

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3435

Appeal PA12-434-2

Ministry of Health and Long-Term Care

December 17, 2014

Summary: The appellant made a request for the list of services provided by a named surgeon, for a given date. The ministry claimed that this information is exempt from disclosure under the section 21(1) personal privacy exemption in the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the record does not contain the personal information of the surgeon, and distinguishes this case from others that have found OHIP billing information to be the personal information of doctors. The adjudicator also did not accept the surgeon's argument that the request is an abuse of process because of a parallel civil litigation proceeding.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of personal information), Regulation 460, section 5.1.

Orders and Investigation Reports Considered: Interim Order MO-2573-I.

OVERVIEW:

[1] The Ministry of Health and Long-Term Care (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a "list of all billings made by [a named surgeon], [a named assistant surgeon] (fellow who assisted in the surgery) or [a named anesthesiologist] for the day of May 23, 2007, billings related to surgical procedures or any other procedures performed May 23, 2007."

[2] The requester later clarified her request as: "what did [the named surgeon] bill OHIP for on May 23, 2007." The requester also indicated that she did not seek access to the names of patients.

[3] The ministry issued a number of decisions relating to this request, which resulted in various appeals. In its final decision, the ministry indicated that one responsive record existed, and that access to this record was denied in full on the basis of the personal privacy exemption at section 21(1) of the *Act* (with reference to the presumption of unjustified invasion of personal privacy at section 21(3)(f) of the *Act*). The appellant appealed the ministry's decision, and this appeal PA12-434-2 was opened.

[4] The parties have confirmed that any identifying information about patients treated by the surgeon on the identified date is not at issue in this appeal. The ministry and the affected party (the surgeon) maintain that the remaining information in the record contains the personal information of the surgeon, and that disclosure would be an unjustified invasion of his personal privacy.

[5] During the course of my inquiry, I received representations from the ministry, the appellant (the original requester) and the affected party (the surgeon).

[6] For the reasons below, I find that the record does not contain the personal information of the surgeon and the personal privacy exemption in section 21(1) therefore does not apply to it.

RECORD:

[7] The record at issue consists of a two-page printout of services provided by the named surgeon on May 23, 2007. It also contains some handwritten explanations of the data. Health numbers of the patients have been severed and are not at issue in this appeal.

DISCUSSION:

Personal Information

[8] The ministry claims that the information is exempt under the personal privacy exemption in section 21(1). This exemption only applies if the information qualifies as "personal information." That term is defined in section 2(1) 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.

[9] 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.¹

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

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

¹ Order 11.

(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.

[11] 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

[12] 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

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Representations

[14] The ministry refers to Order PO-3200, in which I discussed prior IPC orders on the issue of whether a doctor's OHIP billings is personal information. I concluded there that ..."[i]n 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*."

[15] The ministry describes the record at issue as a printout of the surgeon's OHIP billings for May 23, 2007, including a billing code and a fee service description for each service listed on the record, and the fee amount paid. In the ministry's submission, the record "relates to financial transactions" involving the surgeon and therefore contains his personal information as defined in section 2(1)(b).

[16] The ministry states that the monetary value of each alphanumeric billing code, and each corresponding fee service description contained in the record, can easily be found in the *Schedule of Benefits for Physician Services under the Health Insurance Act* (the SOB), which is a publicly available document. It asserts that the record cannot be

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.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

severed effectively so as to remove the financial information and still be responsive to the request.

[17] The surgeon submits that the ministry correctly refused to disclose the record because it is impossible to sever his personal information from it. He also relies on Order PO-3200, stating that the IPC has recognized that information about procedures performed by particular physicians constitutes personal information within the meaning of the *Act*. The surgeon states that the appellant's request is akin to asking how much money he made on May 23, 2007.

[18] The appellant submitted lengthy representations. Much of her submission was not shared with the ministry and the surgeon because it provided her detailed medical history, as background to her request for this information. As it does not bear on the issues I must determine, it was unnecessary to ask the ministry and the surgeon to respond to those parts of her representations.

[19] On the question of whether the record contains the personal information of the surgeon, the appellant submits that it does not as the surgeon was not billing OHIP on a fee-for-service basis. Rather, he was being compensated on a monthly basis pursuant to an Alternative Payment Plan (APP), funded by the ministry.

[20] The appellant describes APP agreements as changing the way doctors are compensated, from a fee-for-service basis to an agreement that provides for annual funding to different categories of physicians. These agreements, which she states are negotiated every three to four years, detail the services that physicians are required to provide (called "In-Scope Services") and the annual compensation the province will pay for the services rendered.

[21] The appellant provided a copy of the APP agreement to which the surgeon was a signatory in 2007, as one of a number of Group Physicians. She states that under the agreement, the ministry pays a lump sum to the Group Physicians, for provision of certain services. The Group Physicians agree not to bill OHIP for those services. The Group Physicians distribute the funds amongst themselves in accordance with their own governance agreement. The APP agreement does not specify what each member of the Group is to be paid.

[22] As a result, the appellant submits, the information in the record cannot be used to calculate the amount of money a Group Physician receives, in a day, a month or a year. There is no direct correlation between a Group Physician's compensation pursuant to an APP agreement and the services documented in the record. The appellant submits that the IPC orders that the ministry and the surgeon rely on are therefore not applicable to the circumstances of this appeal. In those cases, particularly Order PO-3200, doctors billed on a fee-for-service basis. That is not the case here.

[23] In reply representations, the surgeon acknowledges that the services rendered to the appellant in 2007 were covered by an APP. In his submission, this is not relevant. He states that even under an APP, a fixed portion of his "billings" would be paid to his four-person clinical team. Disclosure of his billings on May 23, 2007 would thus reveal his income and financial activities.

[24] The ministry submits in reply that the description of services provided in the record can still be used to gauge a doctor's income because the compensation for the services listed in the record is publicly available in the SOB. Even if the record cannot be used to discern the surgeon's precise income on a particular day, it can be used to approximate his income, if the record is considered to reflect a "typical" work day. It is reasonable to assume that a doctor would not enter into an alternative funding arrangement that would provide less financial compensation than what the SOB permits. Therefore, in the ministry's submission, one could use the record as the basis for calculating, even generally, what the doctor's likely compensation was under the APP, even if he is in a group.

[25] The ministry submits that the information in the record could be used to deduce the surgeon's income level, if not his exact income. Further, it asserts that since the record reflects his service encounters which have an attributed monetary value under the SOB, it is information about his financial activities.

Analysis

[26] As the parties have noted, a number of IPC orders have considered the issue of whether OHIP billings reveal personal information of doctors. In these orders, this office has concluded that OHIP billings that can be connected with specific doctors are their personal information. For example, in Order P-1502, the Commissioner found that payment to a physician for services rendered in connection with the prescription of home oxygen services was a "financial transaction" within the meaning of section 2(1)(b) of the *Act*, and therefore qualified as personal information. I followed this above approach in Order PO-3200.⁵

[27] Interestingly, the above approach can be contrasted with the treatment of other professionals whose billing information has been ordered disclosed under the *Act*. In Order PO-3207, I found that information about legal fees paid to a lawyer by a hospital was not exempt from disclosure under the personal privacy exemption, as it was not personal information.⁶ In Orders MO-2363 and MO-2927, among others, this office found that the details of fee arrangements between government institutions and professional consultants did not qualify as the personal information of the consultants.

⁵ Other orders that have followed this approach include Orders P-778 and P-1505. See also Compliance Investigation Report I96-119P.

⁶ See also Orders PO-3245 and PO-2568.

[28] It is not necessary in the context of this appeal to examine the approach taken to doctors' billings in the above orders. For the present purposes, I find the facts of this appeal distinguishable from those in Order P-1502 and others that have dealt with OHIP billings.

[29] As the surgeon acknowledges, he did not bill OHIP for the services listed in the record at issue. Those professional services were funded under the APP agreement between the ministry and a group of physicians, of which he was a member. The APP agreement set out the funding to be paid to the group as a whole, but it did not govern the compensation paid to each individual physician. The allocation of the funding was a matter addressed by a further agreement between the group physicians.⁷

[30] Thus, the record reveals that the surgeon performed certain services on a given date. For a doctor billing OHIP on a fee-for-service basis, the information in such a record, in conjunction with the SOB, would reveal what the doctor was paid for those services on the date in question. In this case, however, it does not. In these circumstances, I am unable to conclude that disclosure of the record would reveal the personal information of the surgeon. I am unable to conclude that it would reveal information relating to "financial transactions" of the surgeon, within the meaning of the definition of personal information.

[31] I do not view the representations of the ministry and the surgeon to support any opposite conclusion. The surgeon submitted that disclosure of his billings on May 23, 2007 would reveal his income and financial activities. However, I have concluded based on my review of the material before me, that the record does not disclose any "billings" in the conventional sense; it discloses services provided, but not the compensation for those services.

[32] As indicated, the surgeon submitted that under the APP agreement, a portion of the "billings" in the record would be payable to the group. I understand this to be a reference to Article 6.2(a)(vi) of the APP agreement, which provides that funding to the group will include "an amount equal to 10% of the Fee-For-Service value of all service encounter reporting for the Contract Year."⁸ Again, this does not alter my conclusion. At most, what can potentially be discerned from the record is one portion of the funding payable under the APP agreement to the group for a year, ie., that the funding to the group included, at a minimum, 10% of the value of the services performed by the surgeon on May 23, 2007. Without knowing the relationship between this portion of the funding and the amount allocated to the surgeon under the group's arrangement, I am satisfied that this does not amount to information "relating to financial transactions" in which the surgeon was involved.

⁷ No one asserts this is a public document and it is not before me.

⁸ This formula is repeated for each year covered by the APP agreement.

[33] I do not accept the ministry's submission that the record can be used to approximate income, therefore disclosing personal information. This assumes that the record reflects a "typical" work day, which is speculative. Further, this theory does not and cannot take into account the basis on which the group of physicians has decided to allocate its global funding amongst its members, and what factors they have agreed to as relevant to that allocation.

[34] The ministry's other submissions are also broad and speculative and do not establish that the information in the record contains or would reveal any of the types of information described in section 2(1) of the definition of personal information.

[35] As I have therefore determined that the information in the record is not the "personal information" of the surgeon, the section 21(1) personal privacy exemption cannot apply. No other exemption has been claimed or applies and the information remaining at issue in the record must therefore be disclosed.

Abuse of Process

[36] Before concluding, I wish to briefly address the surgeon's submission, in the alternative, that the appellant's request for access under the *Act* is an abuse of process.

[37] The appellant and the surgeon have both described the ongoing litigation in which the appellant seeks a remedy against the surgeon with respect to a medical procedure performed on May 23, 2007. There is no dispute that the appellant seeks the record to assist her in that civil action. The surgeon states that if this record is properly the subject of production in the litigation, it will be produced in the normal course of discovery, and be subject to the appellant complying with her own production obligations. The surgeon submits that the appellant has brought this request as a means of obtaining the record, without complying with her own obligations in the civil proceeding.

[38] Counsel for the surgeon states that had the appellant proceeded in the normal course with the civil action, she might already have obtained the information she seeks, and that he has advised her that if she fulfills her obligations in the civil proceeding, he will make reasonable efforts to determine the services that the surgeon performed on May 23, 2007.

[39] Counsel referred me to Interim Order MO-2573-I, as an example of the IPC's approach to similar issues. This order provides a useful summary of the relationship between access to information under the *Act*, and discovery processes in civil litigation, in the following passage:

The *Act* does not contain any provision aimed at preventing a requester from making an access request, even where the requester is involved in

litigation with the institution, and the requested records may be related to the litigation. At its heart, the City's abuse of process argument is premised on the view that the requests are an abuse of process because of the litigation between the parties, and any decisions regarding the records should be dealt with in the context of the litigation. Based on all of the foregoing analysis, including the decision of Justice Lane in the *Doe* case, quoted above in the extract from Order PO-1688, I disagree. A request for information that could also be sought on discovery in contemporaneous litigation is not, *per se*, an abuse of process.

... such a request cannot be considered a "collateral attack" on a Court's finding in a motion for production.

[40] I do not find the circumstances of this case to be meaningfully different from those considered in the above interim order. Although it may be that the appellant is entitled to the same information through the rules of discovery, those rules do not preclude her from seeking access under the *Act*. Even assuming the background litigation to be as described by the surgeon, the fact that the appellant has chosen to make this request instead of pursuing the discovery process does not, in itself, amount to an abuse of process.

[41] It also does not amount to a request that is "frivolous or vexatious" within the meaning of section 10(1) of the *Act*, as further elaborated in section 5.1 of Regulation 460.⁹ This phrase has been interpreted and considered in a number of IPC orders. I do not need to review them in detail. To begin with, the decision that a request is frivolous or vexatious lies, in the first instance, with the institution. Here, the ministry has not sought to rely on this provision. In any event, the evidence before me does not establish the type of conduct described in section 5.1 of Regulation 460. There is no "pattern of conduct" that amounts to an abuse of the right of access or which the ministry asserts would interfere with its operations. There is no evidence establishing bad faith on the part of the appellant, or that the request is motivated by a purpose other than to obtain access.

⁹ Section 5.1 states:

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

- (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
- (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[42] In conclusion, I find that the information at issue in the record is not the personal information of the surgeon and it is not exempt from disclosure. I do not find that the request is an abuse of process or frivolous or vexatious. I order disclosure of the record, subject to the severances that are not in dispute.

ORDER:

I order the ministry to disclose the record to the appellant, subject to the severances that are not at issue in this appeal, by **January 26, 2015**, but not before **January 21, 2015**.

Original signed by: _____
Sherry Liang
Senior Adjudicator

December 17, 2014