ORDER PO-1880

Appeal PA-000196-1

Ministry of Health and Long-Term Care

NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request from a member of the media, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to certain Ontario Health Insurance Plan (OHIP) information. Specifically, the requester sought access to the following:

> the top 10 items the Toronto GP/FP [General Practitioner/Family Practitioner] top biller in 1998/99 billed for, how many times the doctor individually billed those 10 items and a brief explanation of the items as described under the Schedule of Benefits.

In her request, the requester specifically stated that she was not seeking access to the identity of the physician. I should also note that the total 1998/99 billing amount for the physician in question has already been disclosed by the Ministry.

The Ministry compiled the requested information on one responsive record and denied access to it in its entirety. The Ministry stated that the information qualified as "personal information" in that it related to employment history and financial transactions involving a physician (the affected person). The Ministry denied access to the record on the basis of section 21(1) (invasion of privacy) relying on the factors against disclosure in subsections 21(2)(f) (highly sensitive information) and 21(2)(i) (unfair damage to reputation) and the presumptions against disclosure in subsections 21(3)(d) (relates to employment history) and 21(3)(f) (describes an individual's finances, income, etc.).

The requester, now the appellant, appealed the Ministry's decision. The appellant also raised the issue of whether section 23 of the *Act*, the so-called public interest override, applies in the circumstances of this appeal.

This office sent a Notice of Inquiry to the Ministry, initially. In response, the Ministry submitted representations. In its representations, the Ministry indicated that with respect to the section 21(1) exemption, in addition to the factors against disclosure in subsections 21(2)(f) and 21(2)(i) and the presumption against disclosure in subsections 21(3)(f), it is also relying on the factors against disclosure in subsections 21(2)(e) (unfair exposure to pecuniary or other harm) and 21(2)(h) (information supplied in confidence). In addition, the Ministry indicated that it is also claiming exemptions under section 17 (third party information) and section 20 (danger to safety or health).

I then sent a modified Notice of Inquiry, reflecting the representations received from the Ministry, to the affected person, who made representations in response. After reviewing the representations received from both the Ministry and the affected person, I determined that it was not necessary to seek representations from the appellant.

RECORD:

The record at issue in this appeal is a one-page document entitled "The top 10 items [based on billing amounts] the doctor billed for, how many times the doctor individually billed those 10 items

and a brief explanation of the items as described under the Schedule of Benefits" and pertains to "service months of April 1998 to March 1999 (HCP [Health Care Programs] only)". The record contains the following information relating to each of the ten billing items: (i) fee code and suffix; (ii) a brief description of the services rendered; and (iii) the number of times the services were rendered. The record also contains a reference to the Ministry's request file number. The record does not contain the affected person's name, or any other information.

PRELIMINARY MATTER:

LATE RAISING OF A DISCRETIONARY EXEMPTION

On July 21, 2000, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until August 26, 2000) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

As I indicated above, the Ministry raised, for the first time in its representations, the application of sections 17 and 20 to the record at issue. Because section 17 is a mandatory exemption claim, I will consider its possible application in the discussion which follows. Section 20, however, is a discretionary exemption and I will need to determine whether the Ministry should be permitted to claim this new exemption.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

Former Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, former Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

A number of previous orders have also recognized that the harm articulated in section 20 is different from the harms contemplated by other exemptions contained in the *Act*, since it relates to the health and safety of an individual. Section 14(1)(e) is similar to section 20 in that section 14(1)(e) provides an exemption for records where the disclosure could reasonably be expected to endanger the life or physical safety of an individual. As a result, in a number of cases, affected parties, who would not normally be entitled to raise the application of discretionary exemptions which have not been claimed by the institution [Order P-257], have been permitted to rely on sections 14(1)(e) and 20, due to the nature of these exemptions and the particular circumstances surrounding those cases [Orders R-980015 and PO-1787]. Similarly, in Order PO-1858, an institution was permitted to claim the application of section 14(1)(e), even though it was not raised within the 35-day time period provided for in the Confirmation of Appeal.

In the present appeal, the Ministry made extensive representations with respect to the application of section 20. The affected person also expressed concerns about potential danger to his/her physical safety. In my view, the appellant will not be prejudiced in any way by the late raising of section 20 to the record at issue as I had determined that it was not necessary to seek representations from her in this appeal. Accordingly, in view of the circumstances surrounding this appeal, I have decided to permit the Ministry to claim section 20 for the record at issue and I will consider its possible application in the discussion below.

DISCUSSION:

PERSONAL INFORMATION

Introduction

In order to determine whether the exemption found in section 21 (invasion of privacy) applies to the record at issue, it is necessary, firstly, to determine whether the record contains "personal information" within the meaning of the *Act*. If it is determined that the record does not contain personal information, then section 21 cannot be relied upon to withhold the information.

Personal information is defined in section 2(1) of the *Act*, in part, as "recorded information about an **identifiable** individual" [emphasis added].

As indicated above, the record at issue consists solely of information pertaining to the ten billing items, specifying the relevant code and suffix, description of the medical services which were rendered and the number of times these services were rendered. Although the information at issue

does not contain the name of the affected person, I must determine whether this individual may nonetheless be identifiable given the information contained in the record.

Ministry's representations

The Ministry submits:

> The nature of the ten billing items refers to abortion-related medical services.
>
> ...
>
> On this appeal, the issues include the nature of the GP/FP services provided and billed over a one year length of time in respect of one particular highest OHIP billing doctor identified as being in Toronto.
>
> In respect of section 2(1)(b) respecting financial transactions of the individual, it was found in Order P-316 that the reasonable expectation of identification is based on a combination of information sought and otherwise available. Further, in respect of section 2(1)(c), respecting identifying numbers or particulars, Order P-651 held that those who are familiar with the circumstances in the records may be able to identify the individual in question. And, in Order P-1208, the requesters' [sic] link to the publicity surrounding the information being requested cannot be rendered non-identifying merely by severing the subject's name. As regards section 2(1)(h) there is found to be personal information where the individual is identifiable to the requester. Mere deletion of the subject's name does not make the requested information not "personal information" about the identifiable individual (Order 27). Notwithstanding that the individual's name is not being sought by the requester, the uniqueness of the financial transaction information from OHIP discloses a medical practice profile that can identify the individual.
>
> ...
>
> The information sought is considered to be the personal information of all physicians where the total number of physicians is less than five. This is in keeping with the Ministry's Policy 3-1-21 of the Manual of Corporate Policy Procedures regarding small cell counts and residual disclosure. This Policy states the following: "when the processing of anonymized personal health information yields tabulations of less than five in which a possibility exists where an individual person could be identified, such information will only be released to an agency head or consultant/researcher and will not be included in the statistical report". Further, specialists can be identified in the public domain, where smallness in number is capable of revealing or inferring financial information identifying the individual. As quoted in Order P-644, former Commissioner Tom Wright, in Order P-230, stated "if there is a reasonable

> expectation that the individual can be identified from the information, then such information qualifies under section 2(1) as personal information". The Inquiry Officer in Order P-644 agreed with this approach and adopted it for purposes of that Appeal.

The Ministry also states the following:

> Statistics which identify the numbers of abortions performed in many cases, have a serious potential for identifying a provider. There may be less than five providers of abortion services in a geographical area. The risk of identification is even greater when this information is complemented by the medical practice profile of the highest OHIP billing physician who is located in Toronto.

Affected person's submissions

The affected person submits:

> The request for billings specifically in Toronto might be used in conjunction with other information to identify my practice even though my name has been omitted. ...
>
> There is also the ongoing concern that mistakes and errors might occur in the process of obtaining and distributing this information that could lead to identification again with life threatening consequences.

Analysis

As outlined in the Ministry's representations, in Order P-230, former Commissioner Tom Wright stated:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

I agree with this approach and adopt it for the purpose of this appeal.

In Order P-644, former Adjudicator Anita Fineberg considered the Ministry's policy which dealt with "small cell counts". In that order the information at issue was the classification of physicians practising certain specialities who also performed electrolysis. In this regard, the Ministry made the following submissions:

> Physicians refer their patients to specialists and the fact that certain specialist [sic] also performed electrolysis was widely known. In addition, this information would be known to patients the specialist has treated. Therefore, these specialists can be

> identified in the public domain. The fact that there are so few in each speciality performing electrolysis would reveal or infer financial information about the individual specialists and must be severed under section 21 of the *Act*.

Former Adjudicator Fineberg considered the comments made by former Commissioner Wright in Order P-230 and applied that approach in Order P-644. She concluded that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals.

In another appeal (Order P-1137), however, which again dealt with the Ministry's "small cell count" policy, she took a different approach to the issue. She stated:

> In Order P-230, Commissioner Tom Wright stated:
>
> > If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.
>
> Based on the submissions of the Ministry and adopting the test set out above, I concluded in Order P-644 that, given the small number of individuals and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals. Accordingly, I concluded that the information at issue was personal information.
>
> In this appeal, the Ministry argues that the numbers constitute personal information solely on the basis that they are in groups of less than five. Unlike the information provided in Order P-644, the Ministry has not indicated how disclosure of the fact that there was one hemophiliac in a particular province who contracted HIV and who made a claim could possibly result in the identification of that individual. For example, for one of the provinces, the number of hemophiliac HIV infected individuals is the same as the number of such individuals who have filed a claim against the province. This number has been disclosed because it is greater than five.
>
> In my view, disclosure of the information in Record 135 could not lead to a reasonable expectation that the individuals could be identified. Accordingly, I find that this document does not contain the personal information of any identifiable individuals. Therefore, section 21 has no application. Record 135 should be disclosed to the appellant in its entirety.

In Order P-1389, Adjudicator Donald Hale dealt with another appeal involving the Ministry. In that appeal the information at issue consisted of the total billing amounts relating to the ten highest billing general practitioners in Metropolitan Toronto. In considering the Ministry's representations

on the issue of whether the requested information was about "identifiable individuals", Adjudicator Hale stated:

> The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.
>
> ...
>
> In my view, the Ministry's arguments rely on the unproven possibility that there **may** exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an **identifiable** individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the *Act* [original emphasis].

With respect to the current appeal, although the Ministry refers to a number of previous orders and correctly identifies the conclusions reached in those cases, the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, although the Ministry refers to Order P-316 and states that "the reasonable expectation of identification is based on a combination of information sought and otherwise available", it does not provide any evidence as to what the "otherwise available" information might be. Similarly, in referring to Orders P-651, P-1208 and 27, the Ministry does not provide any specific information as to how it would be possible to identify the affected person given the circumstances of this particular case.

Although the Ministry takes the position that the record at issue discloses a "medical practice profile" that can identify the affected person, the Ministry does not provide any further information or explanations in this regard. I have carefully reviewed the record at issue. Although it does contain a brief description of each of the top ten medical services that were rendered, these descriptions are derived from the OHIP Schedule of Benefits and are very general in nature. Even though the record contains information relating to the top ten services that were rendered, as well as the number of times these services were rendered, based on the material before me, I am not persuaded that the affected person can be identified from this information.

Also, although the Ministry is relying on its "small cell count" policy, it is not clear from the Ministry's representations as to how this policy is applicable in the circumstances of this case. The only information provided by the Ministry is that "there may be less than five providers of abortion

services in a geographical area". The Ministry does not, however, provide any evidence to show that this is in fact the case in the Toronto area, which is the subject of the request. Moreover, neither the Ministry nor the affected person has provided any evidence as to the likelihood of there being a small number of physicians in the Toronto area performing the types of services and/or the number of services that are identified in the record at issue.

Unlike in Order P-644, where former Adjudicator Fineberg concluded that, given the small number of physicians that performed certain types of services and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about **identifiable** individuals, the Ministry and the affected person have not provided me with a sufficient basis on which to reach this conclusion in the present appeal.

As outlined above, the affected person argues that the information at issue might be used in conjunction with other information to identify his/her practice. The affected person has not however, provided me with any evidence as to what this other information might be and/or how it can be used to identify either him/her or his/her practice. Similarly, the affected person has not provided me with any information to explain his/her concern that "mistakes and errors might occur in the process of obtaining and distributing [the information at issue]" that could lead to the affected person's identification. As I indicated previously, the Ministry has already compiled the record which contains the responsive information. This record does not include the affected person's name, nor any other identifying information.

Based on the above, I am not satisfied that there is a reasonable expectation that the affected person can be identified from the information contained in the record at issue. Accordingly, I find that the information at issue is not about an **identifiable** individual and, therefore, does not qualify as "personal information" under subsection 2(1) of the *Act*.

I have determined that the information at issue does not fall within the definition of "personal information" as found in section 2(1) of the *Act*. Accordingly, section 21 of the *Act*, which can only apply to personal information, cannot be relied upon to withhold the information from disclosure.

DANGER TO SAFETY OR HEALTH

Introduction

The Ministry has claimed that section 20 of the *Act*, applies to the record at issue. This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words "could reasonably be expected to" appear in the preamble of section 20, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms." In the

case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly [section] 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 20 still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment could be expected to result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated (PO-1747).

Ministry's representations

The Ministry submits the following:

> ... [D]isclosure of the information could reasonably be expected to seriously threaten the safety or health of an individual. Such individuals include providers, patients, staff, supports and, in some cases, innocent bystanders and neighbours of providers and staff who happen to be in a location where the pro-life supporters are engaged in harassment or acts of violence.
>
> Statistics which identify the numbers of abortions performed in many cases, have a serious potential for identifying a provider. There may be less than five providers of abortion services in a geographical area. The risk of identification is even greater when this information is complemented by the medical practice profile of the highest OHIP billing physician who is located in Toronto.
>
> Violence in relation to protests against abortion services escalated between 1991 and 1995. Recent events in Canada and the United States have emphasized that public identification of a provider can substantially elevate harassment and the risk of violence, not only for a provider but for their patients, family, neighbours, staff and co-workers.
>
> The number of physicians in Ontario who are willing to provide abortion services is limited and is shrinking. Many of these physicians, who have not previously been identified, are concerned about being personally identified. Some in larger centres providing high volumes have stated their intention to discontinue performing abortions if publicly identified, to avoid the risk of harassment and violence to themselves, their families and their co-workers.
>
> Thus, the Ministry submits that disclosure of the requested information could reasonably be expected to seriously threaten the health or safety of an individual.

Affected person's representations

The affected person also refers to acts of violence that have been perpetrated against medical practitioners involved in the abortion services. The affected person goes on to state that the release of the requested information would jeopardize his/her safety, as well as the safety of other individuals.

Analysis

While it is important to take a cautious approach to the issue of disclosure of information relating to abortion services, it does not follow that the disclosure of all such information would give rise to a reasonable expectation of harm (Order PO-1695).

In Order PO-1695, Assistant Commissioner Tom Mitchinson found that:

> … disclosure of the overall funding levels could [not] reasonably be expected to result in any of the harms outlined in section 17(1)(c). The name of the facility is known to the appellant and others, and disclosing the overall funding level would provide *no new or additional identifying information*. Funding of this and other independent health facilities is permitted by the [*Independent Health Facilities Act*], and it is public knowledge that operating costs for independent health facilities are funded by the Ministry [emphasis added].

In two other cases, the Assistant Commissioner found that information which could identify either specific facilities or individuals as being involved in the provision of abortion services should not be disclosed. In Order P-1635, the Assistant Commissioner found personal information which could be used to identify individual providers and particular clinics to be "highly sensitive":

> The Ministry [submits]:
>
> > [Anyone who obtains access to the requested information] could compile a list of all [College of Physicians and Surgeons of Ontario] members in active practice with a specialty in obstetrics and [gynaecology] along with their addresses. It is a simple matter to discover which address represents the locations of abortion clinics. It is also a simple matter to match the residential addresses of these individuals. One could then create a website for posting on the Internet of the names, residential and business addresses of [College] members performing abortions.
> >
> > . . . . .
> >
> > … [P]roviding the bulk data requested could facilitate the compilation, presentation and dissemination of such information concerning, for example, abortion providers, and result in the names of relevant [College] physicians appearing on the U.S. website, or a comparable Canadian one … [D]isclosure of the requested information could result in an unjustified invasion of the personal privacy of these individuals.
>
> As this example illustrates, information which would arguably be non-controversial when available on a one-off basis can accurately be characterized as highly sensitive

> (section 21(2)(f)) when considered in bulk format, as in this appeal. This is particularly true when one recognizes that disclosure under the *Act* is not restricted to the specific requester, but is in effect "disclosure to the world." In my view, this factor alone is sufficient to outweigh the factor favouring disclosure described above.
>
> Therefore, I find that disclosure of the records would result in an unjustified invasion of the personal privacy of the registrants, and that the records are exempt under section 21(1) of the *Act*.

In Order P-1499, the requester sought access to a record revealing the number of abortions performed by hospital and clinic. The Assistant Commissioner found that the record could serve to identify facilities and individuals involved in providing abortion services, and that disclosure could reasonably be expected to lead to the harms described in sections 14(1)(e):

> … the Ministry and affected parties have provided sufficient evidence to establish that disclosure of the record could reasonably be expected to endanger the life or physical safety of individuals associated with the abortion facilities. My decision is not based on the identity of the appellant's organization or its activities, but rather on the principle that disclosure of the record 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 pro life movement, including those who may elect to use acts of harassment and violence to promote their cause. Although I acknowledge that similar information has previously been disclosed, I also accept the Ministry's position that the more abortion-related information that is made available, such as the numbers associated with each facility, the more likely specific individuals will be targeted for harassment and violence.

In Order PO-1747 Senior Adjudicator David Goodis dealt with an appeal involving the Ministry where the information at issue consisted of the number of obstetricians/gynaecologists billing OHIP for therapeutic abortions, as well as the number of therapeutic abortions which were billed to OHIP on an annual basis over a period of five years. In that appeal, the Ministry's submissions relating generally to the abortion issue as well as its specific representations on the sections 14(1) and 20 exemptions, were similar to the Ministry's representations in the current appeal.

Senior Adjudicator Goodis reviewed a number of previous orders of this office, as well as other relevant jurisprudence, in determining whether the information at issue was properly exempt under sections 14(1) and 20 of the *Act*. After referring to the above-noted orders issued by the Assistant Commissioner, Senior Adjudicator Goodis went on to state the following:

> This office has also issued a line of decisions in cases involving requests for information concerning animal experiments taking place in registered research facilities (see Orders 169, P-252, P-557, P-1537). The records at issue in these cases can generally be described as statistical reports identifying the numbers and species

of animals used by each identified facility. In these cases, the Ministry of Agriculture and Food (and, in some cases, affected persons) claimed that the sections 14(1)(e) and (i) applied, based on serious concerns that disclosure of the records could reasonably be expected to result in employees and facilities being targeted for threats and acts of violence by extremists in the animal rights movement. In each case, this office upheld the Ministry's section 14(1)(i) exemption claim. This office made no findings in these cases on the issue of whether non-identifying, province-wide statistical information is exempt. However, there are indications in these orders that this type of information is made available to the public.

I recognize that the animal experimentation cases present a different context from those involving abortion services. However, the two types of cases are similar to the extent that they both involve concerns that upon disclosure of information, members of extremist groups could reasonably be expected to threaten the health or safety of individuals or commit acts of violence against individuals or facilities. On this basis, the principles derived from the animal experimentation cases are relevant to this appeal.

In both the animal experimentation and abortion cases, information associated with individuals or facilities has been found to meet the "harm" threshold in section 14, while more generalized information which cannot be linked to specific individuals or facilities, or which would not reveal new or additional identifying information, has been considered accessible under the *Act*.

The British Columbia Information and Privacy Commissioner recently issued an order which reinforces the approach in the Ontario cases described above. In Order No. 323-1999, a requester sought access to "the amount of abortions performed [at Vancouver General Hospital and Health Sciences Centre] during the calendar years 1997 and 1998." The hospital refused access on the basis of section 19 of the B.C. *Freedom of Information and Protection of Privacy Act*, which contains very similar wording to sections 14(1)(e) and 20 of the *Act*. Commissioner David Loukidelis found that this information was not exempt. He stated:

> This is not the first time requests for access to records involving abortion services have been the subject of an inquiry under the Act. Order No. 7-1994 and Order No. 18-1994 focussed on s. 19(1) of the Act and the safety of individuals involved in providing abortion services to the public. In those cases, however, my predecessor was faced with requests for the names of individuals. Based on the evidence in those cases, it was decided that s. 19(1) authorized refusal of access to the requested personal information.
>
> . . . . .

> … it is relevant to my decision that it is already publicly known that VGH offers abortion services. The material submitted to me by both parties clearly establishes this.
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> . . . . .
>
> Having reviewed all of VGH's material with care, I am unable to agree that it supports the "inextricable sequence" articulated by VGH, i.e., by which release of the requested information as to numbers of abortions performed can logically be connected to a harm identified in s. 19(1). Again, s. 19(1) requires there to be a "reasonable expectation" that disclosure of the information in issue is likelier than not to lead to the identified harm. I cannot conclude there is such a reasonable expectation of harm, in the particular circumstances of this case, flowing from disclosure of the requested information. VGH's materials attest to the general context in which abortion services are provided, i.e., a climate where violence, intimidation and threats do occur. But the materials do not, in my view, support the position advanced by VGH respecting release of this statistical information.
>
> This is not to say the s. 19(1) test can never be met in cases involving such information. The situation might be different if, unlike the case here, it is not publicly known that a particular hospital or clinic provides abortion services. If public confirmation of that fact alone could, in the circumstances, be reasonably expected to threaten anyone else's health or safety, s. 19(1) could well apply. This result may be even more likely if the hospital or clinic is in a small community and has minimal security arrangements available to it. The evidence in such cases would, of course, be determinative.

In the United States, generalized, statistical information similar in nature to the requested information regarding numbers of abortions is widely available, mainly on the basis of statutory requirements. Constitutional challenges to these requirements have been dismissed by the Supreme Court of the United States *[Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)].

In the state of Connecticut, the Freedom of Information Commission considered a request for access to abortion figures under that state's *Freedom of Information Act* (Docket #FIC 1997-092). In upholding a denial of access on the basis of an exclusion for "morbidity and mortality" information, the Commission stated:

> The Commission notes that the very broad language of [the exclusion] precludes its ordering disclosure of the raw data information which was requested in this case. The Commission notes its concern when as in this case raw data or statistical information is barred from disclosure where no reasonable risk of identifying the subject of an abortion or the individual performing such abortion exists.

Pursuant to a request under a freedom of information statute, the Supreme Court of Illinois in *Family Life League v. Department of Public Aid*, 112 Ill. 2d 449 (1986) ordered disclosure of (among other information) the numbers of abortions performed by providers, rejecting arguments that disclosure would lead to threats and harassment.

Like the B.C. and Ontario cases, the U.S. authorities suggest that generalized statistical data regarding abortion services should be accessible under freedom of information legislation.

The information at issue in this appeal consists of general statistical information on a province-wide basis. This information cannot be linked to any individual facility or person involved in the provision of abortion services. I do not accept that the sequence of events, from disclosure to the harms outlined in sections 14(1)(e) and (i), could reasonably be expected to occur. While I accept the Ministry's submission, supported by ample evidence, that individuals and groups on both sides of the abortion debate have been subjected to threats, intimidation, and acts of violence, in my view, any link between disclosure and the harms in these sections is exaggerated. The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person, or to the security of a building, vehicle or system or procedure established for the protection of items within the meaning of sections 14(1)(e) and (i) of the *Act*.

This finding is in keeping with a fundamental purpose of the *Act*, as recognized by the Supreme Court of Canada:

> 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 . . . Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable . . . [*Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 at 403, per La Forest J. (dissenting on other grounds)].

> In my view, to deny access to generalized, non-identifying statistics regarding an important public policy issue such as the provision of abortion services would have the effect of hindering citizens' ability to participate meaningfully in the democratic process and undermine the government's accountability to the public.

I agree with the comments made by Senior Adjudicator Goodis and adopt them for the purposes of this appeal.

I have determined above that the information at issue in the current appeal is not about an **identifiable** individual. Accordingly, since the information at issue would not serve to identify the affected person, its disclosure cannot reasonably be expected to threaten the safety or health of this individual. I also find that the information at issue cannot be linked to any individual facility or any other person involved in the provision of abortion services. Similar to the findings made in Order PO-1747, even though I too accept that individuals and groups on both sides of the abortion debate have been subjected to threats, intimidation, and acts of violence, in my view, any link between disclosure of the requested information and the harms outlined in section 20 is exaggerated. The evidence before me does not establish a reasonable expectation of endangerment to the life or physical safety of any person within the meaning of section 20. Accordingly, I find that the requested information is not exempt under section 20 of the *Act*.

THIRD PARTY INFORMATION

The Ministry claims that the record at issue qualifies for exemption under section 17(1)(b) of the *Act*. This section reads:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> ...
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> ...

In order for a record to qualify for exemption under section 17(1)(b) of the *Act*, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of section 10(1) will occur [Orders 36, M-29, M-37, P-373].

Part one: type of information

In order to satisfy part one of the test, the records must reveal information that is "a trade secret or scientific, technical, commercial, financial or labour relations information." Information contained in a record could also "reveal" information "supplied" by an affected party to an institution if disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution but not contained in the record (Orders P-218, P-228, P-241 and M-36).

Both the Ministry and the affected person submit that the information at issue in this appeal qualifies as "financial information."

The term financial information has been defined in previous orders as follows:

> This term refers to information relating to money and its use or distribution and must contain or refer to specific data, for example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

As outlined above, the record at issue contains information pertaining to the top ten billing items, containing the relevant code and suffix, description of each item and the number of times each item was billed. Although the record does not contain the actual billing amounts, the Ministry explains that the amounts paid per service are publicly available in the OHIP Schedule of Benefits.

Based on this information, I am satisfied that it would be possible, using the information contained in the record at issue in conjunction with the OHIP Schedule of Benefits, to determine the total billing amounts with respect to each of the ten items identified in the record. Accordingly, I find that the information within the record qualifies as "financial information" and, therefore, the first part of the test has been met.

Part two: supplied in confidence

In order to satisfy the second requirement, the Ministry and/or the affected person must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence. In addition, to satisfy this part of the test, it is not necessary to show that the record itself was supplied to the institution. The test will be satisfied if it can be shown that the information contained in the

record was originally supplied to the institution and that disclosure of the record would **reveal** the information originally supplied. [see, for example, P-393, P-493 and P-1137]

Supplied

Both the affected person and the Ministry submit that the record contains billing information which was supplied by the affected person to the Ministry. I concur, and find that the "supplied" component of the second requirement has been established.

In confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry and/or the affected person must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

In its representations, the Ministry takes the position that physicians have a reasonable expectation that information relating not only to their billings but also to the nature and frequency of the medical services performed would be confidential. The Ministry also submits that it has consistently treated the information at issue as confidential.

The affected person also submits that the information contained in the record was supplied to the Ministry in confidence.

Based on the material before me, I am satisfied that the information contained in the record was supplied by the affected person to the Ministry with a reasonably-held expectation of confidentiality. Accordingly, I am satisfied that the second part of the section 17(1) exemption test has been satisfied.

Part three: harms

Introduction

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, Senior Adjudicator Goodis stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide

> variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, the Ministry and the affected person must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraph (b) of section 17(1).

The Ministry submits:

> The continued supply of information related to the number of abortions performed by physicians is fundamental to the success of Ministry planning in this regard. Such information must also be seen as essential to the well-being of women in Ontario. Thus the Ministry submits that it is in the public interest that such information continue to be supplied.
>
> Were physicians to lose trust in the ability of the Ministry to maintain the confidentiality of their information, at least some among them would be less forthcoming in the information they provide and may even cease to supply it. The result would be to compromise the Ministry's efforts to plan adequately for Ontario's future needs in this area of health care, thereby ultimately putting the health of the population at risk.
>
> The Ministry is aware of previous orders of [this office] in which it has been found that subsection 17(1)(b) does not apply where there is a financial motivation for a party to contract with an institution and the provision of certain information is a necessary part of this process (Order P-394), or where an affected party is required to keep certain information and provide it to an institution upon request (Order P-359).
>
> However, the Ministry submits that the present information may be distinguished on the basis that it is reasonable to expect that if the statistics are disclosed and harms result, abortion services are likely to simply cease being provided. This is a reasonable expectation in view of the evidence provided by the Ministry on the number of providers who have ceased providing abortion services in view of the climate surrounding this issue.

> Thus, the Ministry submits that disclosure of the abortion statistics could reasonably be expected to result in this information no longer being supplied to the Ministry where, as noted, it is in the public interest that such information continue to be supplied in order that the public have the benefit of this service. ...

The affected person also submits that if his/her confidentiality is breached, he/she could no longer practice in safety and would have to give serious consideration to withdrawing from this aspect of his/her practice.

In my view, neither the Ministry nor the affected person have provided me with sufficiently detailed evidence to enable me to conclude that disclosure of the records at issue would result in similar information no longer being supplied to the Ministry. To the contrary, the Ministry's representations appear to acknowledge that physicians are required to keep the information at issue and provide it to the Ministry upon request.

The representations of both the Ministry and the affected person focus primarily on concerns surrounding the disclosure of information which would serve to identify individual physicians or facilities. As I concluded above, however, disclosure of the information in the record could not lead to a reasonable expectation that the affected person could be identified. I also found that the information at issue cannot be linked to any individual facility or any other person involved in the provision of abortion services, and that there is no reasonable expectation of endangerment to the life or physical safety of any person through disclosure. In view of these findings, I am not persuaded that disclosure of the requested information could lead to a reasonable expectation of the harm contemplated by section 17(1)(b), as described by the Ministry and the affected person.

As a result, I find that part three of the three-part test has not been met. In view of this finding, section 17(1) of the *Act* cannot apply.

ORDER:

1. I do not uphold the Ministry's decision to deny access to the record at issue in this appeal under sections 17, 21, and 20 of the *Act*.

2. I order the Ministry to disclose the record to the appellant no later than **April 19, 2001,** but not before **April 14, 2001**.

Original signed by: March15, 2001
Irena Pascoe
Adjudicator