Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3960-R

Appeal PA14-596

Order PO-3617

Ministry of Health and Long-Term Care

June 4, 2019

Summary: This order addresses a request for reconsideration of Order PO-3617 as it applies to one physician, Dr. A.B. The record at issue, created in response to an access request made under the *Freedom of Information and Protection of Privacy Act* by a journalist, sets out the total dollar amounts paid annually to the top 100 OHIP billers, their names, and their medical specialties, for the years 2008-2012. The ministry initially disclosed the dollar amounts and most of the specialties, but withheld the physicians' names and some of the specialties under the personal privacy exemption at section 21(1) of the *Act*. In Order PO-3617, the adjudicator found that: (1) the record does not contain personal information, and as a consequence, section 21(1) does not apply, and (2) there is a compelling public interest in the disclosure of the withheld information in the record that would clearly outweigh the purposes of this exemption if it applied. The ministry was ordered to disclose the record in its entirety to the appellant. The adjudicator's order was upheld by the Divisional Court and the Ontario Court of Appeal, and an application for leave to appeal to the Supreme Court of Canada was dismissed.

One of the doctors listed in the record then requested a reconsideration of Order PO-3617 as it applies to him/her, on the basis that s/he did not receive notice of the appeal before the IPC. The request for reconsideration is denied.

Statutes and Regulations Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 2(3), 21(1) and 23.

Orders and Investigation Reports Considered: Orders PO-3617, PO-2225 and MO-3684-I.

BACKGROUND:

[1] This order disposes of a request for reconsideration made by one of the doctors listed in a record containing the top 100 Ontario Health Insurance Plan (OHIP) payment recipients for the years 2008-2012. The appellant, a journalist, submitted a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to a record of the top 100 OHIP billers for each of the five most recent years such data is available, with a breakdown of the dollar amount billed, medical specialty and names of billing doctors.

[2] The ministry generated a record containing a table for each of the five years, each entitled, "Top 100 Ontario Fee-For-Service [FFS] Physician Payments by Specialty based on Professional Billings." Each table consists of columns setting out the Physician Rank (1-100), Physician First Name, Physician Last Name, Physician Specialty, and Professional Fee for Service (FFS) Payments. The FFS column shows only the total annual payments by OHIP to each of the physicians.

[3] The ministry issued a decision granting partial access to the requested information, and relied on the mandatory personal privacy exemption in section 21(1) of the *Act* to deny access to the information it withheld. Most of the physician specialties, and the total OHIP payments to each listed physician in each of these years, were disclosed by the ministry in response to the request. The withheld information consisted of physicians' first and last names; the physician speciality of the six physicians with the highest total OHIP payments for each of the years 2008-2012; and certain other physician specialties.

[4] The ministry withheld the information that it did on the basis that it is reasonably foreseeable that some of the specialty information, combined with the billing information, could lead to the identification of the physicians who billed these amounts. The ministry took the position that the identification of the physicians in the record in this manner, or by releasing their names, constitutes an unjustified invasion of their personal privacy in light of section 21(3)(f) of the *Act*.[1]

[5] This office notified approximately 160 physicians of the appeal and invited them to contact this office if they were interested in receiving more information or participating in the appeal. Notice was also sent to organizations that represent the interests of some or all of the notified physicians.

[6] After considering the representations of the physicians, the Ontario Medical

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[1] Section 21(3)(f) provides that disclosure of personal information describing an individual's finances is presumed to constitute an unjustified invasion of personal privacy.

Association (OMA), the ministry and the appellant, Adjudicator John Higgins ordered the ministry to disclose the record in full. The basis of his order was twofold. First, he found that the identities of the top 100 OHIP payment recipients are not "personal information", and so they cannot be exempt from disclosure under the section 21(1) personal privacy exemption. Second, he found that even if section 21(1) applied to this information, the public interest override found in section 23 would apply.

[7] A number of parties brought applications for judicial review of Order PO-3617. In addition to three applications for judicial review brought by the OMA and two separate groups of doctors, a fourth application was brought by a single doctor under the pseudonym Dr. A.B., claiming that s/he did not receive the IPC's Notice of Inquiry and only became aware of the appeal after Order PO-3617 was released.

[8] Dr. A.B.'s judicial review application was settled when Dr. A.B. and the IPC agreed that Dr. A.B. would be afforded the opportunity to request a reconsideration after Order PO-3617 proceeded through the judicial review application process. That process was finally completed on April 11, 2019, when the Supreme Court of Canada dismissed an application for leave to appeal from the Ontario Court of Appeal decision upholding Order PO-3617.

[9] Dr. A.B. then made this request for reconsideration. Because Adjudicator Higgins is not available to decide the reconsideration request (he is no longer with this office), it has been assigned to me for a decision. I have reviewed the request for reconsideration and accompanying submissions and have decided that it is not necessary to invite submissions from any other party.

[10] In this order, I find that there was a fundamental defect in the adjudication process because Dr. A.B. did not receive notice of the appeal before the IPC. However, I deny the reconsideration request because I disagree with Dr. A.B. that the record contains his/her personal information, or that its disclosure would reveal his/her personal information, and I find that in any event the public interest override would apply to his/her information.

RECORD:

[11] The record consists of a 13-page document entitled "RESPONSE FOI REQUEST: [File number]." The tables set out in the record include the following headings: "Rank", "Physician First Name", "Physician Last Name", "Physician Specialty", and "FFS Payments." The only information at issue in this reconsideration request is the withheld information pertaining to Dr. A.B.

ISSUES:

A. Does the request for reconsideration meet any of the grounds for reconsideration set out in section 18.01 of the Code of Procedure?

B. Should Order PO-3617 be reconsidered as it applies to Dr. A.B.?

- Is the information about Dr. A.B. in the record his/her "personal information"? If so, does the mandatory exemption at section 21(1) of the *Act* apply?
- Does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

A. Does the request for reconsideration meet any of the grounds for reconsideration set out in section 18.01 of the Code of Procedure?

[12] Section 18.01 of the IPC's Code of Procedure provides, in part:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;

[13] Dr. A.B.'s counsel states:

> Dr. A.B. explains that s/he first learned of the adjudication on June 1, 2016, when s/he received a package in the mail from Adjudicator John Higgins of the Information and Privacy Commissioner of Ontario (the "IPC"). The package advised him/her that Adjudicator Higgins' "inquiry into the above-noted appeal has been completed" and enclosed a copy of his decision.
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> Prior to receiving Mr. Higgins' decision Dr. A.B. was aware that the Record was subject to an appeal before the IPC. Other physicians [with whom he/she was professionally acquainted had] received letters from the IPC in February 2015, advising them that a request had been made for the Record and that their names were contained in the Record.

[14] Dr. A.B. also provided an affidavit to this effect in the context of the judicial review application.

[15] The fact that Dr. A.B. did not receive notice of the appeal before this office is clearly a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the Code of Procedure. Given that Dr. A.B. did not have the opportunity to participate in the appeal before Adjudicator Higgins, I will now consider Dr. A.B.'s

substantive arguments on why Order PO-3617 should be reconsidered as it applies to Dr. A.B. Dr. A.B. submits that the IPC should issue a new order that precludes the ministry from releasing his/her name to the appellant. Dr. A.B. submits that the new order need not alter Order PO-3617 as it applies to the other 99 physicians.

B. Should Order PO-3617 be reconsidered as it applies to Dr. A.B.?

[16] Through counsel, Dr. A.B. submits as follows:

> As Dr. A.B. had not received a letter in February 2015 (unlike the other physicians in the Record), s/he believed that his/her name was not contained in the Record. In the months following their receipt of this letter, [Dr. A.B.'s professional colleagues] advised Dr. A.B. that they had retained legal counsel to assist them in making representations to the IPC on the Appeal. As Dr. A.B. believed his/her name was not contained in the Record s/he did not participate in any meetings with [those professional acquaintances] or their legal counsel regarding the Appeal. Had s/he been aware that his/her name was contained in the Record, [s/he could have participated]. It would have also been his/her obligation to contribute to the legal costs arising from participation.
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> Dr. A.B. took the same position publicly by advising [a professional body] that s/he was not on the list. Having it revealed that information was wrong would further damage Dr. A.B.'s reputation.
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> Dr. A.B. submits that these events have altered the nature of the information contained in the record. Release of his/her name at this time would result in great unfairness to him/her. His/her name is no longer just connected to the amount s/he billed OHIP but also to public representations s/he has made regarding his/her placement on the list. This renders his/her name personal information, pursuant to section 21 of FIPPA, and therefore differentiates him/her from the other 99 individuals.
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> In Order PO-3617, Adjudicator Higgins concluded that the information at issue was not personal information because "the act of submitting billings to OHIP and receiving remuneration for those medical services is in a business or professional context that is removed from the personal sphere" (para. 75). Because the billings were not personal, the physicians' names were not personal information when listed alongside those billings.
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> In the case of Dr. A.B., however, what would be revealed by his/her name being on the list is more significant than just his/her billings. As noted above, Dr. A.B. made public representations to [a profession] about his/her placement on the list. For it to be revealed publicly at this time that s/he was in fact on the list would unjustly cast aspersions against him/her through no fault of his/her own.

That means that Dr. A.B.'s name would be connected to personal information, not just the professional information contained in his/her billings. The information would include at least one type of personal information included in FIPPA: his/her personal opinions or views (type (e)). The information would also constitute a presumed unjustified invasion of personal privacy pursuant to section 21(3)(g), because it would relate to "personal recommendations or evaluations, character references or personnel evaluations".

Nor should this information be subject to release due to the section 23 public interest override. While Adjudicator Higgins found the override applied to the list of names generally, there are key differences when considering Dr. A.B. alone.

Order PO-3617 concludes the override applies because of the "substantial expenditures it outlines, and by the overall importance of the health care system to the people of Ontario" (para. 203). That reasoning makes sense in relation to a list of 100 physicians but any benefit to the public gained by the release of a single name is infinitesimal in comparison.

Furthermore, the public interest override requires the balance of public interest with the purpose of the exemption at issue—in this case the protection of privacy. Given the minimal benefit of releasing a single name when compared to the personal and reputational harm Dr. A.B. is likely to suffer, that balance argues strongly in favour of the exemption applying and against the public interest override.

Is the information about Dr. A.B. in the record his/her "personal information"? If so, does section 21(1) apply to it?

Dr. A.B.'s information in the record is not "personal information"

[17] Section 2(1) defines "personal information" as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > (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;

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

[19] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[20] 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

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[2] Order 11.

individual.[3]

[21] 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.[4]

[22] In Order PO-3617, Adjudicator Higgins found that the doctors' OHIP payment information is not personal information within the meaning of section 2(1), and further, that its disclosure would not reveal personal information.

[23] Dr. A.B. argues that as a result of the circumstances set out above, the information in the record that pertains to him/her is now his/her personal information. Specifically, s/he argues that his/her name is no longer just connected to the amount s/he billed OHIP but also to public representations s/he has made regarding his/her placement on the list, and that this information constitutes his/her personal information under paragraph (e) of the definition (his/her views or opinions).

[24] In Order PO-2225, former Assistant Commissioner Tom Mitchinson proposed a test for distinguishing between personal and professional information:

> ... the first question to ask ... is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ... The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[25] In Order PO-3617, Adjudicator Higgins applied this test and found that the billing information in the records was not the "personal information" of the physicians in question. Applying the same test, I find that the same is true of the information in the record that relates to Dr. A.B. Dr. A.B. argues that disclosure of his/her name is no longer just connected to the amount s/he billed OHIP but also to public representations s/he has made regarding his/her placement on the list.

[26] Applying the first part of the Order PO-2225 test, I find that the public representations that Dr. A.B. made were made in a professional context. Dr. A.B.'s statements related to him/her in his/her professional capacity as a physician, and more particularly, related to his/her opinion that s/he did not appear on the list of the top 100

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

OHIP billers. There is nothing inherently personal about these statements.

[27] Second, I find that disclosure of Dr. A.B.'s name would not reveal anything of an inherently personal nature about Dr. A.B. Disclosure of Dr. A.B.'s name, combined with his/her public statements, would reveal to those familiar with those statements that s/he was mistaken when s/he stated that s/he was not listed in the record. Again, however, this is not information that is inherently personal in nature. Simply being mistaken about something in a professional context is not enough for professional information to move into the personal sphere. While paragraph (e) of the definition of personal information provides that "views and opinions" are personal information, this only holds true if the views and opinions are expressed in a personal, rather than professional context.[5]

Because the information about Dr. A.B. is not "personal information", section 21(1) does not apply to it

[28] The section 21(1) personal privacy exemption provides that, with some exceptions, an institution shall refuse to disclose personal information to any person except the individual to whom the information relates. Because I have found that the information in the record relating to Dr. A.B. is not personal information, section 21(1) cannot apply to it. Therefore, I do not need to address Dr. A.B.'s argument that disclosure of this information will cause reputational harm to Dr. A.B. or that it falls within the section 21(3)(g) presumption.

In any event, the public interest override at section 23 of the Act applies to Dr. A.B.'s information

[29] 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. [Emphasis added.]

[30] 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.

[31] In Order PO-3617, Adjudicator Higgins found that the public interest override applies to the information at issue. In my view, his reasons for so finding are also applicable specifically to the information of Dr. A.B. Adjudicator Higgins' findings on the public interest override are lengthy, and I will not reproduce them all here. However,

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

the following paragraphs bear repeating:

> I find it significant that the physicians whose total annual payments are included in the record are being paid very substantial amounts of money from the public purse. As already noted, the dollar amounts paid to individual physicians in the five years reflected in the record have been disclosed, while the physicians' names and, in some instances, their specialties, have been withheld. Accordingly, the dollar figures are public, and I will therefore refer to them here for the purpose of illustrating this point.
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> There is, moreover, no question that substantial expenditures of public funds do relate to the public interest. Seen in that context, there is a clear relationship between the record and the *Act*'s central purpose of shedding light on the operations and activities of government. I therefore find that there is a public interest in the disclosure of the record.
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> This view is consistent with the principle of transparency in relation to government spending and contracts. In my view, the concept of transparency, and in particular, the closely related goal of accountability, requires the identification of parties who receive substantial payments from the public purse, whether they are providing services to public bodies under contract or, as in this case, providing services to the public through their own business activities under an umbrella of public funding. The transparency principle also encompasses the undisclosed specialty information in the record, whose disclosure would provide further information about how public funds are used.
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> In addition, given the significant public discussion of this issue, which is evident from the media clippings from a number of different sources that were provided by the appellant with her representations, I am satisfied that the information in the record "rouses strong interest or attention," and I find that the public interest in this information is therefore "compelling."
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> As discussed extensively above, the compelling public interest in disclosure in this appeal is strongly related to the importance of transparency. The fundamental nature of this type of public interest is evident from section 1(a)(i) of the *Act*, which refers to the principle that "information should be available to the public." The record at issue provides insight into program spending in an area that, as noted by the appellant, consumes 42 per cent of the entire provincial budget.

> In my view, … given the limited nature of the financial information contained in the record, and the fact that specialty information, in and of itself, is clearly not personal information,[6] any privacy interest in the record would be, at best, limited. Moreover, since it is already known in the community that these individuals are physicians and/or specialists, I am not satisfied that the disclosure of the information in the record creates any significant added risk of harm to the physicians' privacy interests. I also note that the names of more than 100,000 individuals subject to the *[Public Sector Salary Disclosure Act]* are disclosed annually, including some individuals whose income is substantial.
>
> Given the importance of transparency in the use of substantial amounts of public money, contrasted with the limited privacy interest that would exist in this record if it contained personal information, I find that the compelling public interest in disclosure of the record clearly outweighs the purpose of the section 21(1) exemption.

[32] Similarly, in the case of Dr. A.B., even if the disclosure of Dr. A.B.'s information in the record would reveal personal information to which section 21(1) applies, I find that Dr. A.B.'s privacy interest in this information is limited, and is outweighed by the compelling public interest in disclosure. In my view, the fact that Dr. A.B. was incorrect when s/he stated that s/he is not listed in the record is a relatively innocuous piece of information.

[33] I am not persuaded by Dr. A.B.'s submission that there is no longer any compelling public interest in the disclosure of his/her information in the record now that the information of the other doctors appearing in the record is to be disclosed. This office does sometimes find that there is no compelling public interest in the disclosure of information if there is other information already in the public realm that is sufficient to meet the public interest at issue. However, in my opinion, in the particular circumstances of this appeal and reconsideration request, the public interest in this case should be considered with respect to the information as a whole, not just the information of Dr. A.B.

[34] In any event, I disagree with Dr. A.B. that there is no longer any compelling public interest in the disclosure of his/her information, even viewed in isolation from the information of the other physicians (whose information is to be made public). Dr. A.B. is one of the top 100 OHIP payment recipients for at least one of the years in question. In my view, this is sufficient to establish a compelling public interest in disclosure of

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[6] See section 2(3) of the *Act*.

his/her information.[7]

[35] Moreover, there is a compelling public interest in the disclosure of not just how much the province paid to Dr. A.B., but also (as with any of the physicians listed in the record) in the disclosure of Dr. A.B.'s identity. A physician's identity can provide important context for any discussion of the amount of his or her billings to OHIP. Two hypothetical examples illustrate this point. If a particular physician on the list of the top 100 billers were known in his or her community for providing excellent service to his or her patients, this fact, combined with the disclosure of that physician's billings, would allow for a more informed discussion concerning the amount of the billings. Or, if a physician were publicly known to have been out of the country for a significant portion of a particular year, this fact, too, could provide important context for any discussion of his or her placement on the list of the top 100 billers in that year.

[36] I conclude, therefore, that even if section 21(1) applied to Dr. A.B.'s information in the record, the public interest override at section 23 would apply to it.

[37] For these reasons, Dr. A.B.'s request for reconsideration is denied.

ORDER:

The request for reconsideration is denied. I order the ministry to disclose the information relating to Dr. A.B. to the appellant by **June 18, 2019** but not before **June 14, 2019**.

Original Signed By
Gillian Shaw
Senior Adjudicator

June 4, 2019

[7] This office has previously found a compelling public interest in disclosure to exist with respect to significant payments made to one individual. See, for example, Order MO-3684-I, in which the adjudicator found a compelling public interest in the disclosure of the salary of a senior public servant.