

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3200

Appeal PA12-194

Ministry of Health and Long-Term Care

May 14, 2013

Summary: The requester sought information relating to the performance of panniculectomy surgery in Ontario. The responsive record consisted of a list of physicians billing OHIP for this type of surgery in certain fiscal years. Based on previous orders dealing with OHIP billing history, the adjudicator finds that the information in the record, in conjunction with publicly-available information about the OHIP fee schedule, reveals personal information of the physicians. The information is exempt under the mandatory personal privacy exemption in section 21(1), and the public interest override does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 21(1), 23.

Orders and Investigation Reports Considered: Orders P-1502, P-1505.

OVERVIEW:

[1] This appeal concerns a request made to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the performance of panniculectomy surgery in Ontario.

[2] Panniculectomy surgery, involving the excision of excess fatty tissue and/or skin in the abdominal region, is an insured service under the Ontario Health Insurance Plan (OHIP) when certain criteria are met and with prior authorization of the ministry. The

requester initially sought his own health records relating to the denial of OHIP funding for an out-of-country panniculectomy performed on the requester. He appealed the denial to the Health Services Appeal and Review Board, and through this process obtained general information about the performance of panniculectomy surgery in Ontario – namely, the number of claims made in respect of the billing code associated with the surgery and the number of physicians who billed this code in the fiscal years 2010/11 and 2011/12 (to February 1, 2012).

[3] The requester then asked the ministry to provide the following additional information about these surgeries: the names of the physicians who performed the surgeries; and specific details of each surgery performed, including what was performed in each surgery, the size of the pannus and part of the stomach removed, and any complications in the surgery.

[4] The ministry issued a decision advising that the requested details of the surgeries are not collected or maintained by the ministry; this information, it said, would only be available in the physicians' surgical records. The ministry denied access to the names of the physicians who performed the surgeries on the basis of section 21(1) (personal privacy), with reference to the presumption in section 21(3).

[5] The requester (now the appellant) appealed the ministry's decision to this office.

[6] During the mediation stage of the appeal process, the appellant indicated that he does not take issue with the ministry's assertion that it does not collect or maintain information on the details of surgeries performed by physicians.

[7] The appellant continued to seek access to the names of the physicians who performed the specified surgery during the fiscal years 2010/2011 and 2011/2012, claiming a public interest in the disclosure of this information pursuant to section 23 of the *Act*. He indicated that the physicians' salaries are not at issue in this appeal.

[8] In response to the narrowed request, the ministry created a record that lists, by name, the physicians who billed OHIP for payment based on the service code associated with the surgery during the fiscal years 2010, and 2011 to January 27, 2012. The ministry maintained, however, that the record is exempt from disclosure pursuant to the mandatory personal privacy exemption in the *Act*.

[9] The parties were unable to resolve the appeal through mediation and the appeal moved to the adjudication stage of the process. As part of my inquiry, I requested and received submissions from the ministry and the appellant.

RECORDS:

[10] The record at issue in this appeal consists of the ministry's list of physicians who billed OHIP for payment based on the service code associated with panniculectomy surgery for the fiscal years 2010, and 2011 to January 27, 2012.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the record?
- C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

Issue A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act* as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(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.

[12] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[13] Section 2(3) also relates to the definition of personal information. That section states:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[14] This office has stated that to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[15] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

Representations

[16] The ministry submits that the names of physicians contained in the record constitute the personal information of the physicians within the meaning of section 2(1)(h) of the *Act*. It argues that, as the value of the service code associated with the surgery can easily be found on a public website, the disclosure of the names of physicians who billed OHIP for payment based on this service code would reveal "other

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

personal information” about them – namely, what they were paid by the ministry for submitting claims in the relevant years. Therefore, according to the ministry, the physicians’ names in this context constitute their personal information within the meaning of the *Act*.

[17] The appellant’s representations do not directly address the issue of whether the physicians’ names amount to their personal information in the context of this appeal. While the bulk of the appellant’s representations will be addressed later in this order, it is relevant to note here that the appellant repeats his intention to seek access to the “operational details” (details of the surgeries) from physicians who have performed this surgery, while specifying that he does not seek access to either the physicians’ names or their salaries. The appellant thus proposes that physicians’ names be redacted from the record in order to avoid the “privacy issue” that is the basis for the ministry’s refusal to disclose.

[18] As noted above, the ministry previously advised, and the appellant accepted, that specific details regarding the surgeries performed by physicians are not collected or maintained by the ministry. For this reason, during mediation, the appellant’s request was narrowed, with the agreement of both parties, to the names of the physicians who billed OHIP for payment based on the service code associated with the surgery during the specified fiscal years. The Mediator’s Report clearly describes the record at issue in the appeal, stating that it consists of a list of physicians, and simply that. The appellant was sent a copy of the Report and invited to notify the mediator if it contained any errors or omissions. Since neither he nor the ministry objected to the report, the appeal was transferred to adjudication.

[19] It is evident that the appellant believes that the ministry may have more records about the details he seeks, but that is not an issue in this appeal. The only issue in this appeal is whether the appellant should be given access to the list of physicians’ names, as described above.

[20] Because of the appellant’s submissions, and other comments made verbally to staff about the scope of the issues, I sent him a letter requesting that he clarify whether he still seeks access to the record at issue in this appeal. The appellant confirmed in a phone conversation with staff that he still seeks the list of physicians’ names.

[21] The question to be determined under this heading is whether those physicians’ names constitute personal information of the physicians within the meaning of the *Act*.

Analysis

[22] This office has considered, in a number of past orders, the issue of whether a physician’s OHIP billings constitute personal information of the physician. In each of

these orders, the adjudicator concluded that OHIP billings that can be connected with specific physicians constitute personal information of those physicians, and that this information is protected from disclosure based on the presumption of unjustified invasion of privacy set out in section 21(3) of the *Act* (this presumption is discussed later in this order).

[23] In Order P-1502, the adjudicator (in this case, the Commissioner) considered whether a copy of a list of physicians who prescribed the home oxygen program for patients during a specified period was personal information of the named physicians and thus protected from disclosure under section 21(1). The record consisted of information including the names of prescribing physicians and the numbers of initial and renewal claims made by them under this program. The adjudicator noted that as physicians are required to conduct a patient assessment prior to prescribing or renewing a claim for home oxygen, and as the amount paid by OHIP for an assessment is available as a matter of public record, it was possible to determine with a reasonable degree of accuracy the physicians' billing history from the information contained in the record. Thus the adjudicator found that a payment to a physician for services rendered is a "financial transaction" within the meaning of section 2(1)(b) of the *Act*, making it personal information of the physician. It was also noted that this conclusion is in line with previous findings of this office in IPC Compliance Investigation Report I96-119P and Order P-778.⁴

[24] In Order P-1505, the adjudicator followed the reasoning in P-1502 to find that OHIP records setting out the amount of claims paid for a specified service code to a particular billing number describe financial transactions within the meaning of section 2(1)(b) of the *Act* and thus constitute personal information of the physician linked to that billing number.⁵

[25] In all these cases, OHIP billing information connected to a particular physician was considered to be the personal information of the physician within the meaning of section 2(1)(b) of the *Act*.

[26] Applying the principles established in prior orders, I find that disclosure of the names of physicians who have billed OHIP for panniculectomy surgery in the specific years in question would reveal an amount paid to them by the ministry. This qualifies as "personal information" as it relates to financial transactions in which they have been

⁴ In Compliance Investigation Report I96-119P, the IPC found that OHIP billings constitute "financial transactions in which the individual has been involved," meeting the definition of personal information contained in section 2(1)(b) of the *Act*. In Order P-778, the IPC held that a list of the names of all Ontario physicians and the corresponding laboratory tests ordered by each of them constitutes personal information of the physicians, given the direct link between the number of lab tests ordered and payments received by physicians from OHIP.

⁵ See also Order PO-2204.

involved, or discloses "other personal information" about them, within the meaning of section 2(1)(h).

Issue B. Does the mandatory exemption at section 21(1) apply to the record?

[27] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[28] Neither party has argued that any of the exceptions in paragraphs (a) to (e) applies to the record. I find that the only exception that might apply to the record is paragraph (f), which provides for an exception to the mandatory exemption if disclosure would not constitute an unjustified invasion of personal privacy.

[29] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[30] If any of paragraphs (a) to (h) of section 21(3) applies, disclosure of the record is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁶

[31] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.⁷

[32] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).⁸

Representations

[33] The ministry submits that the record at issue falls within the presumption at section 21(3)(f) of the *Act*. This section reads:

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

⁷ Orders PO-2267 and PO-2733.

⁸ Order P-99.

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information ...

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness

[34] The ministry submits that the record at issue falls within the presumption at section 21(3)(f) because it describes a physician's income and financial activities. The ministry asserts that the exemption does not require that the information constitute the totality of the individual's income or activities; rather, any portion of an individual's income or an aspect of an individual's financial activities will suffice. Therefore it argues that disclosure of the record, which demonstrates that the physicians were paid at least once by the ministry for the specified surgery, combined with publicly available information about the amount actually paid by the ministry for the surgery, would reveal a portion of the physicians' income or an aspect of their financial activities (namely, their billing activity), amounting to disclosure of their income or financial activities within the meaning of section 21(3)(f) of the *Act*.

[35] The ministry did not address the application of the criteria in section 21(2).

[36] The appellant did not make submissions on whether disclosure of the information at issue is covered by a presumption in section 21(3), or whether any of the criteria in section 21(2) apply. As indicated above, his representations address his desire to gain information about the "operational details" from doctors that have performed panniculectomy surgery. The record at issue in this appeal does not contain any operational details, and the only decision for me to make is whether disclosure of the names of physicians would be an unjustified invasion of their privacy.

Analysis

[37] In the IPC orders canvassed above, where physicians' OHIP billings were found to be information relating to financial transactions of physicians, and thus personal information of the physicians, this office went on to exempt this information from disclosure based on the presumption of unjustified invasion of privacy at section 21(3)(f) of the *Act*.

[38] In Order P-1502, an OHIP payment to a physician, characterized as a financial transaction within the meaning of section 2(1)(b) of the *Act*, was found to be a sub-component of the physician's "financial activity." Thus a listing of these transactions for a specified period amounted to a billing history that described financial activities of the physician within the meaning of section 21(3)(f) of the *Act*. The adjudicator found that the presumption of unjustified invasion of personal privacy applied to exempt the record from disclosure.

[39] The same reasoning was applied in Order P-1505 for OHIP records setting out the amounts of claims paid for a specified service code to a particular billing number. The record was exempt from disclosure based on the presumption at section 21(3)(f), as disclosure would reveal the physician's financial activities – namely, his billing history.

[40] In these cases, OHIP billing information found to be "information relating to financial transactions" of a physician within the meaning of section 2(1)(b) of the *Act* was then found to be subject to the presumption contained in section 21(3)(f) because it described the individual's "financial activities."

[41] In the appeal before me, the most that would be revealed by disclosure of the record is that the named physicians billed OHIP at least once in the relevant years for the surgery in question. None of the above cases considered whether disclosure of a single transaction describes an individual's "financial activities" for the purpose of the section 21(3)(f) presumption. I have some doubt about whether this information is equivalent to the "billing history" that was found in the above cases to be covered by the section 21(3)(f) presumption. For the same reason, I also have some doubt about whether disclosure of a single transaction "describes an individual's income" within the meaning of section 21(3)(f), as argued by the ministry.

[42] I have decided it is unnecessary to come to a firm conclusion about whether the section 21(3)(f) presumption applies, because even if it does not, there are no factors under section 21(2) that favour disclosure of the information.

[43] As I have indicated, the appellant's representations do not squarely address disclosure of the record at issue. Although he stated in his representations that the names should be "redacted" (on the mistaken assumption that the record contained "operational details"), he has since indicated that he wishes to have access to the names.

[44] Section 21(2) lists relevant circumstances that might either favour disclosure, or weigh against disclosure. On review of the material before me, I do not find any of the factors favouring disclosure listed there applicable to this appeal. There is nothing before me establishing that disclosure of the list of physicians is desirable for any of the reasons listed in that section. Because none of the factors favouring disclosure apply, I cannot be satisfied that such disclosure would not be an unjustified invasion of personal privacy.

[45] Before leaving this section, I wish to acknowledge that it may be curious that a simple list of names of physicians who perform a type of surgery should be an unjustified invasion of their privacy. Indeed, it is evident that many physicians wish to have their area of expertise known, and even advertise this fact. Information about a physician's activities, therefore, is often publicly known, and not sensitive. In this case,

however, the information about physician's activities is based specifically on their OHIP billings, and this kind of information has been treated as "personal information" under the *Act*.

Issue C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 21(1) exemption?

[46] Section 23 states:

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.

[47] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[48] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.⁹ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.¹⁰

[49] A public interest does not exist where the interests being advanced are essentially private in nature.¹¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹²

[50] Any public interest in *non*-disclosure that may exist also must be considered.¹³ A significant public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling" and the override will not apply.¹⁴ A compelling public interest in disclosure must also clearly outweigh the purpose of the established exemption claimed in the circumstances of the appeal.

⁹ Orders P-984, PO-2607.

¹⁰ Orders P-984 and PO-2556.

¹¹ Orders P-12, P-347 and P-1439.

¹² Order MO-1564.

¹³ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹⁴ Orders PO-2072-F and PO-2098-R.

Representations

[51] The ministry submits that the public interest override in section 23 does not apply to the record at issue. It argues that there is no apparent public interest in the identity of physicians who have billed OHIP in the last two years for the specified service code. The ministry notes that if there is a public interest in the identity of physicians in Ontario who can perform this type of surgery (as opposed to the subset of those physicians who have billed OHIP for this service in the past two years), this interest can be satisfied by seeking the information directly from the College of Physicians and Surgeons of Ontario. The ministry argues that the appellant's interest is of a private, rather than public, nature and section 23 does not apply to override the application of section 21.

[52] The bulk of the appellant's submissions are focused on the public interest in disclosure of information about the performance of panniculectomy surgery. The appellant states that his goal in pursuing this appeal is to ensure that other patients do not suffer needlessly because of lack of access to timely medical care, as the appellant asserts he has. He submits that access to information is necessary to "expose and bring accountability" to our provincial health care system. The appellant cites decisions of the Supreme Court of Canada and the Health Services Appeal and Review Board in support of his position that the medical services he received do not meet standards established in case law.

[53] As noted above, the appellant in his representations seeks access to information that is not at issue in this appeal, including information relating to decisions of the Health Services Appeal and Review Board to deny the appellant's request for funding for panniculectomy surgery performed out of country, and "operational details" of panniculectomy surgeries performed by Ontario physicians during the past two fiscal years. The appellant indicates that he requires this information in order to compare the types of surgeries performed by Ontario physicians with the type of surgery for which he sought and was denied funding by OHIP. The appellant also submitted a number of documents relating to his dealings with the Health Services Appeal and Review Board, including his original request for funding made to the ministry, letters from various physicians in support of his application for funding and correspondence between the appellant and the ministry concerning his application.

Analysis

[54] This appeal concerns whether the ministry properly denied access to the record based on section 21(1) of the *Act*. Having found that the record contains personal information of the physicians and that the mandatory personal privacy exemption in section 21(1) applies, the remaining question is whether there is a compelling public interest in disclosure that overrides the exemption.

[55] In his representations, the appellant does not directly address the question of public interest in disclosure of the record at issue; rather, his public interest arguments are both broader and narrower in scope. The broader public interest argument concerns the importance of openness and transparency to ensure the effective provision of health care in our public system. A decision of the Supreme Court of Canada invalidating Quebec's prohibition on private health insurance¹⁵ is cited in support of this broader argument. The narrower argument concerns the importance of disclosure of information relating to the appellant's own matter before the Health Services Appeal and Review Board (the Board). The appellant cites a decision of the Board (unrelated to his own), in which the Board found that abdominoplasty is an insured service under OHIP,¹⁶ to contrast with the appellant's experience seeking OHIP funding for his panniculectomy surgery performed out of country. The appellant appears to argue that disclosure of records relating to his matter before the Board is necessary to bring accountability to the Board's decision-making processes.

[56] Neither type of argument addresses the question of public interest in disclosure of the record at issue in this appeal. The appellant has not shown that there is a public interest in disclosure of the names of physicians who have billed OHIP for performance of panniculectomy surgery in the past two years. At most, the appellant has demonstrated that he has a private interest in this information because he believes it will assist him in gathering other information he believes to be relevant in an ongoing dispute between the appellant and the Board.

[57] I also accept the ministry's submission that any public interest in the information contained in the record can be satisfied by contacting sources that make similar information publicly available, including the College of Physicians and Surgeons of Ontario and the physicians who provide these specialty services themselves, as they generally appear to advertise their expertise in this area. In the absence of any evidence of a compelling public interest in the specific information at issue in this appeal, section 23 does not apply to override the application of the personal privacy exemption. This analysis is also consistent with the application of section 23 in the past orders of the IPC concerning OHIP billings considered above.

[58] In conclusion, I find that the record at issue in this appeal is exempt under section 21(1) of the *Act* and the public interest override does not apply.

¹⁵ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

¹⁶ *H.B. v. Ontario (Health Insurance Plan)*, 07-HIA-0360 (June 11, 2008).

ORDER:

I uphold the ministry's decision to deny access to the record at issue in this appeal.

Original signed by: _____
Sherry Liang
Senior Adjudicator

_____ May 14, 2013