Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3222

Appeal PA12-243

Ministry of Health and Long-Term Care

June 24, 2013

Summary: In this, the first decision considering the exclusion in section 65(5.7) of records "relating to the provision of abortion services", the adjudicator finds that information about the number of claims and amounts billed for abortion services under OHIP is covered by the exclusion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 65(5.7).

Cases Considered: *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request reads as follows:

> How many claims, and how many dollars, did physicians bill for, "Medical management of non-viable fetus or intra-uterine fetal demise between 14 and 20 weeks gestation", that is, service code P001 with all diagnostic codes broken down by hospitals, clinics, and physicians' office, in each of 2009 and 2010?

> If possible, for diagnostic codes "NA" and 895, can you please provide any additional breakdowns that would further identify what these codes were used for?
>
> If not all P001 records are accompanied by a diagnostic code, then please also provide how many P001s had no diagnostic code associated with them, and how many P001 records, and how many dollars, there were for each diagnostic code that was specified – in other words, the number of P001 services claimed, broken down by diagnostic code, location of service (hospital, clinic, physician's office), and year.

[2] The ministry located responsive records and denied access to them in full. In its decision letter, the ministry advised the requester that:

> … effective January 1, 2012, section 65 of the *Act* (Application of the *Act*) was amended to exclude records relating to the provision of abortion services. The effect of section 65(5.7) of the Act is that individuals no longer have a right to make access requests under Part II of [the *Act*] to an institution for records in the custody or under the control of that institution relating to the provision of abortion services.

[3] The requester, now the appellant, appealed the ministry's decision to this office.

[4] In her very detailed appeal letter, the appellant explains why she disagrees with the ministry's interpretation of section 65(5.7) with respect to the requested records. Among other things, she states that the exclusion only pertains to hospital records of individual persons, and not to aggregate OHIP billing records. She states that her request covers "aggregate OHIP billing totals of hospitals, abortion clinics and physician offices" and that aggregate OHIP billing records do not identify any individual hospital records or an individual's personal records. The appellant states that when the *Act* was amended to add section 65(5.7), "everyone believed that the exclusion only pertained to individual hospital abortion services and not aggregate OHIP records."

[5] During mediation, a copy of the appellant's appeal letter was provided to the ministry, and the ministry confirmed its decision regarding access. The ministry also noted that the Canadian Institution for Health Information's (CIHI) website provides statistics for abortions performed in hospitals and clinics in Canada, and that the most recent report includes data from 2010.

[6] The appellant advised the mediator that she is aware of the CIHI statistics, but notes that they are not based on OHIP billings, which is the information requested.

[7] The parties were unable to resolve the appeal through mediation and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[8] I have requested and received submissions from the appellant and the ministry. Based on those submissions and a review of the material before me, I uphold the ministry's decision and find that section 65(5.7) applies to exclude the records from the scope of the *Act*.

RECORDS:

[9] The record at issue is a 2 page chart titled "P001A – Medical Management of Non-Viable Fetus Or Intra-Uterine Fetal Demise Between 14 and 20 Weeks Gestation Volume by Diagnostic Code and by Service Location, Fiscal Year 2010." There is no dispute that the service code "P001" is only used when billing OHIP for the provision of abortion services.

ISSUE:

Issue A: Does the record relate to the provision of abortion services, thereby excluding it from the application of the *Act*?

[10] The ministry claims that section 65(5.7) applies to exclude the record from the application of the *Act*.

[11] Section 65(5.7) states:

> This *Act* does not apply to records relating to the provision of abortion services.

Representations

[12] The appellant submits that section 65(5.7) of the *Act*, when interpreted purposively and with the goal and objectives of the *Act* in mind, does not exclude the requested documentation. As the goals of the *Act* are to provide transparency while protecting the privacy of individuals, the appellant submits that the initial presumption in interpreting section 65(5.7) must be to disclose the information sought with any exemption narrowly defined.

[13] The appellant further submits that the request relates to general billing information for medical services without identification of personal information. While the requested charts deal with taxpayer funds paid for the past delivery of abortion services, she submits, they do not deal directly and narrowly with the *provision* of abortion services.

[14] The appellant submits that the Legislature could not have intended for generalized billing data to be excluded from the *Act* as its exclusion would not advance the purpose of privacy protection.

[15] The appellant also argues that the allocation of taxpayer funds and their use to fund abortions is an important political issue in Canada and the information requested is necessary to ensure transparency within the government, and to protect the appellant's participation in the democratic process.

[16] In this regard, the appellant submits that the ministry's interpretation of section 65(5.7) violates her right to freedom of expression, as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). She submits that "[i]t is trite law that where statutory language is ambiguous or capable of more than one meaning, an interpretation consistent with *Charter* values is to be preferred." Here, she states, section 65(5.7) is capable of more than one meaning.

[17] The appellant states that section 2(b) of the *Charter* is engaged. She administers and authors a blog which acts as a platform for the discussion of abortion and other related political issues. She is seeking the information in order to comment on this political issue. Denial of access to the information, she submits, precludes meaningful commentary on the issue.

[18] The appellant states that she does not necessarily argue that section 65(5.7) is in and of itself unconstitutional. However, her position is that if the ministry's interpretation of section 65(5.7) is allowed to stand, the effect of that interpretation is a violation of her section 2(b) *Charter* rights.

[19] In response to the appellant's representations, the ministry submits that the information in the record "relates to" the "provision of abortion services" and is therefore excluded from the *Act*. The ministry submits that the very title of the record indicates that it contains a collation of information about abortion services, and that the purpose of the record is to convey information about the provision of these services. Similarly, the ministry submits that the wording of the appellant's request indicates that she seeks access to information about the medical management of a non-viable fetus or intra-uterine fetal demise between 14 and 20 weeks gestation, which is a provision of abortion services. The ministry also states that the service code "P001" can only be used when billing OHIP for the provision of abortion services.

[20] Here, the ministry submits, although the appellant may disagree with the policy rationale for the exclusion, the only issue in the appeal is whether the contents of the record "relate to the provision of abortion services." The distinction the appellant is trying to create between the "past delivery of abortion services" and the "provision of abortion services" is specious. It does not exist in the *Act* - the exclusion is not limited to the description of abortion services, who received the services or the current or

future provision of abortion services. If the information "relates to" the provision of that medical service, it is excluded from the *Act*, regardless of whether it is statistical or personal information.

[21] The ministry submits that interpreting the exclusion so as not to apply to the information at issue would distort its plain meaning. The application of the exclusion to the record at issue is not based on a "broad interpretation"; it is based on a plain read of the wording of the statutory provision.

[22] The ministry refers to the Divisional Court's decision in *Ontario (Attorney General) v. Toronto Star*[1] (*Toronto Star*), which established the interpretation of the words "relating to" in section 65 of the *Act*. In that decision, the Divisional Court held that the proper test to apply for the words "relating to" is the "some connection" test. The ministry submits that the IPC has adopted the "some connection" test when interpreting section 65, and that this test applies equally to section 65(5.7).[2]

[23] The ministry submits that, in this case, the record has more than "some connection" to the provision of abortion services. The ministry submits that the record is based directly and entirely on factual information derived from billing data for the provision of abortion services. As such, the record is about a particular aspect of the provision of abortion services in Ontario.

[24] Finally, the ministry submits that the appellant has mistakenly characterized section 65(5.7) as an exemption that should be interpreted in light of section 1 of the *Act*. The ministry submits that section 65(5.7) is an exclusion and that its purpose is to exclude records altogether from the operation of the *Act*. The ministry refers to *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),*[3] in which the court found that "the legislature has distinguished exclusions from exemptions" in the *Act* and that the statutory exclusions "operate independently from the statutory exemptions".[4]

Analysis

[25] I find that, by its very terms, the appellant's request seeks information relating to the provision of abortion services. Her representations describe the information sought as dealing with "taxpayer funds paid out for the past delivery of abortion services." I see no distinction between this information, and other information "relating to" the provision of abortion services.

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[1] 2010 ONSC 991.

[2] I discuss this test in detail below.

[3] (2001), 55 O.R. (3d) 355, 203 D.L.R. (4th) 538, O.J. No. 3223 (C.A.), reversing [2000] O.J. No. 1974 and Toronto Docs. 698/98 and 209/99 (Div. Ct.), leave to appeal to S.C.C. refused (June 13, 2002), Doc. 28853 (S.C.C.).

[4] Above at note 2., at para. 30.

[26] As set out in the Notice of Inquiry, the decision in *Toronto Star*[5] established the meaning of the words "relating to" in section 65 of the *Act*:

> The meaning of the phrase "relating to" must be determined by applying the modern approach to statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, the Supreme Court stated the following:
>
> > Today there is only one principle or approach; namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. [citation omitted]
>
> Section 65(5.2) contains the phrases "relating to" and "in respect of." The Supreme Court of Canada has interpreted these phrases: *Canada (information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8 (CanLII), 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 25; *Markevich v. Canada*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2003] 1 S.C.R. 94. In *Markevich*, the Court held the following, at para. 26:
>
> > The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 39, per Dickson J. (as he then was):
> >
> > > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
> >
> > In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.

[5] Above at note 1.

> Accordingly, the words "relating to" in s. 65(5.2) require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."
> ….
>
> The meaning of the statutory words "relating to" [in section 65 of the *Act*] is clear when the words are read in their grammatical and ordinary sense. There is no need to incorporate complex requirements for its application, which are inconsistent with the plain, unambiguous meaning of the words in the statute.
>
> The Adjudicator's interpretation of the phrase "relating to" is also discordant with the intention of the legislature. There are no pragmatic or policy reasons to impute a substantial connection requirement and depart from reading the words in their grammatical and ordinary sense in the context of the *Act*. [paras. 41-46]

[27] I adopt the reasoning in the above decision. Following this interpretation of the words "relating to", I find that the record at issue has *at least* "some connection" to the provision of abortion services. In the ministry's submission, and this is not in dispute, the record is based directly and entirely on factual information derived from billing data for the provision of abortion services. I agree with its submission that the appellant's proposed interpretation of section 65(5.7) would distort the plain meaning of the exclusion.

[28] Further, based on my findings above as well as the principles expressed in *Toronto Star*, I reject the appellant's argument that this statutory language is ambiguous or capable of more than one meaning, thus requiring a consideration of *Charter* values.

[29] The appellant has referred me to *Bell ExpressVu Limited Partnership v. Rex*[6] (*Bell ExpressVu*), in which the Supreme Court of Canada considered the use of "*Charter* values" in statutory interpretation, stating:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" […], it must be stressed that, to

[6] [2002] 2 S.C.R. 559. (*Bell ExpressVu*).

> the extent this Court has recognized a "*Charter* values" interpretive principle, *such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations*. [Emphasis added.]
>
> This Court has striven to make this point clear on many occasions: [citations omitted].
>
> These cases recognize that a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "*Charter* values" rule was expressed in *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695, at p. 752:
>
> > [T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. [paras. 62-64]

[30] The Court concluded by stating that "where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result". [para.66]

[31] In this case, I find there is no ambiguity in the language of section 65(5.7). The evident intent of the Legislature in enacting this provision is to exclude records relating to the provision of abortion services from the *Act*. Moreover, the interpretation given to the words "relating to" in *Toronto Star* means there must be "some connection" between the provision of abortion services, and the record at issue. I find that there is at least some connection. The alternative interpretation offered by the appellant is not sustainable and not "equally plausible" in the sense described in *Bell ExpressVu*.

[32] In the absence of ambiguity, there is no need to resort to a consideration of section 2(b) of the *Charter* in determining this appeal.

[33] Accordingly, I find that the record is excluded from the application of the *Act* under section 65(5.7) and I uphold the ministry's decision.

ORDER:

1. I uphold the ministry's decision. The record is excluded from the application of the *Act* under section 65(5.7).

Original signed by: June 24, 2013
Sherry Liang
Senior Adjudicator