Order F20-12

MEDICAL SERVICES COMMISSION

Celia Francis
Adjudicator

April 20, 2020

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Summary: A physician requested copies of all information the Medical Services Commission (MSC) held about him. The MSC disclosed the responsive records, withholding some information under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) (disclosure would be an unreasonable invasion of third-party personal privacy). The physician asked that an inquiry be held to determine if s. 22(1) applies to the patients' names and Personal Health Numbers (PHNs) in the records. The adjudicator found that s. 22(1) applied to patients' names and PHNs.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(3)(a), 22(3)(b), 22(2)(c), 22(2)(f).

INTRODUCTION

[1] In April 2017, a physician made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for all information that the Medical Services Commission (MSC) held about him.[1] The MSC disclosed the responsive records in August of that year, withholding some information under s. 14 (solicitor client privilege) and s. 22 (unreasonable invasion of third-party personal privacy).

[2] The physician requested a review by the Office of the Information and Privacy Commissioner (OIPC) of the MSC's decision to withhold patients' names under s. 22. He also said that the MSC had not done an adequate search for records.

[3] During mediation by the OIPC, the MSC located and disclosed other records, withholding some information under s. 22. Mediation resolved the adequate search and s. 14 issues and some of the s. 22 severing. The physician asked that an inquiry take place respecting the application of s. 22 to patient

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[1] The MSC is a public body listed in Schedule 2 of FIPPA.

names and personal health numbers (PHNs).[2] The inquiry proceeded and the OIPC received submissions from the MSC and the physician.

ISSUE

[4] The issue I must decide in this inquiry is whether s. 22(1) of FIPPA requires the MSC to withhold information. Under s. 57(2) of FIPPA, the physician has the burden of proving that disclosure of the information in dispute would not be an unreasonable invasion of third-party personal privacy under s. 22(1) of FIPPA.

DISCUSSION

Background

[5] The MSC manages the Medical Services Plan (MSP) under the *Medicare Protection Act* (MPA). The MSC is responsible for ensuring access to health care and for managing payments for health care services. Under the MPA, health practitioners (who include physicians) who are enrolled in MSP can bill MSP directly for services they provide to patients.

[6] The MSC has authority to audit health practitioners to ensure public funds are being spent appropriately. It does this through the Audit and Inspection Committee (AIC) and the Billing Integrity Program (BIP).[3] The BIP analyzes data and verifies billings to ensure patients received the services the health practitioner billed for. It also conducts audits and compares the practice and billing patterns of health practitioners to those of their peers.

[7] Based on its analysis, the BIP may recommend to the AIC that a practitioner be audited to determine if there has been inappropriate billing. If the AIC approves an audit, the BIP conducts it. If there is evidence of inappropriate billing, the MSC may decide to pursue recovery of the wrongfully paid money under s. 37 of the MPA or have the practitioner de-enrolled from MSP under s. 15 of the MPA.

[8] Before the MSC makes a determination, the practitioner is given notice of the MSC's intention, as well as a copy of the audit report and document disclosure. The practitioner is also given an opportunity to have a hearing before an independent panel.

[9] In August 2014, the BIP recommended that the physician in this case be audited. In May 2017, the BIP conducted an audit of the physician's billings for the period from 2011-2016. In November 2018, the MSC issued notice to the

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[2] Fact report, para. 8.
[3] The records indicate that the BIP is part of the Ministry of Health and the AIC is part of the MSC.

physician of its intention to proceed under ss. 15 and 37 of the MPA. It also gave him a copy of the audit report about his practice and unredacted copies of the relevant records. These included the records the BIP had created and gathered during its audit.[4] The physician requested a hearing which was scheduled to take place in late 2019.[5]

Information in dispute

[10] The responsive records comprise the following:

- a memorandum from the BIP to the AIC;
- patient records;
- tables that the BIP created during its audit;
- audit planning documents;
- correspondence with the physician;
- a verification report;
- verification letters to and from the patients;[6] and
- notes to file.

[11] The information in dispute is the names and PHNs that the MSC withheld under s. 22.

[12] The physician appeared to question the withholding of other personal information.[7] The Investigator's Fact Report states, however, that the applicant requested an inquiry on the application of s. 22 to patient names and PHNs. The MSC prepared its submission accordingly. I am, therefore, not prepared to expand the scope of the inquiry at this late date.

Preliminary Issues

[13] In his response submission, the physician raised a number of concerns that are not listed as issues in the notice for this inquiry.[8]

Search

[14] The physician questioned the adequacy of the MSC's search for records. The Investigator's Fact Report for this inquiry notes that the physician initially questioned the adequacy of the MSC's search for responsive records. It goes on

[4] The MSC said that there is "significant overlap" between these documents and the records that are responsive to the physician's access request; para. 39, affidavit of the BIP Director.
[5] The information in this Background section is drawn from paras. 14-33 of the MSC's initial submission and the affidavit of the BIP Director, paras. 4-41.
[6] The patients were asked to indicate on the letters from MSC whether they had received the services listed, provide any comments and return the letters to MSC.
[7] Physician's response submission, p. 2.
[8] Physician's response submission, pp. 2-7; physician's letter of March 19, 2020.

to say that this issue was settled during mediation.[9] Indeed, the physician acknowledged that the search issue is not part of this inquiry.[10] I will, therefore, not consider this matter here.

MSC Process

[15] It is clear from the tenor of the physician's submissions that he is dissatisfied with the MSC investigation and hearing process, including the extent of its document disclosure. This is, however, not an issue I have any authority to deal with in this inquiry. The physician's recourse is to raise his concerns with the MSC.

Records at Tab 5

[16] The Physician noted that the MSC referred to records at Tab 5 of its initial submission and said he did not have these records. The MSC said the physician had received copies.[11]

[17] The records at Tab 5 are the responsive records in dispute, with the information in dispute boxed in red. I am satisfied from the MSC's submissions that the physician has received copies of the responsive records, minus the information boxed in red.

Section 22 – harm to third-party personal privacy

[18] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[12]

[9] Paras. 4 & 6, Fact Report.
[10] Physician's response submission, page 2.
[11] MSC's reply submission, para. 8.
[12] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.

[19] I have taken the same approach in considering the s. 22 issues here.

Is the information "personal information"?

[20] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. "Contact information" is defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[21] The MSC said that the patients' names and PHNs are the personal information of third parties.[13]

[22] The names and PHNs are recorded information about identifiable patients that is not contact information. I find that it is personal information of the third-party patients.

[23] The physician argued that patients' medical information is the personal information of the medical practitioner and is "open for release" under FIPPA.[14] I disagree. First of all, the patients' medical information is about them, not about the physician, so it is *their* personal information, not the physician's. Secondly, one of FIPPA's purposes is to protect personal information from unauthorized disclosure. The physician is not entitled under FIPPA to unfettered access to other people's personal information, even if they were his patients. Indeed, the purpose of this inquiry is to determine if the physician is entitled to have access to the information in dispute, which is other people's personal information.

Does s. 22(4) apply?

[24] The MSC argued that this provision does not apply here.[15] The physician did not address this issue.

[25] I agree with the MSC that there is no basis for finding that s. 22(4) applies here. The personal information at issue does not, for example, relate to any third party's position, functions or remuneration as an officer, employee or member of a public body (s. 22(4)(e)).

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[13] MSC's initial submission, para. 44.
[14] Physician's response submission, p. 8.
[15] MSC's initial submission, para. 46.

Presumed unreasonable invasion of third-party privacy – s. 22(3)

[26] The relevant provisions read as follows:

> 22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …

[27] **Medical information – s. 22(3)(a) –** The MSC said that disclosing the names and PHNs would reveal the patients' medical information.[16] The physician did not dispute that the names and PHNs are medical information.

[28] The information in dispute arises out of medical treatment records in the physician's clinic. In many places, it is listed along with MSP diagnostic treatment codes. The MSC disclosed these codes, along with information explaining what the codes mean. Thus, disclosure of the names and PHNs would reveal that the patients had attended a medical clinic and what medical treatment the patients had received.

[29] I am, therefore, satisfied that disclosure of the names and PHNs would reveal medical treatment information of the patients. I find that disclosure of the information in dispute is presumed to be an unreasonable invasion of third-party privacy under s. 22(3)(a).

[30] **Compiled as part of an investigation – s. 22(3)(b) –** The MSC said that the information in dispute was compiled and is identifiable as part of the audit, in order to determine if the physician had violated the MPA.[17] The physician appeared to acknowledge this.[18]

[16] MSC's initial submission, paras. 49-50.
[17] MSC's initial submission, paras. 51-53.
[18] Physician's response submission, pp. 5, 6.

[31] I agree with Order 01-12,[19] where former Commissioner Loukidelis found that, for the purposes s. 22(3)(b):

> … "law" refers to (1) a statute or regulation enacted by, or under the statutory authority of, the Legislature, Parliament or another legislature, (2) where a penalty or sanction could be imposed for violation of that law. …[20]

[32] The MSC has the authority under the MPA, a statute of BC, to determine if a health practitioner has submitted a claim for payment, knowing that he or she did not provide the service or knowing that the nature or extent of the service was misrepresented.[21] If the MSC makes such a determination, it may cancel the practitioner's enrolment in MSP.[22]

[33] The MSC may also audit practitioners' claims for payment and their patterns of practice or billing under the MPA.[23] If the MSC determines that a practitioner claimed payment for services he or she did not provide or that a practitioner misrepresented the nature or extent of the service, the MSC may require the practitioner to repay an amount the MSC considers appropriate.[24]

[34] I am satisfied from my review of the MPA that it provides for the imposition of penalties or sanctions. In addition, the records themselves show that the MSC compiled the information in dispute as part of its investigation into a possible violation of the MPA. I find that this information was compiled and is identifiable as part of an investigation into a possible violation of a law, for the purposes of s. 22(3)(b).[25]

[35] There is no indication that disclosure is necessary to prosecute the violation or to continue the investigation. Disclosure of the information in dispute is therefore presumed to be an unreasonable invasion of the third-party patients' personal privacy under s. 22(3)(b).

Relevant Circumstances

[36] The relevant provisions are these:

> 22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third

[19] Order 01-12, 2001 CanLII 21566 (BC IPC).
[20] At para. 17.
[21] Section 15(1)(c) of the MPA.
[22] Section 15(2) of the MPA.
[23] Section 36(2) of the MPA.
[24] Section 37(1) of the MPA.
[25] In Order F19-30, 2019 BCIPC 32 (CanLII), I found that an investigation under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which provides for penalties for the violation of that Act, was a law for the purposes of s. 22(3)(b).

party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

…

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

(f) the personal information has been supplied in confidence,

…

[37] **Applicant's rights – s. 22(2)(c) –** In Order 01-07,[26] former Commissioner Loukidelis set out the following test for determining whether s. 22(2)(c) applies in a given case:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;

2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;

3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and

4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.[27]

[38] The MSC said that it has provided the physician "complete unredacted access to the records" relevant to the MSC hearing process. In its view, therefore, s. 22(2)(c) is not applicable here.[28]

[39] The MSC provided me with a list of the records it initially disclosed to the physician as part of the MSC hearing process (approximately 1,000 pages). These records include those the BIP created and gathered during its audit and others that the physician himself provided to the MSC.

[40] The physician admitted he had received patient records as part of the audit process.[29] He said, however, that he has not received all of the records that are relevant to that process.[30] He argued he needs the information in dispute to identify the patients "to determine if the material is relevant to the audit process"

[26] Order 01-07, 2001 CanLII 21561 (BC IPC) at para. 31.
[27] Following Ontario Order P-651, [1994] O.I.P.C. No. 104, the former Commissioner found that s. 22(2)(c) would apply only where all of the listed circumstances exist.
[28] MSC's initial submission, footnote 23 to para. 62.
[29] Physician's response submission, page 5, para. xiv.
[30] Physician's response submission, page 2, para. ii, page 4, para. vi, page 5, para. xi.

and to defend himself in the MSC process. He also suggested that he should have received identical sets of records in the MSC process and under FIPPA.[31]

[41] I accept that the records the MSC compiled or generated during its investigation would be relevant to the MSC hearing process and necessary to the physician in that process. Moreover, the MSC hearing process was still underway at the time of this inquiry.

[42] The MSC's evidence is that there is considerable overlap between the records it disclosed to the physician under FIPPA and those it disclosed to him as part of the MSC hearing process.[32] After comparing the FIPPA records to the list of MSC hearing records, I agree.

[43] My review of the MSC's document list and the records in dispute indicates that, as part of the MSC hearing process, the physician received unredacted versions of the information in dispute in this FIPPA inquiry. I have also taken into account that the MSC said that, in total, it has disclosed over 32,000 pages of records to the physician during the MSC hearing process, including the 1,000 pages it disclosed initially.[33] I can also see from the physician's response submission that he has both redacted and unredacted records.

[44] I realize the physician disputes the MSC's submission on the issue of whether he has received records relevant to his MSC hearing process. I am, however, satisfied that the physician has received the personal information which would be relevant to his MSC hearing process and which might have a bearing on his rights in that process.

[45] For all these reasons, I am not persuaded that the information in dispute is necessary or relevant to a fair determination of any legal rights the physician may have. I find that s. 22(2)(c) does not apply here.

[46] **Supplied in confidence – s. 22(2)(f) –** The MSC said that the patients provided their personal information to the physician in confidence, as part of receiving medical treatment. It added that patients who completed and returned their verification letters also provided their personal information in confidence.[34] The physician acknowledged that, in general, patients provide their personal medical information in confidence.[35]

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[31] Physician's response submission, pp. 3, 5, 6; physician's letter of March 19, 2020.
[32] Para. 39, affidavit of the BIP Director.
[33] MSC's letter of March 16, 2019.
[34] MSC's initial submission, para. 54-55; Affidavit of BIP Director, para. 13.
[35] Physician's response submission, page 8.

[47] I accept the MSC's submission that physicians are obliged to keep patient information confidential.[36] The verification letters say nothing about confidentiality. However, medical information is sensitive, in my view, and I accept that patients who responded to the MSC's verification letters provided their personal medical information in confidence. I am satisfied that the factor in s. 22(2)(f) applies in this case, heavily favouring withholding of the information in dispute.

[48] **Applicant's knowledge –** Previous orders have found that a relevant circumstance under s. 22(2) is the fact that an applicant knows or is aware of the personal information in issue. It may or may not favour disclosure, depending on the case.[37]

[49] The physician argued that he knows the patients' names and PHNs because he treated them.[38] The physician also pointed out that he provided some of the records to the MSC or received them from the MSC.[39]

[50] The MSC acknowledged that the physician has received or is aware of the personal information in dispute, either because it was disclosed to him as part of the MSC hearing process or because it originated with him in his patient records. In the MSC's view, however, this does not mean the physician is entitled to receive it again under FIPPA. It argued that, with disclosure under FIPPA, there would be no restriction on the physician's use of the personal information, whereas under the MSC process, the physician is bound by an implied undertaking of confidentiality.[40]

[51] I accept that the physician would already know much of the personal information in dispute because he had access to it for the purposes of treating his patients or because he provided some of it to the MSC. As far as I can tell, however, as part of the MSC process, the physician received unredacted versions of the information in dispute, including information the BIP generated during its audit. The implied undertaking of confidentiality regarding the MSC information by which the physician is bound is, in my view, a relevant circumstance weighing heavily in favour of withholding the information in dispute under FIPPA.

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[36] Appendix 1 to MSC's initial submission, College of Physicians and Surgeons of British Columbia Practice Standard, "Medical Records, Data Stewardship and Confidentiality of Personal Health Information", page 4.
[37] See, for example, Order 03-24, 2005 CanLII 11964 (BC IPC), and Order F10-41, 2010 BCIPC No. 61.
[38] Physician's response submission, page 6.
[39] Physician's response submission, page 10.
[40] MSC's initial submission, paras. 56-63.

Conclusion on s. 22(1)

[52] I found above that the information in dispute (patients' names and PHNs) is third-party personal information and that its disclosure is presumed to be an unreasonable invasion of third-party personal privacy under ss. 22(3)(a) and (b). I also found that the factor in s. 22(2)(c) does not apply.

[53] I find, however, that the factor in s. 22(2)(f) and the implied undertaking are relevant circumstances heavily favouring withholding the information in dispute.[41]

[54] In my view, the physician's knowledge of the personal information in dispute, either in the course of providing medical treatment to his patients or through the MSC process, does not outweigh the relevant circumstances that favour withholding the information. The physician has not met his burden of proof. I find that s. 22(1) applies to the information in dispute and the MSC must withhold it.

CONCLUSION

[55] For the reasons given above, under s. 58(2)(c) of FIPPA, I require the MSC to refuse the physician access to the information in dispute.

April 20, 2020

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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[41] Previous orders have acknowledged that, while the previous disclosure of, or access to, third-party personal information through employment is a relevant circumstance, it does not necessarily outweigh other factors. For example, Order 01-30, 2001 CanLII 21584 (BC IPC), at paras. 18-19, and Order 03-29, 2003 CanLII 49208 (BC IPC), at paras. 22-24, found that past access to personal information through employment did not outweigh the factor in s. 22(2)(f).