Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4471

Appeal PA21-00101

Ministry of Health

December 21, 2023

Summary: The Ministry of Health received a request under the *Act* for access to records pertaining to its review of the requester's OHIP billing. The ministry decided to grant the requester partial access to responsive records relying on the law enforcement exemption in section 14(1) and the personal privacy exemption in section 21(1). The requester appealed the ministry's decision, seeking access to the information withheld pursuant to section 14(1)(c). During mediation, it was agreed that because the records might contain the requester's personal information, the discretionary exemption to refuse the requester's own information in section 49(a), read with 14(1)(c), may apply.

In this order, the adjudicator finds that the exemption in section 49(a), read with 14(1)(c), applies to the information at issue. The adjudicator upholds the ministry's decision to withhold the information that she finds exempt and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended, sections 2(1), 14(1)(c) and 49(a).

Orders Considered: Orders PO-2560, PO-2984 and P-1537.

OVERVIEW:

[1] This appeal considers the Ministry of Health's (the ministry's) decision to deny a requester access to records relating to its investigation of the requester's Ontario Health Insurance Plan (OHIP) billing and subsequent referral to the Ontario Provincial Police (OPP).

[2] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to the following:

1 All [ministry] records of communications, including letters, emails and meeting minutes between [the ministry] and the [OPP] relating to [the requester's] billings between September 1, 2016, and June 23, 2017.

2 A list of [ministry] records provided to the [OPP] from the [ministry] relating to [the requester's] billings between September 1, 2016, and June 23, 2017.

[3] The ministry's investigation of a physician's claims for payments for OHIP insured services is called a "post-payment review". In response to the request, the ministry identified responsive records relating to its post-payment review of the requester's OHIP billing, which included the request for the post-payment review to be conducted, documents created as part of the post-payment review, the referral to the ministry's Payment Accountability and Fraud Control Unit and related correspondence between the ministry and the OPP. The ministry issued a decision denying access to the responsive records pursuant to the law enforcement exemption in section 14(1) and the solicitor-client privilege exemption in section 19 of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] The mediator spoke to the parties. The ministry initially advised that the responsive records pertained to a matter that was part of an ongoing investigation. Subsequently, the ministry advised that the investigation had been completed and issued two revised access decisions granting the appellant partial access to the responsive records.

[6] In its revised access decisions, the ministry relies upon the law enforcement exemption in section 14(1)(c) and the personal privacy exemption in section 21(1) citing the presumption in section 21(3)(b) of the *Act* for withholding portions of the responsive records. In addition, the ministry decided to withhold some information in the records on the basis that it is not responsive to the request.

[7] The appellant advised that he is only seeking access to the information withheld from the responsive records pursuant to the law enforcement exemption in section 14(1)(c). The parties agreed that in the event that the appellant's personal information is found to be contained in the records at issue, the application of section 14(1)(c), read with section 49(a), should be considered. Accordingly, the application of the discretionary exemption in section 49(a) allowing the ministry to refuse the appellant access to his own personal information was added to the appeal.

[8] As the appellant is not seeking access to the information withheld on the basis of the personal privacy exemption in section 21(1) of the *Act*, the application of this

exemption is not an issue to be determined in this appeal.

[9] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and invited and received representations from the ministry and then the appellant, addressing the facts and issues set out in a Notice of Inquiry. The ministry's representations were shared with the appellant[1], who provided representations in response.

[10] In this order, I find that the records contain the appellant's personal information and the discretionary exemption in section 49(a), read with the law enforcement exemption in section 14(1)(c), applies to the information at issue. I uphold the ministry's decision to withhold the information that I have found to be exempt and dismiss the appeal.

RECORDS:

The information at issue consists of the portions of the responsive records the ministry has decided to withhold pursuant to section 49(a), read with section 14(1)(c). The records are described in the following index:

Record #	Description	Pages	Withheld
2	Excel Spreadsheet – Request for Payment Investigation Review October 2014	1 tab	In part
5	PDF Doc – Claims data for Physician (FY 2015/2016)	4 pages	In part
6	Word Doc – Referral form July 2016	1 page	In part
11	Word Doc – Data request May 2017	4 pages	In part
12	Word Doc – Updated data request May 2017	4 pages	In part
18	Word Doc – Updated data request Jun 2017	4 pages	In part

[1] The ministry's representations were shared in accordance with *Practice Direction 7* to the IPC's *Code of Procedure*.

20	PDF Doc – Email MOH/OPP June 2017	3 pages	In part
21	Excel Spreadsheet – Data for 2015/2016 – All FSC – Additional Data Elements	2 tabs	In full
22	Excel Spreadsheet – Data for 2015/2016 – All FSC –	2 tabs	In full
23	Excel Spreadsheet – Data for 2015/16 – Specific FSC	2 tabs	In full

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose information is it?

B. Does the discretionary exemption at section 49(a), allowing the ministry to refuse the appellant access to his own personal information, read with the law enforcement exemption at section 14(1)(c), apply to the information at issue?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose information is it?

[11] In order to decide which sections of the *Act* may apply to a specific case, I must first decide whether the records contain "personal information," and if so, whose personal information it is.

[12] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[2]

[13] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or

[2] See the definition of "record" in section 2(1).

business capacity is not considered to be "about" the individual.[3]

[14] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[4]

[15] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[5]

[16] Section 2(1) of the *Act* gives a list of examples of personal information. The examples that are relevant to this appeal include:

> "personal information" means recorded information about an identifiable individual, including,
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> ...
>
> (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,
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> ...
>
> (h) the individual's name if 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.

[17] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[6]

The parties' positions

[18] The ministry's position is that the records at issue contain the appellant's personal information. Notwithstanding that the appellant's name appears in records relating to his claims for payment for insured services submitted in his professional capacity, the ministry submits that the information reveals something of a personal nature about the appellant. The ministry states that the information at issue reveals the appellant's conduct relating to the submitting of claims for unauthorised payments,

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(3) and 2(4).

[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[6] Order 11.

which is personal.

[19] Though invited to do so in the Notice of Inquiry, the appellant does not address the issue of whether the records at issue contain personal information in his representations. The appellant responds to the ministry's position and submits that any argument that the information requested is excluded on the basis that it is his own personal information is "without merit" because he has consented to disclosure of information about himself.

Analysis and finding

[20] As noted above and set out in the Notice of Inquiry sent to the parties, to determine which sections of the *Act* apply to the information withheld by the ministry, I must first decide whether the records at issue contain personal information and, if so, whose information it is. If the records contain the appellant's own personal information, his access rights are greater than if they do not. [7] If I find that the records contain the personal information of the appellant, then the application of the law enforcement exemption in section 14(1)(c) is considered under Part III of the *Act*.

[21] I therefore do not agree with the appellant's submission that the ministry's representations on whose personal information is in the records are "without merit."

[22] In Order PO-2560, the adjudicator considered whether records of a physician's billing information contained their personal information and stated:

> While in some instances it might be argued that the affected party's billing information is professional information and not personal information, the investigation into the affected party's billing practices indicates that, in the context of this appeal, such information is in fact the affected party's personal information.

[23] I agree with this approach and adopt it in this appeal. From my review of the records, I am satisfied that they contain the appellant's personal information. Although the appellant's name and OHIP billing information is information that relates to the appellant in his professional capacity, the records containing this information have all been generated as part of the post-payment review process and the referral to the ministry's Payment Accountability and Fraud Control Unit. I find that the disclosure of the information relating to the appellant, in the context of the investigation of his billing practices, would therefore reveal information of a personal nature.

[24] Based on my review of the records, I find that they contain the appellant's name and information relating to financial transactions in which he has been involved. I find

[7] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

that this is the personal information of the appellant as contemplated by paragraphs (b) and (h) of the definition of personal information in section 2(1) of the *Act*.

[25] The appellant is not seeking access to information withheld pursuant to the personal privacy exemption in section 21(1) and the application of this exemption is not an issue to be determined in this appeal. Accordingly, I make no finding about the personal information of other individuals that may be contained in the responsive records.

[26] I now consider the appellant's right of access to the information at issue under Part III of the *Act*.

Issue B: Does the discretionary exemption at section 49(a), allowing the ministry to refuse access to the appellant's own personal information, read with the law enforcement exemption at section 14(1)(c), apply to the information at issue?

[27] The ministry claims that section 49(a), read with section 14(1)(c), applies to the information at issue. Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49(a) provides some exemptions from this general right of access.

[28] Section 49(a) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > (a) where section 12, 13, **14**, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information[.] [emphasis added]

[29] The discretionary nature of section 49(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.[8] If an institution refuses to give an individual access to their own personal information under section 49(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[30] Section 14 contains several exemptions from a requester's right of access, mostly related to the context of law enforcement. The subsection of section 14(1) relevant in this appeal is 14(1)(c), which states:

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[8] Order M-352.

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
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> reveal investigative techniques and procedures currently in use or likely to be used in law enforcement[.]

[31] The term "law enforcement" is defined in section 2(1):

> "law enforcement" means,
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> (a) policing,
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> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
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> (c) the conduct of proceedings referred to in clause (b).

[32] For section 14(1)(c) to apply, the institution must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.[9]

The ministry's position

[33] The ministry explains the health insurance coverage for Ontario residents provided through OHIP, pursuant to the *Health Insurance Act* (HIA). The ministry states that physicians verify patient eligibility for health care services using a patient's OHIP health card and submit corresponding claims for insured services to the ministry for payment. This submission uses fee codes that are set out in the HIA and its regulations to identify insured services.

[34] The ministry further explains that claims submitted by physicians providing health services in Ontario are paid by the ministry using an honour system and computerized checks from machine generated controls. The HIA authorises the ministry's Provider Audit Unit to conduct post-payment reviews of physician's claims payments as a way of providing accountability for the use of OHIP funds. The ministry reviews unauthorised billing and payment concerns that are reported externally or identified internally on a post-payment review basis to determine if payment of the physician's claims is in accordance with the HIA.

[35] The ministry states that possible actions resulting from its post-payment reviews include:

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[9] Orders P-170, MO-2347-I and PO-2751.

- Educating and assisting physicians in correct billing for OHIP services;
- Recovery of funds by way of a negotiated settlement with a physician or referral to the Health Services Appeal and Review Board (HSARB) for an order to recover funds from a physician in the absence of a negotiated settlement;
- Referral to the College of Physicians and Surgeons of Ontario (CPSO) if there are issues or concerns regarding patient safety or a physician's standard of practice;
- Referral to the ministry's Payment Accountability and Fraud Control Unit if there are concerns that a physician is intentionally not submitting claims in accordance with the HIA, which can lead to referral to the OPP.

[36] The ministry's position is that its post-payment review process constitutes "law enforcement" within the meaning of the definition of that term in section 2(1) of the *Act*. In particular, the ministry submits that the post-payment review process is an investigation or inspection that leads or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. The ministry states that a referral to HSARB is a hearing process that can result in an order for billing suspension or an order requiring a physician to cease submitting OHIP claims. The ministry states that its post-payment review process can also result in referrals to the OPP for proceedings under the *Provincial Offences Act* (for contravention of the HIA) or under the *Criminal Code* (for fraud and other related offences).

[37] The ministry submits that the information at issue, if disclosed, would reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. The ministry submits that it uses these investigative techniques and procedures when assessing claims for unauthorized payment claims to OHIP. Specifically, the ministry states that the methodology is used to assess a possible indication of fraudulent billing practices.

[38] The ministry submits that the severed portions of the records provide details of how it determines that there is a discrepancy in claims for payments and the methodology used for doing so. The ministry states that the information at issue describes the types of claims for payments that it may select for investigation and specific data elements and the combination of data elements it uses to assess if there is inappropriate billing. The ministry submits that the severed portions also specify reasons why a physician's billing may be selected for investigation.

[39] The ministry submits that disclosure to the appellant is tantamount to "disclosure to the world." It is the ministry's position that this information in the records is not generally known to the public and that its disclosure would compromise future cases. In particular, the ministry submits that disclosure of the details of how it determines discrepancies in physician billing could increase the risk of the investigative techniques becoming known to the public and being used by physicians to avoid detection of

fraudulent billing practices.

The appellant's position

[40] The appellant's position is that "there is no foundation for the claim to the exemption." The appellant does not directly address whether the ministry's post-payment review process constitutes law enforcement for the purposes of the *Act*.

[41] The appellant submits that the ministry admits any law enforcement process has been completed and the Crown prosecution service terminated its investigation. The appellant cites Order PO-2984, in which the adjudicator considered the application of sections 14(1)(c) and 14(1)(i) of the law enforcement exemption. The appellant quotes the following from the adjudicator's summary of the application of the exemption:

> Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario* (*Attorney General*) v. *Fineberg* (1994), 1994 CanLII 10563 (ON SC), 19 O.R. (3d) 197 (Div. Ct.)].
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> Where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [PO-2037, upheld on judicial review in *Ontario* (*Attorney General*) v. *Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 1998 CanLII 7154 (ONCA), 41 O.R. (3d) 464 (C.A.)].
>
> It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a per se fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General)* v. *Fineberg*].

[42] The appellant submits that the ministry has provided no detailed and convincing evidence to establish a reasonable expectation of harm but has admitted that the investigation has been completed, which "precludes any argument in favour of the [ministry's] position that the exemptions claimed are appropriate." The appellant states that he adopts and incorporates into his representations the arguments made in a letter sent to the IPC by his counsel when filing his appeal in February 2021.[10]

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[10] The representations in counsel's letter to the IPC of February 2021 claim deficiencies in the ministry's initial access decision as the grounds for the appeal. As noted above, in its initial decision the ministry denied access to the records in full. The representations in counsel's letter do not address the application of the law enforcement exemption in section 14(1)(c), which is relied upon by the ministry in its revised

Analysis and findings

[43] For the reasons that follow, I find that the discretionary exemption in section 49(a), read with the law enforcement exemption at section 14(1)(c), applies to the information at issue.

Law enforcement

[44] I accept the ministry's submission that the post-payment review process constitutes "law enforcement" as defined in section 2(1) of the *Act*. From my review of the process, I am satisfied that the structure of the post-payment review authorised by the HIA to provide accountability for the use of OHIP funds is an investigative process that can ultimately lead to proceedings in a court or tribunal where sanctions or penalties are imposed.

[45] I find that the possibility of a referral to HSARB for an order for billing suspension or requiring a physician to cease submitting OHIP claims or to the OPP that could result in court proceedings under the *Provincial Offences Act* or under the *Criminal Code* are court and tribunal processes where sanctions or penalties can be imposed.

[46] The possible referral of a matter to a physician's regulatory body, the CPSO, is also relevant. The ministry states that the possibility of such a referral may arise from its post-payment review where concerns arise in relation to patient safety or a physician's standard of practice. In my view, this potential outcome suggests that a post-payment review fulfils more than an auditing function and it is part of an investigative process that can have broader consequences for a physician's practice.

[47] I also note that when the appellant appealed the ministry's decision to the IPC, the ministry's position was that an investigation was ongoing into the billing that was the subject of the records at issue. From my review of the records, specifically the correspondence between the ministry and the OPP, it is apparent that some of these records were generated as part of the ministry's Payment Accountability and Fraud Control Unit's referral of the matter to the OPP. I find that the records at issue demonstrate that the post-payment review process can ultimately lead to court proceedings where sanctions or penalties could be imposed. Accordingly, I am satisfied that the post-payment review is law enforcement as contemplated by the definition in section 2(1) of the *Act*.

Disclosure reasonably expected to reveal investigative techniques and procedures

[48] Turning to the specific law enforcement exemption claimed at section 14(1)(c), I am satisfied that the ministry has established that the disclosure of the information at issue could reasonably be expected to reveal investigative techniques and procedures in

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access decisions issued during the mediation stage of the appeal process and granting partial access to responsive records.

use in law enforcement.

[49] From my review of the records and the ministry's representations, I am satisfied that disclosure of the information at issue could reasonably be expected to reveal the methodology used by the ministry to assess indicators of inappropriate billing practices. I accept the ministry's submission that this methodology includes the types of queries performed by the ministry to identify discrepancies in billing, the types of claims for payment selected by the ministry for investigation and the data elements and combinations of data elements used by the ministry to assess the appropriateness of billing. From my review of the information at issue, I am satisfied that these portions of the records consist of these queries, the types of claims and the data elements chosen by the ministry for this purpose. In particular, I find that the information relating to fee codes, which appears in all the withheld records, and the specific combinations of fee codes chosen by the ministry to assess billing practices is part of the ministry's investigative techniques.

[50] I do not agree with the appellant's submission that the ministry has failed to provide detailed and convincing evidence to establish a reasonable expectation of the harm specified in section 14(1)(c). The harm contemplated by section 14(1)(c) is harm to the effective conduct of law enforcement activities by the revelation of investigative techniques and procedures.

[51] The IPC has previously held that disclosure of a record is disclosure to the world. In Order P-1537, former Assistant Commissioner Tom Mitchinson decided that the disclosure of records relating to animal welfare in Ontario research facilities could reasonably be expected to endanger the security of the facilities and reasoned that:

> My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the animal rights movement, including those who may elect to use acts of harassment and violence to promote their case.

[52] I agree with this reasoning and adopt it in this appeal. Disclosure of the information at issue amounts to disclosure to the public generally. I accept the ministry's submission that its methodology for assessing the appropriateness of a physician's billing is not generally known to the public.

[53] I also accept the ministry's submission that the disclosure of its methodologies could reasonably be expected to cause harm to the effectiveness of its post-payment review process and the proceedings to which the post-payment review can ultimately lead. The ministry explains that once disclosed, the information at issue could be used to identify how it assesses inappropriate billing and this would allow physicians to avoid overpayments or unsubstantiated claims being detected. I accept that this could

reasonably be expected to thwart the ministry's ability to identify instances of misuse of the OHIP payment system.

[54] From my review of the records, I note that the information at issue comprises codes and code combinations and other data elements that are used in the post-payment review process to highlight inappropriate practices. I am satisfied that these fee codes are known to physicians because they are the same fee codes used in the physicians' claims to the ministry for payment. I accept the ministry's submission that disclosure of the fee code combinations that "raise red flags" in a post-payment review would allow physicians to use the codes in a way that avoids drawing the ministry's attention to billing practices. I find that this is the type of harm to law enforcement that is contemplated by section 14(1)(c).

[55] I acknowledge the appellant's submission that the ministry's investigation has been completed. As noted above, the exemption in section 14(1)(c) protects the effectiveness of investigative techniques and procedures used in law enforcement. The fact that the ministry's investigation has been completed is not a relevant factor in applying the exemption in section 14(1)(c) to avoid interference with the investigative techniques and procedures used in the post-payment review process.

[56] For these reasons, I find that the information at issue is exempt from disclosure pursuant to section 49(a), read with 14(1)(c).

[57] Further, I am satisfied that the ministry properly exercised its discretion in applying the exemption in section 49(a) by taking into account relevant considerations and not taking into account any irrelevant considerations. I note that the ministry's decision provided partial access to the responsive records. By providing disclosure to some responsive records containing the appellant's own personal information, it is clear that the ministry balanced the appellant's right of access to his own information with the purpose of the law enforcement exemption that protects the effectiveness of the ministry's investigative techniques and procedures.

[58] The appellant did not address the ministry's exercise of discretion in his representations.

[59] Accordingly, I uphold the ministry's exercise of discretion to withhold the information at issue under section 49(a), read with section 14(1)(c) and dismiss the appeal.

ORDER:

I uphold the ministry's decision to apply the discretionary exemption in section 49(a), read with section 14(1)(c), to the information at issue.

Original signed by:	December 21, 2023

Katherine Ball
Adjudicator