

FOI Legislation and Litigation Update

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Council on
Governmental Ethics
Laws - 2017
Conference

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Topics

- Access to information about billings, salaries and benefits paid from the public purse
- Interplay between right to access billings information and freedom of expression
- Update on amendments to federal and provincial access to information legislation

Billings, salaries and benefits

- OHIP billings – Ontario Ministry of Health and Long-Term Care
 - Journalist sought access to total amount paid to top 100 OHIP (Ontario Health Insurance Plan) billing physicians, their names and their medical specialties, for 2008-2012
 - Ministry disclosed the dollar amounts and most of the specialties, but withheld all of the physicians' names and some specialties under the personal privacy exemption

Billings, salaries and benefits

- OHIP billings – Ontario Ministry of Health and Long-Term Care
 - In Order PO-3617, Ontario IPC found that the withheld information does not constitute personal information, and therefore, the personal privacy exemption does not apply
 - OHIP payments do not reflect personal income – business expenses paid out of this amount
 - Even if the exemption did apply, the compelling public interest in disclosure would clearly outweigh the purposes of the exemption
 - Transparency and accountability require identification of parties who receive substantial payments from public purse (e.g. \$6.6 million)
 - IPC ordered the Ministry to disclose the record in full

Billings, salaries and benefits

- OHIP billings – Ontario Ministry of Health and Long-Term Care
 - OMA and two physician groups sought JR of IPC's order: *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090
 - Argued that the IPC adjudicator ignored earlier IPC decisions concluding that OHIP payments were personal information
 - Claimed that the IPC adjudicator should have considered 2005 “Cory Report”
 - Suggested that the requester failed to establish proper rationale for disclosure

Billings, salaries and benefits

- OHIP billings – Ontario Ministry of Health and Long-Term Care
 - Ontario Divisional Court dismissed application
 - Confirmed that the IPC adjudicator was not bound by *stare decisis*, and that he reconciled varying decisions in an appropriate fashion
 - Refused to criticize the IPC adjudicator for failing to rely on a report that was not provided to him by any of the parties
 - Clarified that the requester does not need a reason to obtain the information – public is entitled to information held by government
 - ONCA recently granted leave to appeal

Billings, salaries and benefits

- MCP billings – Newfoundland and Labrador Department of Health and Community Services
 - Department received a request for all Medical Care Plan (MCP) billings listed, by physician, for 2015
 - Department initially refused access under personal privacy exemption
 - In Report A-2016-019, the Newfoundland and Labrador IPC found that the information was not personal information – recommended disclosure
 - Billings are professional or business information, not personal information
 - Alternatively, if personal information, disclosure not an unreasonable invasion of privacy – reveals financial details of contract to supply goods or services to a public body, and is about third parties' remuneration as employees of a public body
 - Department decided to comply with IPC's recommendation
 - Newfoundland and Labrador Medical Association appealed the IPC's decision – case currently before the Supreme Court of Newfoundland and Labrador

Billings, salaries and benefits

- Sunshine list information – Newfoundland and Labrador school board
 - Journalist sought access to the name, job, title and taxable income for all school board employees earning more than \$100,000 in 2015
 - Request made before province had sunshine list legislation – appeal heard after legislation passed
 - School board decided to disclose in full on basis that it is not an unreasonable invasion of privacy
 - Teachers' association appealed to province's Supreme Court, while some teachers filed complaints with the Newfoundland and Labrador IPC
 - IPC recommended release of the information in Report A-2016-015

Billings, salaries and benefits

- Sunshine list information – Newfoundland and Labrador school board
 - In *Newfoundland and Labrador Teachers' Association v Newfoundland and Labrador English School District*, 2016 NLTD(G) 211, the Newfoundland and Labrador Supreme Court found that employees' names would reveal personal information, and that the school board failed to establish that disclosure would “not be an unreasonable invasion of privacy” – names withheld
 - Note: the public interest override does not apply to the personal privacy exemption in Newfoundland and Labrador

Billings, salaries and benefits

- Overlapping concerns expressed by physicians and teachers
 - Potential for perceived unfairness in small communities with tension regarding income disparity
 - Misinterpretation of amounts paid (e.g. lump sum payment due to deferred leave, overhead expenses, etc.)
 - Fear of vandalism, theft, harassment and violence
 - Concern about deterioration of relationships with patients/students
 - Potential increase in requests for personal loans

Billings, salaries and benefits

- However, important to remember that physicians' billings are already disclosed in some jurisdictions
 - New Brunswick – first list of physicians' billings disclosed this year
 - British Columbia – since 1971
 - Manitoba – since 1996
- In Prince Edward Island, there is a government bill before the legislature
- US Medicare (public health insurer for everyone over 65) also publishes annual physician billing information

Billings, salaries and benefits

- Benefits information relating to senators, including Mike Duffy
 - Journalist made a request to the Privy Council Office (PCO) for benefits information relating to senators – located 28 responsive pages, but withheld 27 pages
 - PCO claimed various exemptions, including the personal information exemption
 - Information Commissioner filed JR of PCO’s decision at the Federal Court
 - In *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2017 FC 827, the Federal Court found that the information was not personal information, as personal information does not include information relating to “any discretionary benefit of a financial nature”
 - Denied PCO’s argument that a benefit must increase a person’s net worth or economic position, as defined in *Income Tax Act*
 - Rather, benefit is defined broadly as some form of advantage, favour, gift or profit – no need for material improvement of a person’s financial situation

Billings, salaries and benefits

- The Ontario Divisional Court's decision on OHIP billings and the Federal Court's decision on senators' benefits illustrate how the federal and Ontario access to information statutes facilitate transparency regarding these types of expenditures
- Awaiting outcome of MCP billings appeal in Newfoundland and Labrador
- Although the Newfoundland and Labrador Supreme Court's decision on school board employees' salaries did not result in disclosure, the province had already passed sunshine list legislation at the time of the decision

More billings... and freedom of expression

- Exclusion for abortion records
 - Ontario Ministry of Health and Long-Term Care received a request for aggregate billing data relating to abortions – denied access under exclusion for records relating to the provision of abortion services
 - Ontario IPC upheld Ministry's decision
 - Requester filed an application to strike down the exclusion under s. 2(b) of the *Charter* (freedom of expression) on the basis that it effectively precludes meaningful public discussion on a matter of public interest
 - In *ARPA Canada and Patricia Maloney v R.*, 2017 ONSC 3285, the Ontario Superior Court found that the exclusion infringes the *Charter* – declared invalid
 - Substantially impedes meaningful public discussion
 - No room for discretion (e.g. for non-identifiable information)
 - Insufficient statistical data available to allow for meaningful debate
 - No apparent countervailing considerations (e.g. safety concerns)

More billings... and freedom of expression

- Exclusion for abortion records
 - The Ontario government has since amended the abortion records exclusion
 - Information relating to the provision of abortion services excluded if:
 - Disclosure of the information could threaten the health or safety of an individual, or the security of a facility or other building, or
 - The information identifies an individual or facility, or could be utilized to identify an individual or facility
 - New provision clarifies that statistical or other information relating to the provision of abortion services that does not meet the above conditions is not excluded

Amendments to federal access legislation

- Liberal government committed to reviewing the *Access to Information Act* at the beginning of its mandate
- Standing Committee on Access to Information, Privacy and Ethics conducted a review of the Act and issued a report in 2016 with recommended amendments
- Government tabled Bill C-58 before Parliament's summer break
- Some amendments out of step with recommendations from the Committee and the Information Commissioner
- Committee reported the bill with minor amendments on November 20

Amendments to federal access legislation

- Key amendments:
 - Requesters must specify the subject matter of the request, type of record being requested, and the relevant date or time period
 - Institutions may decline to act on certain requests, including if they do not meet the above requirements, or if the requester may access records by other means
 - Codification of proactive disclosure for Prime Minister and Minister's offices, Parliament and courts administration
 - Removes additional fees from the Act – but may be prescribed in the regulations
 - Commissioner may issue order, but institution can apply to Federal Court for *de novo* review
 - Clear power for Commissioner to examine records subject to solicitor-client privilege

Amendments to federal access legislation

- Information Commissioner's main criticisms:
 - The additional obligations on requesters create a barrier to access
 - Some of the grounds on which an institution may decline to respond to a request are unreasonable and severely limit the right of access
 - Proactive disclosure requirements are not a substitute for access rights – Commissioner has no oversight of proactive disclosure
 - Fees should be eliminated
 - Commissioner should have full order-making power – *de novo* court review and lack of enforcement mechanism = no teeth

Amendments to provincial access legislation

- Saskatchewan government passed amendments to the *Local Authority Freedom of Information and Protection of Privacy Act* and the provincial equivalent in May 2017
- Amendments include:
 - Coverage of police services as local authorities and addition of new law enforcement exemptions
 - Duty of local authorities and government institutions to respond to access requests openly, accurately and completely
 - Clarification of manner of access depending on format of original record

Amendments to provincial access legislation

- Ontario government also passed amendments to provincial and municipal access legislation in May 2017
- New exemption created for records that reveal information received in confidence from an Aboriginal community by an institution
- Also includes records where disclosure could reasonably be expected to prejudice relations between an Aboriginal community and the Ontario government or an institution

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