CITATION: Ontario Medical Association v. Ontario (Information and Privacy Commissioner) 2017 ONSC 4090
DIVISIONAL COURT FILE NO's.: 305/16, 306/16 & 312/16
DATE: 20170630

2017 ONSC 4090 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, NORDHEIMER & D. EDWARDS JJ.

BETWEEN:	
ONTARIO MEDICAL ASSOCIATION, SEVERAL PHYSICIANS AFFECTED DIRECTLY BY THE ORDER and AFFECTED THIRD PARTY DOCTORS	*J.J. Colangelo*, for the applicant, Ontario Medical Association
	C. Dockrill, for the applicants, Several Physicians Affected by the Order
Applicants	*L. Galessiere*, for the applicants, Affected Third Party Doctors
– and –	
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, THE HONOURABLE ERIC HOSKINS, MINISTER OF HEALTH AND LONG-TERM CARE, THE MINISTRY OF HEALTH AND LONG-TERM CARE and THERESA BOYLE	*L. Murray*, for the respondent, Information and Privacy Commissioner of Ontario
	K. Chatterjee, for the respondents, The Honourable Eric Hoskins, Minister of Health and Long-Term Care and the Ministry of Health and Long-Term Care[1]
Respondents	*I. Fischer*, for the respondent, Theresa Boyle
	HEARD at Toronto: June 19 & 20, 2017

NORDHEIMER J.:

[1] There are three applications for judicial review of an order dated June 1, 2016 ("the Order") of the respondent Information and Privacy Commissioner of Ontario ("IPCO") directing the respondent Ministry of Health and Long-Term Care ("Ministry") to disclose to the

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[1] Although counsel appeared for the respondents, The Honourable Eric Hoskins, Minister of Health and Long-Term Care and the Ministry of Health and Long-Term Care, those respondents did not participate in the hearing.

respondent Theresa Boyle, the names, annual billing amounts, and medical field of specialization, if applicable, of the top one hundred physicians, for their billings to the Ontario Health Insurance Program ("OHIP") for each of the 2008 through 2012 fiscal years.[2]

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[2] Ms. Boyle is a reporter employed by the Toronto Star. She has written articles about the medical system in this Province including articles relating to those physicians who are the top one hundred billers to OHIP. In furtherance of these articles, Ms. Boyle made a request, dated April 11, 2014, to the freedom of information officer of the Ministry to disclose the amount billed, medical specialty and names of the top one hundred OHIP billers for the five years preceding her request.

[3] The Ministry refused to disclose the identities of these physicians but did disclose the amounts paid in rank order, although all names and some areas of specialty were omitted. That disclosure showed that, in 2012, the top physician received payments totalling $6,190,181.22 and the one hundredth physician received payments totalling $1,424,199.18.

[4] On November 24, 2014, Ms. Boyle appealed the decision of the Ministry to the IPCO. The appeal, although originally assigned to the Commissioner, was ultimately assigned to John Higgins (the "Adjudicator") for the purpose of inquiry and adjudication. The Adjudicator had retired as an adjudicator with IPCO in 2012 but recently returned as an adjudicator on a contract basis.

[5] The Adjudicator issued his order on June 1, 2016. In the order, he held that the information requested was not "personal information" and the privacy exemption in s. 21(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") did not apply. The Adjudicator therefore ordered that the records be disclosed in full.

[6] The Order sets out the process that was followed by the Adjudicator on the appeal. I borrow that recitation from paragraphs 10 to 14 of the Order:

> 10 The adjudicator initially assigned to this appeal identified that a large number of physicians may be affected by this appeal. He sent notification letters to approximately 160 physicians, notifying them of the appeal and inviting them to

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[2] *Order PO-3617; Ontario (Ministry of Health and Long-Term Care) (Re)*, [2016] O.I.P.C. No. 99

contact this office if they were interested in receiving more information or participating in the appeal. A large number of the physicians who received notification letters indicated their interest in participating in this appeal.

11 The adjudicator then sent a Notice of Inquiry to the ministry and the notified physicians who had indicated their interest in participating. He also sent it to organizations ("interested organizations") that represent the interests of some or all of the notified physicians, as they may be able to present useful information to aid in the determination of this appeal.

12 The ministry, the interested organizations, and many of the notified physicians (the "affected parties") provided representations. The appeal was subsequently transferred to me to complete the inquiry. As a result of the representations received, I added the mandatory exemption at section 17(1) of the Act (third party information) as an issue in this appeal.

13 I then sent a Notice of Inquiry to the appellant inviting her to provide representations, and provided her with the complete representations of the ministry and one of the interested organizations, as well as a summary of the main non-confidential arguments made by the ministry, the interested organizations and affected parties. The appellant responded with representations.

14 Subsequently, I sent a Reply Notice of Inquiry to the ministry, the interested organizations and the affected parties, inviting them to provide reply representations. With the Reply Notice of Inquiry, I included a complete copy of the representations of the appellant, the ministry and one of the interested organizations, as well as a copy of the summary of non-confidential arguments made by the ministry, the interested organizations and affected parties that I had previously sent to the appellant. A number of affected parties and one of the interested organizations provided reply representations. The ministry indicated that it would not provide reply representations.

[7] Ultimately, the Adjudicator made the following determinations (Order paras. 21-22):

In this order, I have determined that:

* the record does not contain personal information, and therefore cannot be exempt under section 21(1);

* the information in the record was not "supplied" to the ministry, and the evidence does not support a conclusion that the harms in section 17(1) could reasonably be expected to occur; for these reasons, section 17(1) does not apply; and

* in the alternative, if the exemptions in section 21(1) and/or 17(1) had been found to apply, the public interest override in section 23 would also apply.

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In the result, I am ordering the ministry to disclose the record in full.

[8] The applicants seek a review of the Order. They contend that the Order is unreasonable and an invasion of their individual privacy. They ask that the Order be set aside.

Analysis

[9] At the outset, I should note that there is agreement among the parties that the standard of review applicable to the Order is reasonableness.

[10] I start my analysis with reference to certain provisions from the *FIPPA* beginning with its purpose as found in s. 1, that reads:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> > (i) information should be available to the public,
> >
> > (ii) necessary exemptions from the right of access should be limited and specific, and
> >
> > (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[11] There is no dispute that the presumption under *FIPPA* is that information that is in the possession of provincial government institutions will be disclosed. As s. 1(a)(ii) makes clear, "exemptions from the right of access should be limited and specific". It is also clear, however, that the well-recognized right of individuals to privacy must be protected. Consequently, there are specific provisions in *FIPPA* that protect personal information.

[12] The next relevant provision is the definition of "personal information" that is found in s. 2(1). Personal information is defined as:

> … 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 where 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.

[13] Section 2(3) is also relevant to this definition. It reads:

> 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.

[14] The principal finding made by the Adjudicator was that the information that was sought by Ms. Boyle was not personal information. In reaching that conclusion, the Adjudicator relied on the two step test set out in *Order PO-2225; Ontario (Rental Housing Tribunal)*, [2004] O.I.P.C. No. 8. In that decision, Assistant Commissioner Mitchinson referred to prior decisions of the IPCO that had dealt with the definition of personal information. The Assistant Commissioner noted, at para. 23, that these prior decisions had determined that there was:

> … a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" …

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[15] Assistant Commissioner Mitchinson then described a two-step analysis for determining whether a person's name would reveal other personal information about the individual. The two steps or questions are:

> (i) in what context do the names of the individuals appear?
>
> (ii) is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?

[16] Applying that two step procedure in this case, the Adjudicator first determined that the names of the physicians arose in the context of providing medical services. He found that that constituted a professional or business activity. The Adjudicator then concluded that the act of submitting bills to OHIP, and receiving payment in return, occurred in a business or professional context that is "removed from the personal sphere". The applicants do not appear to take issue with that conclusion.

[17] The Adjudicator then went on to consider the second step. He pointed out that many of the affected parties had submitted that OHIP payments did not portray actual income to the physician because allowable business expenses have not been deducted from those amounts. The affected parties submitted, however, that the public might not appreciate that distinction and assume that the numbers reflected income and a distorted picture would result. Indeed, this argument was also advanced before this court by the applicant, O.M.A.[3]

[18] The Adjudicator concluded that, because the monies received by the physicians is in relation to a business or profession and given that it does not reflect actual income, as the physicians themselves argued, the monies received from OHIP did not reveal "other personal information about the individual". Specifically, the Adjudicator said, at para. 77:

> Payments that are subject to deductions for business expenses are clearly business information. Since it is not an accurate reflection of personal income, it does not reveal anything that is 'inherently personal in nature'.

[19] It is this latter conclusion with which the applicants take exception. One of their principal attacks on this point is that the Adjudicator ignored earlier decisions of the IPCO that

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[3] Factum of the Ontario Medical Association, para. 46.

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had concluded that payments from OHIP to physicians were personal information. The applicants criticize the Adjudicator for not following these earlier decisions. They complain that all that the Adjudicator did to justify his departure from these earlier decisions was to simply say that he was not bound by the principle of *stare decisis*.

[20] I do not view the applicants' criticism on this point to be a fair one. I first note that the Adjudicator was correct when he said that he is not bound by the principle of *stare decisis*. As Iacobucci J. said in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 14:

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.

[21] I should add, on this point, that the applicants' efforts to discern a departure from the principle enunciated in *Weber* by reference to the decision in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 does not withstand scrutiny. Not only do the paragraphs cited by the applicants from the decision of Abella J. not establish any such departure, the submission fails to recognize that Abella J.'s reasons on this point were expressly not endorsed by the majority in that case (see para. 70).

[22] Contrary to the suggestion of the applicants, however, the Adjudicator did not simply move from that correct proposition to decide the issue before him without reference to the prior decisions. In fact, the Adjudicator made specific reference to those earlier decisions. In doing so, he observed that there appeared to be a dichotomy in the manner in which IPCO had dealt with payments to physicians and payments made to other professionals. He expressed concern about the "anomaly" that resulted from the differences in approach reflected in these various decisions. I should note that the Adjudicator was not the only one to identify this anomaly. An earlier decision by Assistant Commissioner Liang identified the same concern.[4]

[23] It is in this latter context that the Adjudicator mentioned that he was not bound by *stare decisis*. He then dealt head on with the concern about departing from those earlier decisions and explained why he had concluded that he should do so. He said, at para. 71:

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[4] Order PO-3435; Ontario (Ministry of Health and Long-Term Care) (Re), [2014] O.I.P.C. No. 294

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> In my view, the divergent approach to professional fees noted by Assistant Commissioner Liang in Order PO-3435 provides a compelling rationale for applying the same template across the board in determining whether information is properly considered "personal information" in a business, professional or official context.

[24] The adjudicator then added, at para. 72:

> Although applying the template in Order PO-2225 to physicians' billing information is a departure from the approach taken in a number of previous orders of this office, which could be seen as a form of inconsistency, this approach actually supports consistency of decision-making, which is also seen as a valuable objective in judicial commentary on tribunal adjudication.

[25] In my view, it was open to the Adjudicator, having identified this anomaly, to address it. In doing so, the Adjudicator approached the reconciliation of these varying decisions in an appropriate fashion. He was not bound to follow those earlier decisions but, rather than simply embarking on his own path, he explained the reasons why he was departing from them. The Adjudicator then applied the established two part test – a test that the applicants do not take issue with – in reaching his decision on the central issue.

[26] On that central issue, the Adjudicator had to be satisfied that disclosing the names of the physicians "would reveal other personal information about the individual" in order for the names to fall within the definition of "personal information". He concluded, for the reasons that he set out, that the payments made by OHIP to physicians did not reveal personal information. Rather, he found that they revealed professional information. That conclusion was open to the Adjudicator on the record that was before him.

[27] The next challenge to the Adjudicator's conclusion is that he failed to follow the decision in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.), that is described by the applicants as "authoritative and binding". I would make two observations with respect to this challenge. First, the issue in *Pascoe* was not the name of the physician so it does not directly address the issue raised here. Indeed, the requestor in that case was not seeking the name of the physician involved. Hence, the decision in *Pascoe* does not provide any binding answer to the question that the Adjudicator had to answer here. Second, both this court and the Court of Appeal found that the conclusion of IPCO (that the information sought, namely "disclosure of

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the medical procedures charged by the highest billing general practitioner in Toronto in 1998-99", was not personal information) was a reasonable one.

[28] Two other arguments advanced by the applicants should be mentioned. One argument is the considerable emphasis placed by the O.M.A. on a report by retired Justice Cory prepared for the Minister of Health in 2005 (the "Cory Report") that resulted in amendments to the *Health Insurance Act,* R.S.O. 1990, c. H.6.

[29] It is difficult to criticize the Adjudicator for not referring to, or relying on, the Cory Report since none of the parties provided that report to the Adjudicator. In addition, the thrust of that report dealt with how physicians' billings to OHIP are reviewed. That is not the issue that is raised in this application nor does it assist in determining that issue. It confuses two entirely different issues of concern.

[30] In any event, the Adjudicator did reference s. 38 of the *Health Insurance Act* that the O.M.A. had emphasized, among others. The Adjudicator quite appropriately noted that the obligation of secrecy established by s. 38 respecting payments made by OHIP to physicians was expressly made subject to *FIPPA*. Consequently, the issues that surrounded the Cory Report and that led to the amendments to the *Health Insurance Act* clearly were not intended to circumscribe the analysis under *FIPPA* and, consequently, they do not assist in addressing the issue here.

[31] The other argument made by the applicants is that Ms. Boyle had failed to establish a proper rationale for why the information that she sought ought to be disclosed to her. In other words, Ms. Boyle had failed to establish a pressing need for the information or how providing it to her would advance the objective of transparency in government.

[32] Two observations can be made on this argument. The first observation is that Ms. Boyle does not need a reason to obtain the information. *FIPPA* mandates that information is to be provided unless a privacy exception is demonstrated. Once it is determined that the information is not personal information, there is no statutory basis to refuse to provide it.

[33] The second observation is that this argument ignores the well-established rationale that underlies access to information legislation. That rationale is that the public is entitled to information in the possession of their governments so that the public may, among other things,

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hold their governments accountable. As La Forest J. said in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

and further at para. 63:

> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

[34] The proper question to be asked in this context, therefore, is not "why do you need it?" but rather is "why should you not have it?".

[35] In the end result, the Adjudicator conducted a thorough analysis of the issues. His conclusion that the information in question is not personal information as defined under *FIPPA* is a reasonable one, that is, it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[5]

[36] In light of that conclusion, it is unnecessary to deal with the subsidiary arguments regarding the application of s. 17 or s. 23 as other justifications for disclosure of the information sought.

[37] One final issue needs to be addressed. The applicants, other than the O.M.A., submitted that there was a reasonable apprehension of bias on the part of the Adjudicator. This complaint arises in the context where originally this matter was going to be determined by Commissioner Beamish. However, Commissioner Beamish made certain statements, that were reported in the media, that led the objecting applicants to complain that he had prejudged the matter. It should be noted that the Commissioner has express statutory authority, under s. 59 of *FIPPA*, to comment on privacy protection implications; engage in public education; and provide information concerning *FIPPA* and the Commissioner's role and activities. The Commissioner's statements must be viewed in that context. However, as a consequence of the concerns raised,

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[5] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47

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and without accepting that they were valid, Commissioner Beamish recused himself and the matter was referred to the Adjudicator.

[38] In my view, assuming for the purposes of this submission that a reasonable apprehension of bias existed as it related to the involvement of the Commissioner, there is no merit to the submission that there remained a reasonable apprehension of bias that attached to the Adjudicator. For one thing, no such issue was raised by the objecting applicants with the Adjudicator at any time up to and including the release of the Order. It was only after the Order was received that the complaint was extended to the Adjudicator.

[39] For another, there is no basis upon which it could be concluded that because the Commissioner made some statements, to which objection was taken, that every other decision-maker associated with IPCO is equally "tainted". If that were the result, IPCO would be effectively precluded from deciding the issue at all, a result that would be absurd. If there was a problem arising from the Commissioner's public statements, it was fully addressed when the Commissioner recused himself. The fact is that there is no reason or foundation to conclude that the Adjudicator reached anything other than his own personal decision based on the record that was before him. Indeed, the Adjudicator said precisely that in his reasons.

[40] I would add that there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one.[6] It is not even approached, much less met, in this case.

[41] Finally, on this point, I would only add that because of this issue, the record of proceedings that was produced by IPCO for this judicial review application included in it material relating to the bias issue, but which did not form part of the material upon which the Adjudicator reached his decision. While I understand why IPCO chose to include this material in the record of proceedings given that the bias issue was raised, in future, if the inclusion of such material proves to be necessary, it ought to be contained in a separate volume apart from the material upon which the decision was reached, so that the delineation between the two is clear, not only to the court but to the parties.

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[6] *Martin v. Martin* (2015), 127 O.R. (3d) 1 (C.A.) at para. 71

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Conclusion

[42] The application for judicial review is dismissed.

[43] In accordance with the agreement of the parties, there will be no order for costs in favour of the respondents, Information and Privacy Commissioner of Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care or the Ministry of Health and Long-Term Care. The applicants will pay to the respondent, Theresa Boyle, costs in the agreed amount of $50,000 inclusive of disbursements and H.S.T.

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NORDHEIMER J.

I agree ___________________________
KITELEY J.

I agree ___________________________
D. EDWARDS J.

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REASONS FOR JUDGMENT

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