



Information and Privacy  
Commissioner/Ontario

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

# ORDER 9

Appeal 880016

Ministry of Health



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Appeal Number 880016

**O R D E R**

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case are as follows:

1. On January 11, 1988, the Ministry of Health (the "institution") received an access request from the appellant for:
  - (a) "the names and locations of doctors who have extra-billed after Bill 94" [Health Care Accessibility Act] came into force;
  - (b) "any reports reviewing such extra-billing or reporting on complaints received";
  - (c) the "medical areas" or "OHIP fee areas that doctors have been practicing extra-billing";
  - (d) "the techniques used to claim for extra-billing".
2. The institution determined that no reports existed which reviewed

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extra-billing or reported on complaints received.

3. By letter dated February 10, 1988, the institution provided access to the following records relating to the appellant's request:
  - (a) Explanatory note to Inquiry Report;
  - (b) Inquiries - Alpha Physician List (January 13, 1988);
  - (c) Alphabetic Physician Listing - Key to Code;
  - (d) Statistical information relating to additional charges by:
    - (i) numbers of physicians by specialty;
    - (ii) option status;
    - (iii) type of additional charge;
  - (e) Reimbursement for unauthorized payments/approved declarations by dollar range.
4. The physicians' names, OHIP registration numbers and the dates on which they opted in or out of OHIP were severed from the records released to the appellant.
5. On February 22, 1988, the Office of the Information and Privacy Commissioner received a letter from the requester appealing the decision of the institution to sever information from the records which he received.
6. By letters dated February 23, 1988, receipt of the requester's appeal was acknowledged and notification given to the institution that an appeal had been received.

7. Between February 23, 1988 and May 13, 1988, efforts were made by an Appeals Officer and the parties to settle the appeal. However, both parties sought resolution of the issues by way of an inquiry.
  
8. By letter dated May 13, 1988, I sent a notice to the appellant and to the institution stating that I was conducting an inquiry into the appeal. I advised that the institution had raised the application of section 67 of the Act as a preliminary issue and invited the parties to make representations pertaining to this issue. Further, I advised that after deciding on the application of section 67, I would, if necessary, issue notices to affected parties and invite representations on the outstanding issues. An Appeals Officer's Report was enclosed with the Notice of Inquiry.
  
9. Written submissions were received from the appellant and the institution on the following issues:
  - A. Whether the legislative provisions relied on by the institution are "confidentiality provisions" barring the application of the Act?
  
  - B. If the answer to Issue A is in the affirmative, whether the severances in question fall within the scope of the confidentiality provisions relied on?

ISSUE A: Whether the legislative provisions relied on by the institution are "confidentiality provisions" barring the

application of the Act?

At the outset, I think it important to outline some general observations before considering the specifics of this appeal.

As Information and Privacy Commissioner, I am charged with responsibility for ensuring that the rights and obligations of citizens and government officials as they relate to the Act are respected and complied with. Where, as in this case, an institution purports to remove itself from the ambit of the Act through the use of a "confidentiality provision" in another act, it is my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under that act (i.e. the head of the institution) are covered by the "confidentiality provision" relied on.

Section 67 of the Freedom of Information and Protection of Privacy Act, 1987 reads as follows:

67.-(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

- (a) the repeal of unnecessary or inconsistent provisions; and
- (b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

Section 67 does not contain an exemption to the Act's disclosure obligations. Rather, subsection 67(2) provides that the Act overrides "confidentiality provisions" in other legislation, unless the other legislation specifically provides otherwise. However, because subsection 67(3) delays the application of subsection 67(2) until January 1, 1990, a head may be bound not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date.

In this appeal, the institution has relied on section 44 of the Health Insurance Act, R.S.O. 1980, c.197 and section 7 of the Health Care Accessibility Act, S.O. 1986, c.20 as "confidentiality provisions" which forbid the disclosure of the information requested by the appellant. Those provisions read as follows:

Health Insurance Act:

44.-(1) Each member of the Medical Review Committee, every practitioner review committee, the Medical Eligibility Committee and the Appeal Board and each employee thereof, the General Manager and each person engaged in the administration of this Act and the regulations shall preserve secrecy with respect to all matters that come to his knowledge in the course of his employment or duties pertaining to insured persons and any insured services rendered and the payments made therefor, and shall not communicate any such matters to any other person except as otherwise provided in this Act.

(2) A person referred to in subsection (1) may furnish information pertaining to the date or dates on which insured services were provided and for whom, the name and address of the hospital and health facility or person who provided the services, the amounts paid or payable by the Plan for such services and the hospital, health facility or person to whom the money was paid or is payable, but such information shall

be furnished only,

- (a) in connection with the administration of this Act, the Health Disciplines Act, the Public Hospitals Act, the Private Hospitals Act or the Ambulance Act or the Hospital Insurance and Diagnostic Services Act (Canada), the Medical Care Act (Canada) or the Criminal Code (Canada), or regulations made thereunder;
- (b) in proceedings under this Act or the regulations;
- (c) to the person who provided the service, his solicitor or personal representative, the executor, administrator or committee of his estate, his trustee in bankruptcy or other legal representatives;
- (d) to the person who received the services, his solicitor, personal representative or guardian, the committee or guardian of his estate or other legal representative of that person; or
- (e) pursuant to a subpoena by a court of competent jurisdiction.

(3) The information referred to in subsection (1) may be published by the Ministry of Health in statistical form if the individual names and identities of persons who received insured services are not thereby revealed.

(4) The General Manager may communicate information of the kind referred to in subsection (2) and any other information pertaining to the nature of the insured services provided and any diagnosis given by the person who provided the services to the statutory body governing the profession or to a professional association of which he is a member.

Health Care Accessibility Act:

7. Despite subsection 44(1) of the Health Insurance Act, the General Manager, the Minister and one other person engaged in the administration of this Act who is designated in writing by the Minister may furnish to,

- (a) a member of the Board;
- (b) the person to whom insured services were rendered or where a person other than the person to whom the insured services were rendered was charged for those services, the person who was so charged; and
- (c) any other person, with the consent of the person to whom the services were rendered,

information pertaining to the nature of the insured services, the date or dates on which the insured services were provided and for whom, the name and address of the person who provided the services, the amounts paid or payable by the Plan for such services and the person to whom the money was paid or is payable, for the purpose of enforcing this Act.

In my opinion, these two provisions qualify as "confidentiality provisions" as the term is used in section 67 of the Act.

Although I do not purport to offer a definitive outline of all types of provisions contemplated by section 67, it is clear in this case that section 44 of the Health Insurance Act employs mandatory language to "preserve secrecy" with respect to certain matters, while section 7 of the Health Care Accessibility Act operates as a limited and specific exception to that provision. Accordingly, I am satisfied that these provisions do operate to forbid the head to disclose "all matters that come to his attention in the course of his employment or duties" with certain specified exceptions for particular types of information. Therefore, my response to Issue A is in the affirmative.

ISSUE B: If the answer to Issue A is in the affirmative, whether the severances in question fall within the scope of the purported "confidentiality provisions"?

Subsection 44(2) of the Health Insurance Act states that the name and address of the "person who provided the services" may be disclosed in certain identified circumstances. Section 7 of the Health Care Accessibility Act also provides an exception allowing the release of, among other types of information, the name and address of "the person who provided the service" in certain circumstances. Both subsection



44(2) and section 7 are exceptions to the general application of subsection 44(1) which stipulates that "all matters" coming to the attention of certain individuals in certain circumstances shall not be communicated.

As a matter of statutory interpretation a specified exception to a provision of general application is necessarily subsumed by that provision of general application. The names of doctors who provided health care services must be considered information included in the phrase "all matters" and accordingly, fall under the general prohibition against disclosure contained in subsection 44(1) of the Health Insurance Act.

Are the OHIP billing numbers and dates when doctors opted in or out of the plan properly defined as coming within "all matters... pertaining to... insured services rendered and the payments made therefore"? In my view, they are, and therefore, my response to Issue B is also in the affirmative. (I might note that the appellant did not request these latter two particular types of information.)

Having answered both of the issues in the affirmative, this appeal has been decided in favour of the institution's position of non-disclosure.

However, I would like to take this opportunity to respond to certain statements contained in the institution's submissions respecting the scope of my authority to review "confidentiality provisions" and to view records allegedly covered by such provisions.

It has been suggested by the institution that "where section 67 of the

FOI/PPA is invoked, the Commissioner's scope of review of the Ministry's decision is limited to an inquiry as to what confidentiality provision should be relied on and the basis for the Ministry's decision." The institution also submitted that "once a determination is made that the information requested falls within the scope of confidentiality of [a statutory provision], that information cannot be disclosed - neither to the Requestor nor to the Commissioner."

I do not accept this position. While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the provision upon receipt of an appeal. I regard this duty as fundamental to the effective operation of

the Freedom of Information and Protection of Privacy Act, 1987 and the principles of providing a right of access to information and protecting the privacy of individuals.

Furthermore, I do not accept that a "confidentiality provision" applies to preclude the application of the Act without also ensuring that the provision in question relates to the specific records sought by the requester. In many cases I will not be able to formulate such a conclusion without first viewing the record and determining whether it contains the kind of information covered by the "confidentiality provision". Mere reliance on the assertions of the institution, without the right to inspect the record, cannot possibly inspire confidence on the part of the public that the principles enshrined in the Act have

been protected. In my opinion, this approach is supported by subsection 52(4) of the Act which reads as follows:

52 (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purpose of the investigation.  
(emphasis added)

Accordingly, it is my intention to fully review the application and scope of any legislative "confidentiality provisions" which are invoked by institutions in denying access to records requested by an appellant.

Furthermore, in the course of so doing, I will determine on a case by case basis the extent to which I must examine those records to ensure that they are covered by the provisions relied upon.

In conclusion, I find in the circumstances of this appeal that section 44 of the Health Insurance Act and section 7 of the Health Care Accessibility Act operate as "confidentiality provisions" barring the application of the Freedom of Information and Protection of Privacy Act, 1987 in respect of the information requested.

I further find that the information severed from the records to which the appellant has been given access is information governed by the confidentiality provisions identified above and that this information, therefore, has been properly withheld from disclosure.

Original signed by:  
Sidney B. Linden  
Commissioner

July 28, 1988  
Date