Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3105

Appeal PA11-235

Ministry of Health and Long-Term Care

August 21, 2012

Summary: The appellant made a request to the ministry for a copy of the rules governing the assessment of OHIP claims. The ministry denied access to the record on the basis of the discretionary law enforcement exemption in section 14(1)(i) and the economic interests exemptions in section 18(1)(c) and (d). During the inquiry, the ministry also raised the discretionary law enforcement exemption in section 14(1)(l). The adjudicator finds that section 14(1)(l) applies to exempt the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 14(1)(l).

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Health and Long-Term Care (the ministry) for access to information relating to the "Rules for determining the Validity and Eligibility of claims and the Medical Rules for the Assessment of OHIP claims."

[2] The ministry's decision stated the following, in part:

> …
>
> Medical rules for determining the validity and eligibility of claims are embedded in the OHIP medical claims processing system and are part of the application program code. They are not documented.
>
> A document containing 1,363 pages that sets out the computerized medical rules of assessment of OHIP claims was located. Access to the document is being denied pursuant to sections 18(1)(c), (d) and 14(1)(i) of the *Act*.

[3] During mediation, the appellant confirmed that he is appealing the ministry's decision to withhold the document containing the medical rules of assessment of OHIP claims. The mediator relayed this information to the ministry. The ministry subsequently issued a supplementary decision stating that there are no records containing the medical rules for determining the validity and eligibility of claims as "the rules are embedded in the actual processing system." It further advised that access was denied to a 1,363 page document which contains the computerized medical rules for assessment of OHIP claims, pursuant to the discretionary exemptions in sections 14(1)(i) (law enforcement) and 18(1)(c) and (d) (economic interests) of the *Act*.

[4] During my inquiry into this appeal I sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[5] In this order, I uphold the ministry's decision.

RECORDS:

[6] The record at issue consists of a 1,363 page document setting out the computerized medical rules for assessment of OHIP claims.

ISSUES:

A. Should the ministry be allowed to claim the application of section 14(1)(l) in addition to the other exemptions claimed?

B. Does the discretionary exemption at section 14(1)(l) apply to the record?

C. Was the ministry's exercise of discretion proper?

DISCUSSION:

A. Should the ministry be allowed to claim the application of section 14(1)(l) in addition to the other exemptions claimed?

[7] In its representations, the ministry submitted that it was claiming the application of section 14(1)(l) in order to exempt the information from disclosure, despite not having referred to it at the request or mediation stage.

[8] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[9] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period. [*Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).]

[10] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the Ministry and to the appellant (Order PO-1832). The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period (Orders PO-2113 and PO-2331).

[11] The ministry submits that raising this additional exemption would not prejudice the appellant as its arguments in support of this exemption are similar to its arguments

in support of section 14(1)(i).[1] The ministry submits that the appellant would not be required to address any substantively new arguments other than those upon which the ministry originally based its decision to deny access. In addition, the ministry submits that its arguments in regard to section 18(1)(c) and (d) are premised on the potential for fraudulently submitted claims negatively impacting the government's economic and financial interests. Lastly, the ministry argues that its submissions with respect to section 14(1)(l) would not result in any additional denial of information or severing of information sought by the appellant.

[12] The appellant did not address the issue of whether the ministry should be allowed to claim the new discretionary exemption. However, the appellant did make representations on its application to the record at issue.

[13] Based on my review of the ministry's representations, I find that the appellant would not be prejudiced by the ministry's late-raising of the discretionary exemption in section 14(1)(l). The ministry's claim of section 14(1)(l) did not result in additional information being severed from the record. Further, I agree with the ministry that its arguments on the application of section 14(1)(l) are similar to those respecting section 14(1)(i). Finally, I note that the appellant had two opportunities during the inquiry process to make representations on the application of section 14(1)(l) to the record and did, in fact, make extensive representations on its application.

[14] Based on the circumstances in this appeal, I will consider the application of section 14(1)(l) to the record.

B. Does the discretionary exemption at sections 14(1)(l) apply to the record?

[15] The ministry submits that section 14(1)(l) applies to exempt the record at issue from disclosure. This section states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

[16] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[1] The ministry's argument for the application of section 14(1)(i) is that the record could potentially be used to facilitate the submission of fraudulent/improper claims for payment.

[17] Where section 14(1) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[18] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

[19] The ministry argues that section 14(1)(l) applies as disclosure of the information could reasonably be expected to facilitate the commission of unlawful acts in the event that unscrupulous individuals were to exploit its contents for financial gain or to electronically compromise the claims payment system.

[20] The ministry submits that the disclosure of the record would permit knowledgeable/sophisticated individuals to use the technical contents of the record, in concert with other publicly available information, to unlock the mechanism designed to give effect to payment rules/restrictions contained in the Schedule of Benefits and to undermine the integrity of the OHIP claims payment system. The ministry states:

> In other words, individuals could use this information to undermine and manipulate the integrity of the OHIP claims payment system, either by circumventing or exploiting systemic vulnerabilities or gaps in the claims payment system (thereby preventing the system from detecting fraudulent/improper claims for payment), or by compromising the integrity and functionality of the system through electronic sabotage or computer attack.
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> …
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> As described above, the record at issue constitutes a 1,363 page document containing an index and a plain language description of all of the applicable Medical Rules used by the OHIP claims payment system for the assessment of OHIP claims. The index contains information about each Medical Rule, as well as the codes that appear to physicians where the Medical Rule is engaged in the event that the system denies a claim for payment or reduces the payment amount of the claim. The remainder of the document contains a plain language description of each and every existing Medical Rule utilized by the OHIP claims payment system, as well as a description of the associated computer coding that is used to

> operationalize that particular Medical Rule within the electronic claims payment system.

[21] The ministry notes that apart from the record at issue, there are other publicly-available informational resources to assist physicians with the submission of claims to OHIP and to provide physicians with the knowledge required to conduct the business/billing portion of their practice. The ministry submits that when these related information resources are combined with the record at issue, the potential vulnerabilities of the OHIP claims system are revealed and could be exploited. The ministry states:

> The revelation of those vulnerabilities could further allow physicians and others to modify their claims for payment in order to exploit such vulnerabilities and/or circumvent existing Medical Rules payment security features.

[22] In support of its argument, the ministry provided confidential representations which discussed particular vulnerabilities present in the OHIP system and gave concrete examples of how the information in the record at issue could be used given the inherent vulnerabilities.

[23] The appellant submits that the "Medical Rules" already exist in the public domain in one form or another, be it verbal, paper or electronic. The appellant questions the reasonableness of the possible harm if the record at issue "simply represents a compendium of the information that is already in the public domain." The appellant submits that the ministry has not substantiated its claim of harm and provides his evidence that the harm alleged would not ensue. The appellant states:

> I have discussed this issue at length with Sergeant Scott James, Unit Commander of the OPP Health Fraud Investigations Unit. Sergeant James noted that of the 28, 216 health care professionals in the province of Ontario, only 25 are investigated annually for potential fraud, and only 26 doctors have been convicted of OHIP related fraud/overbilling between 1998 and 2007. Further, Sergeant James noted that health care professionals who commit fraud are "of the mindset to commit fraud", and that these people, in fact know the rules, and that they make a conscious decision to circumvent the rules.

[24] The appellant submits that people who are intent on committing fraud will do so with or without the Medical Rules. The appellant argues that neither the OPP nor the ministry use the Medical Rules to detect fraud, but rather rely on basic accounting principles to detect mathematically impossible claiming practices.

[25] In reply, the ministry submits that it disputes the appellant's claim that the record at issue exist in the public domain. The ministry states:

> Although the payment rules/preconditions stipulated in the Schedule of Benefits are publicly available to physicians (as are accompanying descriptions of those payment rules/preconditions in other public documents, such as the Online Resource Manual for Physicians), the Medical Rules, themselves, and the audit/verification computer coding forming part of the OHIP Claims Payment Systems are not publicly available.
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> …
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> Put another way, the Schedule of Benefits specifies "what" the rules/preconditions are for physicians who are submitting specific claims for payment to OHIP. These rules/preconditions are available to all physicians so as to ensure physicians have all of the relevant information they require when submitting claims for payment to the OHIP system. By contrast, the disclosure of the Medical Rules detailed in the record at issue reveal "how" the OHIP claims payment system is programmed to empirically validate and audit claims submitted to the system in order to prevent the payment of improperly submitted or fraudulent claims. For additional details regarding this distinction, the ministry refers the Adjudicator to the confidential portions of its previous representations.

[26] The ministry also disputes the evidence provided by the appellant relating to Sergeant James and states:

> Ministry staff spoke directly with Sgt. James in light of the Appellant's representations in this appeal. With reference to his written notes of the telephone conversation with the Appellant…, Sgt. James was unable to verify several of the statements attributed to him in the Appellant's submissions. In particular, Sgt. James indicated to Ministry staff that he told the Appellant he had no specific knowledge of the "Medical Rules" or of the specific document at issue in this appeal. In addition, Sgt. James indicated that he did not provide, nor did he agree to confirm, the statistics quoted by the Appellant in his submissions regarding the number of physicians charged or convicted of offences related to OHIP fraud/overbilling.
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> …

> With regard to his written notes, Sgt. James indicated to Ministry staff that he told the Appellant that he was unable to provide an opinion when asked by the Appellant to comment on whether or not providing access to the record at issue would eliminate or reduce OHIP-related fraud. Sgt. James further indicated that he told the Appellant that he had no specific knowledge of the record at issue, and that he was unable to speak specifically to the process used by the Ministry to determine improper billing by physicians.

[27] Lastly, the ministry disputes the appellant's position that the ministry does not rely on the Medical Rules to detect fraud. The ministry states:

> As noted above, the record at issue provides a detailed description of the coding embedded within the OHIP Claims Payment System and the measures employed by the Ministry in order to operationalize the payment rules/ preconditions stipulated in the Schedule of Benefits in order to verify/audit improperly submitted claims. Although OHIP fraud may also be detected as a result of "basic accounting principles" to which the Appellant refers, the Ministry maintains that the Medical Rules, themselves, form a fundamental part of how the Ministry detects and prevents the payment of improper claims by physicians and others to OHIP.

[28] The appellant was given an opportunity to respond to the ministry's reply representations and he did so by providing an example of his particular knowledge of the Medical Rules which he deduced through his own practice. Finally, the appellant makes an argument on the need for transparency in the OHIP claims system and says:

> As such, I maintain that the government's responsibility to provide a transparent and accountable framework to which care providers, billing agents and billing agencies may adhere by far outweighs any theoretical risk that someone who is intent on committing fraud will utilize the information contained within the "Medical Rules".

[29] Based on my review of the parties' representations and the record at issue, I find that the ministry has established that disclosure of the record at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime pursuant to section 14(1)(l) of the *Act*. I find the basis for my decision in the concrete examples provided by the ministry in its confidential representations which provided detailed and convincing evidence of the possible harm which would result from the disclosure of the record. These representations could not be shared with the appellant as they contained the substance of the record claimed to be exempt.

[30] I accept that the inherent vulnerabilities in the OHIP Claims System could be exploited with the disclosure, knowledge and use of the information at issue. And, accordingly, I find that disclosure of the information at issue could facilitate the commission of an unlawful act or hamper the control of crime. I accept the appellant's argument that doctors and others are able to discern some of the Medical Rules through their daily practices. However, I find that the appellant has not established that the Medical Rules are in the public domain such that the harm set out in section 14(1)(l) is not a distinct possibility. Accordingly, I find the record at issue to be exempt, subject to my finding on the ministry's exercise of discretion.

C. Was the ministry's exercise of discretion proper?

[31] The sections 14(1)(l) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[32] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[34] In support of their exercise of discretion to apply section 14(1)(l), the ministry states that it considered:

- The potential for misuse and abuse of the record to undermine the integrity of the OHIP claims payment system via the submission of targeted fraudulent and problematic claims.
- The possible public interest that would be served in disclosing the record to the appellant.
- The potential financial impact on both the ministry and the province in the event of the possible harms.

- Availability of other publicly available sources of information relating to the submission of OHIP claims.

[35] The appellant submits that the ministry has acted in bad faith in the claim of irrelevant exemptions.

[36] Based on my review of the record and the ministry's representations, I find that the ministry's exercise was based on proper considerations and the appellant has not established that the ministry has acted in bad faith. The ministry properly considered:

- the wording of the exemption and the interests sought to be protected
- whether the appellant had a compelling need to receive the information
- whether disclosure would increase public confidence in the operation of the ministry
- the nature of the information and its sensitivity

[37] Accordingly, I uphold the ministry's exercise of discretion to withhold the record from disclosure pursuant to section 14(1)(l).

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: August 21, 2012
Stephanie Haly
Adjudicator