for the 10 listed doctors could reasonably be expected to identify any individual doctor.

Five affected parties did not provide representations in response to the Notice of Inquiry. I have reviewed the portions of the record relating to these doctors and I am not satisfied that there is a reasonable expectation that any of them can be identified from the information about their billings that is contained in the record. Accordingly, I find that the information relating to these five doctors is not about an identifiable individual and, therefore, does not qualify as "personal information" under section 2(1) of the *Act*.

I have reached the same conclusion for affected parties 2, 3, 4 and 5.

Affected party 5's representations do not point to any basis for linking the information in the record to him/her. In my view, the generalized representations provided by this affected party are not sufficient to render the information identifiable, and I find that the information concerning affected party 5 does not qualify as "personal information" under section 2(1).

Affected parties 2 and 3 both argue that the nature of their practices, as reflected in the billings, is specific enough to identify them. The primary focus of both of these doctor's practices is the same. It is a field of medicine that is, by its very nature, performed by a wide range of physicians in Toronto. As far as the other billings entries for these two doctors are concerned, I

am not persuaded, based on the representations of affected parties 2 and 3, that they would establish a profile unique to these doctors so as to render the information identifiable. In the case of affected party 2, one of the types of medical service described in his/her representations in support of the section 2(1) argument would not appear to be discernable from the record itself, and the various billings descriptions for both doctors would appear to represent the types of services provided by many doctors in the Toronto area during the course of any year. I am advised by the Ministry that the particular billing code identified by affected party 3 as rendering his/her information identifiable is a code that appears on the billing records of a significantly greater number of doctors in the Toronto area than the small cell count policy adopted by the Ministry. For all of these reasons, I find that the information relating to affected parties 2 and 3 is not about an identifiable individual and, therefore, does not qualify as "personal information" under section 2(1).

Affected party 4's area of practice is comparable to the affected party in Order PO-1880, and the record relating to this doctor is highly similar to the record that was disclosed in that appeal. Having considered the representations provided by affected party 4, and for the same reasons articulated by Adjudicator Pascoe in Order PO-1880, I am not persuaded that there is a reasonable expectation that this doctor can be identified from the information relating to him/her contained in the record. Although affected party 4 maintains that only two doctors in the Toronto area bill for a particular procedure included in his/her billing profile, I am advised by the Ministry that this billing code appears on the billing records of a significantly greater number of doctors in the Toronto area than the small cell count policy adopted by the Ministry. Accordingly, I find that this information is not about an identifiable individual and, therefore, does not qualify as "personal information" under section 2(1).

I have reached a different conclusion regarding affected party 1. This doctor practices in a highly specialized field, as reflected in both the record and his/her representations. As stated in the representations, he/she is the only doctor in Toronto providing this particular specialized service. Following the reasoning applied by Adjudicator Fineberg in Order P-644, I find that, given the small number of general practitioners who incorporate this area of specialization into their practice and the fact that the procedures outlined on their billing information would reveal this specialized practice, there is a reasonable expectation that the disclosure of the information related to affected party 1 would render him/her identifiable. Unlike the situation in Orders P-1137, P-1389 and P-1880, I am persuaded based on the evidence in this appeal that information in the public domain or in the general practitioner community could be linked to the information relating to affected party 1 in order to make a connection between a particular billing information and the specific doctor. Accordingly, I find that disclosing information about affected party 1 would reveal information relating to financial transactions in which this individual has been involved and, therefore, this information qualifies as "personal information" under paragraph (b) of the definition in section 2(1).

INVASION OF PRIVACY

Section 21(1)

Once it has been determined that a record contains the personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The Ministry claims that section 21(1)(f) applies to the circumstances of this appeal.

Section 21(1)(f) reads:

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

Section 21(3)

Section 21(3) of the *Act* lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Ministry has relied on the "presumed unjustified invasion of personal privacy" in section 21(3) (f), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

Representations

The Ministry submits:

> … OHIP treats the amount paid to a physician as his or her personal, financial information. The [Commissioner's office] has confirmed that physician OHIP billing records fall within this definition (I96-119P).
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> …
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> [D]isclosure of the [sic] as well as the frequency of the top ten items of the Toronto GP/FP top OHIP biller, is tantamount to the disclosure if it is information describing the finances and financial activities of the individual. It thus

> constitutes a presumed unjustified invasion of privacy of the individual from which the relationship between service volumes and financial information of service providers can be extrapolated.
>
> Therefore, the Ministry submits that disclosure of the information must be presumed to be a violation of privacy.

Affected party 1 submits:

> … The information in the Record relates to fees paid in respect of services rendered, which amounts were dependent on the number of services rendered. The Record therefore contains information with respect to income and the financial history and activity of the Affected Party.
>
> It is submitted that the Record describes the Affected Party's income. The information contained in the Record relates directly to monies billed and paid by the Ministry for medically necessary services which were rendered to patients of the Affected Party. The Record makes it possible for anyone to identify the amounts that the Affected Party was paid by the Ministry for the fiscal period 2001/2002, which constitutes the Affected Party's income for that year. The presumption under s21(3) therefore applies and accordingly, the Record should not be released.
>
> It is further submitted that the record describes the financial activity of the Affected Party. As noted by Commissioner Cavoukian in Order P-1502, information which would reveal a physician's billing history or profile is "financial activity" and therefore disclosure of records which contain this information would constitute an unjustified invasion of personal privacy. The Record at issue describes the Affected Party's finances and financial activity because it reveals the Affected Party's billing history and profile for the fiscal year 2001/2002. The Record describes financial activity between the Ministry and the Affected party in that it speaks to the transactions of billing and payments for services rendered and should therefore not be disclosed.

Findings

In Order P-1502, Commissioner Ann Cavoukian considered the application of section 21(3)(f) in the context of billings submitted to the Ministry of Health by physicians for services rendered under the provincial health system. Commissioner Cavoukian found that information that would reveal a physician's billing history is "financial activity", and that disclosure of records that contain this information would constitute a presumed unjustified invasion of privacy under section 21(3)(f). She stated:

> Although there are similarities between the physician billings and billing details for services provided by individuals under the terms of a consulting contract, in

> my view, the personal information contained in the records at issue in this appeal is more accurately described as a component of the "income" or "assets" of these individuals, two terms that are also used in section 21(3)(f). Accordingly, I find that disclosure of this information would constitute a presumed unjustified invasion of the personal privacy of these individuals under section 21(3)(f) of the *Act*

This reasoning applies equally to billing information relating to affected party 1. This information is the same type of information that was at issue in Order PO-1502, and I accept the arguments made by the Ministry and affected party 1 that its disclosure would reveal affected party 1's income as contemplated by section 21(3)(f).

Therefore, I find that disclosing the withheld portions of the record that relate to affected party 1 would constitute a presumed unjustified invasion of privacy under section 21(3)(f), and this information qualifies for exemption under section 21(1) of the *Act*.

In Order PO-1880, the Ministry relied on section 20 and 17(1)(b) as alternative exemptions for the information at issue in that appeal. These exemptions were not claimed here, although they were raised either directly or indirectly by affected parties 2 and 4 in their representations.

Adjudicator Pascoe rejected both of these exemption claims in Order PO-1880, and I find that her reasoning would be applicable to the portions of the record that do not contain "personal information" in this appeal.

As far as section 20 is concerned, Adjudicator Pascoe found:

> I have determined above that the information at issue in the current appeal is not about an **identifiable** individual. Accordingly, since the information at issue would not serve to identify the affected person, its disclosure cannot reasonably be expected to threaten the safety or health of this individual. I also find that the information at issue cannot be linked to any individual facility or any other person involved in the provision of abortion services. Similar to the findings made in Order PO-1747, even though I too accept that individuals and groups on both sides of the abortion debate have been subjected to threats, intimidation, and acts of violence, in my view, any link between disclosure of the requested information and the harms outlined in section 20 is exaggerated. The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person within the meaning of section 20. Accordingly, I find that the requested information is not exempt under section 20 of the *Act*.

I find that Adjudicator Pascoe's reasoning would apply to the arguments put forward by affected party 4 in this appeal. Affected party 2's arguments concerning section 20 are more general in nature, based on a perceived increase risk to safety for doctors at high income levels. I have determined that affected party 2 is not identifiable, so therefore he/she is not subject to the type

of risk of harm outlined in section 20. In addition, I am not persuaded that the generalized nature of the risk of harm argued by affected party 2 would be protected by section 20 in any event.

As far as section 17(1)(b) is concerned, Adjudicator Pascoe did not accept the argument that disclosing billings records would result in similar information no longer being provided to the Ministry. She points out: "To the contrary, the Ministry's representations appear to acknowledge that physicians are required to keep the information at issue and provide it to the Ministry upon request". I can see no reason why the same finding would not apply in this appeal, given the fact that it involves the identical type of record that was at issue in Order PO-1880.

In summary, I find that the information in the record relating to affected party 1 qualifies for exemption under section 21(1) of the Act and should not be disclosed. The information relating to the other nine doctors does not qualify as their "personal information" and therefore cannot qualify for exemption under section 21(1) and should be disclosed.

ORDER:

1. I uphold the Ministry's decision not to disclose the information relating to affected party 1.

2. I order the Ministry to disclose the information relating to the remaining nine doctors by **December 19, 2003** but not before **December 15, 2003**. The Ministry is encouraged to contact this office if there is any confusion regarding the identity of affected party 1.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant pursuant to Provision 2.

Original signed by: November 14, 2003
Tom Mitchinson
Assistant Commissioner