COURT FILE NO.: 274/01
DATE: December 17, 2001

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

LANG, DAY and CZUTRIN JJ.

B E T W E E N:	
ATTORNEY GENERAL FOR ONTARIO Applicant	*Elaine Atkinson*, for the Applicant
- and -	
IRENA PASCOE, ADJUDICATOR Respondent	*William S. Challis* and *Shirley Senoff*, for the Respondent Adjudicator
- and -	
JOHN DOE, REQUESTER Respondent	*Peter Jacobsen*, for the Respondent Requester
JOHN Q. DOE, AFFECTED PARTY Respondent	No one appearing for the Respondent Affected Person
	HEARD: Friday, November 30, 2001

[1] This judicial review challenges the Privacy Commissioner's decision to order disclosure of the medical procedures charged by the highest billing general practitioner in Toronto in 1998-99.

[2] In response to an earlier request, the Ministry had disclosed the amount billed by the doctor. In this request, under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended (*FIPPA*), a reporter (the requester), sought and obtained a *FIPPA* order for production by the Ministry of Health and Long-Term Care (the Ministry) of the top ten items billed to the Ontario Health Insurance Plan (OHIP) by the highest billing general/family practitioner in Toronto (the affected person). Neither request sought the physician's identity.

[3] When the most recent request was submitted, the Ministry compiled the requested top ten items broken down by fee code, suffix, description of service and the number of times the service was rendered. The compiled summary contains no other information and specifically does not include the name of the physician. The Ministry took the position that the information sought was personal information relating to the employment history and financial transactions of the affected person, and was therefore protected by *FIPPA*. The requester appealed the Ministry's refusal to disclose the information to the Information and Privacy Commissioner (the commissioner). After a mediation of the issues failed, the commissioner sent a Notice of Inquiry to the Ministry and the affected person. Both responded. The Ministry submitted further grounds for exemption of the information on the basis of sections 20 (danger to safety or health) and 17(1)(b) (confidential information). After considering those submissions, the commissioner decided she did not need representations from the Requester. She held that the records did not qualify as "personal information" and ordered the Ministry to disclose. The Ministry seeks judicial review of that decision, which was stayed pending this application.

Issues

[4] The Applicant raises the following issues:

1. Does the information qualify as "personal information" as defined in section 2(1) of *FIPPA*?

2. Do the records qualify for exemption pursuant to the mandatory exemption provided by section 21 of the Act as being an "unjustified invasion of personal privacy"?

3. Is there a compelling public interest under section 23 in the disclosure of the records that clearly outweighs the purpose of the exemption provided by section 21 of *FIPPA*?

4. Do the discretionary exemptions provided by subsections 17(1)(a), (b) and (c) apply to this record?

5. Does the discretionary exemption provided by section 20 apply to this record?

Standard of Review

[5] Before looking at the individual issues, it is necessary to determine the appropriate standard of review.

[6] The commissioner in this case considers written submissions, but not affidavits or sworn evidence, and applies the statutory provisions to her factual findings. She makes no policy determinations. Her decision is not protected by a privative clause. These characteristics speak to a standard closer to the correctness end of the review spectrum. On the other hand, the legislation does not provide a statutory right of appeal and confers on the commissioner an independent duty to decide questions of public access to information. On these issues Campbell J.'s statement is often quoted:

> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963*, [1979] 2 S.C.R. 227, supra, the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.
> *John Doe v. Ontario (Information and Privacy Commissioner)*, (1993), 13 O.R. (3d) 767 at pp. 782-783.

[7] On the spectrum from correctness to patent unreasonableness, this case must be reviewed asking whether the commissioner's decision was reasonable. All represented parties agree that this is the appropriate standard. All the issues before the commissioner engage her expertise in balancing the competing interests of the public's right to know, the affected person's right to privacy and the government's interest in maintaining confidentiality of public records. The question of whether the information qualifies under section 2(1) (personal information), under section 21 (unjustified invasion of personal privacy) or under the exemptions is at the core of the commissioner's specialty. Her knowledge about matters pertaining to access to information is invoked. This court must recognize and respect that expertise in reviewing her decision.

[8] The Court of Appeal has confirmed that reasonableness is the appropriate standard of review of the commissioner's decision: *Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129 at 138-140.

[9] The test for reasonableness is canvassed in *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 at 19 (S.C.C.), in the context of the definition of an unreasonable decision, Iacobucci J. said:

> ¶ 56 I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. **An unreasonable decision is one that, in the main,**

> **is not supported by any reasons that can stand up to a somewhat probing examination.** Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the later kind of defect would be a contradiction in the premises or an invalid interference.
>
> ¶ 57 The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable
> [emphasis added]

And further, Justice Iacobucci continues,

> ¶ 80 ... a reviewer, and even one who has embarked upon review on a standard of reasonableness simpliciter, will often be tempted to find some way to intervene when the reviewer him or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

[10] Accordingly, this court must be cautious about intervening and must ask not whether the commissioner's decision was correct, but whether it was reasonable. If the court finds it unreasonable, it must be able to articulate specific grounds such as a finding that the commissioner based her decision on a lack of or misapprehension of the evidence, or she drew an insupportable inference, or her application of the principles to the facts challenges logic or lacks coherence. Only if the decision is unreasonable, would the reviewing court interfere with the result. The court would not interfere simply because it might have come to a different conclusion.

Purposes of legislation

[11] The purposes of *FIPPA*, which the commissioner must balance, are set out in the legislation:

> 1. 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.

[12] The presumption is then in favour of disclosure to promote the goals of government transparency and accountability and to permit public debate. Only if a competing individual interest outweighs those goals will the information be protected. In keeping with these objectives, the *Act* places the burden of proof on the Ministry to establish the applicability of an exemption (section 53). With respect to reasonable (not probable) expectation of harm, that burden must be discharged by providing detailed and convincing evidence: *Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129 at 142 (Ont. C.A.)

1. Personal Information

[13] The primary question before the commissioner was whether the information requested was "personal information", which is defined at section 2(1), in the relevant part, as "information about an identifiable individual". Section 21(1) prohibits the head of an institution, in this case the Ministry, from disclosing such information to any person other than the individual to whom the information relates, with certain exceptions. One of the exceptions is contained in s. 21(1)(f) permitting the disclosure of personal information if it "does not constitute an unjustified invasion of personal privacy".

[14] While the records in question do not name the physician, it is common ground that the records may themselves, or in combination with other information, identify the individual even if he or she is not specifically named. The test is accepted as follows:

> 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.
> *Order P-230* [1991] O.I.P.C. No. 21.

[15] The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or

she could be identified by those familiar with the particular circumstances or events contained in the record. See *Order P-316* [1992] O.I.P.C. No. 74; and *Order P-651* [1994] O.I.P.C. No. 104.

[16] The Ministry and the affected person submitted that the disclosure of the physician's top ten billing procedures would, in this case, give the requester a profile of the practitioner's medical practice that may be sufficient to identify the individual physician.

[17] The Ministry submitted that:

> 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 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 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.

[18] This is the extent of the submissions and evidence offered by the Ministry in support of its position that the release of the practice components would make the affected person identifiable. No specifics were provided. The affected person's submissions expressed a concern that the information in the records, when combined with other information, might identify the physician's practice.

[19] In considering these submissions, the commissioner noted and accepted the correct test for a "reasonable expectation" that the individual could be identified and said:

> ... the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, ... it does not provide any evidence as to what the "otherwise available" information might be. Similarly ... 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 those 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 [such physicians] in a geographical area". The Ministry does not, however, provide any evidence to show that this is the fact 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.
> ...
>
> 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*. *Order PO-1880*, pp. 7-8.

[20] The Ministry, apart from its small cell count finding, did not proffer any submissions establishing a nexus connecting the record, or any other information, with the affected person. Any connection between the record and the affected person, in the absence of evidence, is merely speculative. The Ministry made no submissions explaining its small cell count finding or showing how it applied to the facts of this case. No other information was identified by the Ministry or by the affected person that could link the record to an identifiable individual. For example, the Ministry, which has ready access to such data, provided no evidence that the services billed were only provided by a small number of physicians in Toronto, unless its reference to its small cell study was intended to constitute such evidence. In the absence of detailed and convincing evidence from the Ministry or the affected person, I am unable to conclude that the commissioner acted other than reasonably, or indeed had any other option given the onus on the Ministry, when she concluded that the affected person was not identifiable.

[21] In its factum, the Ministry argues that the commissioner failed to consider the nature of the service provided by the physician and the unique social history associated with the provision of that service. A fair reading of the commissioner's order indicates that she was cognizant of the issues raised in the circumstances of this case, but was bound by the legislation, as she interpreted it, to release the information, unless satisfied by the Ministry or the affected person that the information could identify the affected person. Clearly she was not so satisfied. I am unable to conclude that the commissioner, in arriving at that decision, was unaware of or ignored the potential effects of the release of the requested records.

2. Unjustified Invasion of Privacy

[22] Since the commissioner reasonably concluded that the record did not contain "personal information", it was unnecessary for her to consider whether its disclosure would constitute an unjustified invasion of personal privacy under section 21(1)(f) as that provision only comes into consideration when there is an identifiable individual.

3. Public Interest Override

[23] The Ministry relies on section 23, often referred to as the "public interest override":

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[24] This section is intended to permit disclosure even of personal information otherwise exempted under *FIPPA* where the importance of the public interest in the record outweighs the concerns that permitted the exemption. In this case there was no exemption as the commissioner had made a finding that the record did not constitute personal information. Accordingly, section 23 does not apply in the circumstances here and, in any event, is not apparently available to the party seeking to suppress the record.

4. Section 17 Discretionary Exemptions

[25] In the relevant part, *FIPPA* provides that "a head shall refuse to disclose a record that reveals ... financial information ..., supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (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;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; ..."

[26] Before the commissioner, the applicant made submissions that the record was exempt under section 17(1)(b). Submissions were not made under any other subsection of 17. Accordingly, I agree with the findings of the commissioner, and of the requester, that the applicant should not be permitted to raise new grounds at this stage of the proceeding. In arriving at this conclusion, I note the absence any explanation for the applicant's failure to raise these issues before the commissioner, and the absence of submissions supporting the applicability of either section 17(1)(a) or (c) in any event.

[27] In her conclusion on section 17(1)(b), the commissioner stated and applied the following three part "harms" test, the appropriateness of which is not challenged by the other parties to this application:

> 1. the record must reveal information that is ... financial ... 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 the harm specified in clause (b) of section 17(1) will occur.
> *Commissioner's Order*, pp. 16-17.

[28] I agree with the submissions of all the parties that the physician satisfies the first two parts of the test as she or he supplied financial information to the government in the expectation of confidence. The sole question before the commissioner was whether its disclosure could cause similar information to no longer be supplied where it is in the public interest that it continue to be supplied. It is also common ground that it is in the public interest that the information continue to be supplied both for the benefit of the recipients of the physician's services and for the purposes of governmental health care planning.

[29] The commissioner found at page 21:

> 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 the individual physicians .... As I

> concluded above, however, disclosure 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 .... 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.

[30] The commissioner noted in her findings that other jurisdictions do not use privacy legislation to prevent the disclosure of information similar to the information contained in the record at issue in this proceeding, and those jurisdictions presumably do not suffer the harm of non-reporting raised by the government in this case. The Ministry had the burden of proving on "clear and convincing" evidence that a "reasonable expectation of probable harm arose" as set out in section 17(2)(b). For this purpose the Ministry relied primarily upon its view that the physician was identifiable, a submission earlier rejected by the commissioner.

[31] Applying the standard of review to this aspect of the commissioner's decision, I am mindful that it is not within our mandate to substitute any different decision that we might have made for that of the commissioner. In addressing this issue, the commissioner's expertise, her knowledge of the legislation's purpose and application were engaged. The standard of review is reasonableness. I see nothing unreasonable or irrational in her conclusion, which does stand up to probing examination, to justify interfering in her decision.

4. Section 20 exemption

[32] Finally the Ministry and the affected person submit that disclosure of the information would "reasonably be expected to seriously threaten the health or safety of an individual" and hence was entitled to the benefit of the discretionary exemption provided for by section 20.

[33] The commissioner noted that "the 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." *Order PO-1880*, p. 9. The commissioner noted that the Ministry was not required to establish that the affected person would be probably harmed, but only that the expectation of harm was reasonable. She was cognizant of and applied the appropriate principles to the facts placed before her. Since she had found that the requested information would not identify a particular individual, her conclusion was reasonable that there could be no reasonable expectation of harm to the affected person. Even if the information requested disclosed a small group of individuals, the Ministry had not provided evidence that a reasonable expectation of harm may apply to that group of individuals. The Ministry had historically disclosed the requested information until 1995 and, while prior disclosure does not foreclose the Ministry from now resisting disclosure, the Ministry did not made submissions that the pre-1996 disclosure had then resulted in any harm as support for its current reliance on section 20. In short, there was a paucity of evidence upon which the commissioner could arrive at any other disposition than disclosure. The commissioner's decision then on this issue cannot be said to be unreasonable.

Result

[34] The question before the commissioner in this case was largely fact dependent, or at best was a question of mixed fact and law. The commissioner's decision considers the appropriate principles, applies those principles to the submissions received by her, and is supported by her reasons. The decision cannot be said to be unreasonable. The application for judicial review is dismissed.

[35] Submissions with respect to costs may be made in writing within thirty days.

LANG J.
CZUTRIN J. — I agree.
DAY J. — I agree.

Released: December 17, 2001

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JOHN DOE, REQUESTER

Respondent

JOHN Q. DOE, AFFECTED PARTY

Respondent

REASONS FOR JUDGMENT

Lang, Day, Czutrin JJ.

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