OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-42

MINISTRY OF HEALTH SERVICES

David Loukidelis, Information and Privacy Commissioner
December 17, 2003

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Summary: The Ministry disclosed information in audit reports relating to three physicians' services that were billed to the Medical Services Plan, but refused to disclose some information from those reports. The information is personal information the disclosure of which would be an unreasonable invasion of the personal privacy of the audited physicians under s. 22(1). The Ministry is not required to disclose information under s. 25(1).

Key Words: personal information – unreasonable invasion of third party personal privacy – public interest disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (b), (e), and (h), 22(3)(d) and (f), 25(1), 57(1) and (2).

Authorities Considered: B.C.: Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 03-41, [2003] B.C.I.P.C.D. No. 41.

1.0 INTRODUCTION

[1] The applicant, a journalist, made a request to the Ministry of Health Services ("Ministry") under the *Freedom of Information and Protection of Privacy Act* ("Act") for access to all records related to physicians at a specified hospital "that performed … [a specified medical procedure] since 1997, and possibly overcharged, double-billed and/or defrauded MSP [Medical Services Plan] and/or APB". The access request was subsequently narrowed from "all records" to "all reports, final or draft".

[2] The Ministry disclosed three audit reports dated March 21, 2001, from which it withheld some information under s. 22(1) of the Act.

[3] The applicant gave the following reasons for requesting a review under the Act of the Ministry's decision:

> The Ministry refused to release many records because they invoked sec. 22, privacy. This reply is an insult to anyone's intelligence; doctors' medicare billings are taxpayers' funds and have nothing to do with doctors' privacy; in fact, lists of doctors and what they billed medicare yearly have already been published in the Vancouver Sun. Please order all the records released to me, and apply sec. 25.

[4] The matter did not resolve in mediation and proceeded to this written inquiry under s. 56 of the Act.

[5] The disputed information is in three audit reports prepared by the MSP Audit Section of the Financial Policy and Monitoring Branch of what was then the Ministry of Health. The disputed information was withheld on the basis that it was personal information the disclosure of which would be an unreasonable invasion of third party personal privacy under s. 22(1).

[6] The audit reports are each seven pages long—including a cover page—and they have a common format. Each report relates to an individual physician's fee-for-service billings and sessional billings respecting a specific service over a three-year period. Each report indicates that an inspection of the audited physician's billings was undertaken to address two issues, and that one of the issues—the possible overlap of fee-for-service and sessional billings—has been dealt with in the report and the other issue has been assigned to a special team under the authority of senior Ministry staff. Each report describes the practitioner profile of the audited physician, the audit team (including the identity of the responsible audit inspector), the objective, scope and methodology of the audit, and the audit inspector's findings, conclusions and other observations.

[7] The Ministry withheld the following information from each report:

- name, position and practitioner number of the audited physician;
- why the MSP Audit Section selected the audited physician;
- the second issue concerning which of the audited physician's billing practices were inspected;
- number and amount of fee-for-service payments to the audited physician for fiscal years discussed in the report and for the aggregate of those periods;
- amount of sessional payments to the audited physician for fiscal years discussed in the report and for the aggregate of those periods;
- statistical variations, if any, of the audited physician's billings for the service from standard peer group profiles;

- number of services billed for by the audited physician during the audit period, number of instances identified of overlaps of sessional and fee for service time, and total, average and per service figures for overlap minutes and amounts billed; and
- observations about the duration of the procedures billed for by the audited physician.

2.0 ISSUES

[8] The issues in this case are as follows:

1. Was the Ministry required by s. 22 to refuse to disclose the disputed information?

2. Was the Ministry required by s. 25(1) to disclose the disputed information?

[9] As was the case in Order 03-41, [2003] B.C.I.P.C.D. No. 41, the effect of ss. 57(1) and (2) is that the Ministry has the burden to establish that the disputed information is personal information, but it falls on the applicant to establish that the disclosure of personal information would not be an unreasonable invasion of third party personal privacy under s. 22.

[10] For s. 25 of the Act, I have applied the approach to burden of proof explained in Order 02-38, [2002] B.C.I.P.C.D. No. 38.

3.0 DISCUSSION

[11] **3.1 Parties' Submissions** – The Ministry provided an initial and a reply submission. The initial submission included some *in camera* passages and two supporting affidavits—one of which was *in camera*—and a further *in camera* document as an appendix to the submission.

[12] The audited physicians provided joint third-party initial and reply submissions. Each physician also provided an *in camera* affidavit addressing how he or she would be identifiable and would be affected by disclosure of the disputed information.

[13] The applicant provided a one-page initial submission and a one-page reply submission, both of which say much the same thing. His brief submissions reiterate his reason for requesting a review and add some other broad points of argument. The following passage from his reply summarizes his submissions on the inquiry:

> It is pleaded that physicians are challenging the findings of the audit. But there is no exemption in the FOIPP Act to bar disclosure on those grounds.
>
> It is stated that "the Audit Reports relate to billing or non-medical issues". I cannot agree that the amounts of billings are unrelated to medical issues, for they can be related to the amounts of prescribing or over-prescribing of treatments.

> As I note in my initial submission, if the speculation on over-prescribing is false, the doctors have nothing to fear from the records release, indeed should welcome it, as it would clear them; but if the belief is correct, it is unquestionably in the public interest to know. (The Hospital's refusal to release these records very unfortunately fuels negative speculation on this question.) Either way, this would be a fair opportunity to apply FOIPP section 25 ("health or safety of the public").

[14] **3.2 Third-Party Personal Privacy** – The disclosure exception in s. 22 applies to "personal information", which is defined in Schedule 1 of the Act to mean "recorded information about an identifiable individual". The Ministry and the audited physicians say that the disputed information is all "personal information".

[15] I will first address the names, positions and practitioner numbers of the audited physicians. This information directly or indirectly identifies each of them, but the applicant says its disclosure would not be an unreasonable invasion of their personal privacy because it would be an opportunity to establish that "speculation on over-prescribing is false". This misses the point, in my view. The audited physicians do not want to be identified as the subjects of the audit reports at all. Characterizing the audit reports as an opportunity for the audited physicians to vindicate their reputations—or not—is not responsive to the aspect of their personal privacy that is in issue.

[16] I agree that the applicant has failed to show that disclosure of information in the audit reports that identifies the audited physicians would not be an unreasonable invasion of their personal privacy. Disclosure of their names, positions or practitioner numbers in the audit reports would not only identify them individually, it would also associate them identifiably with an audit into possible overlap between their sessional and fee-for-service MSP billings. This would connect the audited physicians identifiably to information about their financial history or activities. Section 22(3)(f) of the Act creates a presumption that this would be an unreasonable invasion of their personal privacy.

[17] An MSP audit of billings for services by an individual physician is not comparable with complaint or investigation records of a self-governing profession relating to matters that did not proceed to disciplinary citation, which I have in the past found fell under s. 22(3)(d) of the Act. See, for example, Order 02-01, [2002] B.C.I.P.C.D. No. 1. I am nonetheless also inclined to the view that information that identifiably connects the audited physicians with the fact, and the results, of these audits falls under s. 22(3)(d) (personal information related to their employment or occupational history).

[18] The applicant has failed to show that any factor in s. 22(2) operates to counter the presumed unreasonable invasions of personal privacy under s. 22(3). For example, the applicant has not established any connection under s. 22(2)(a) or (b) between individually identifying the audited physicians and subjecting the activities of the Ministry, or the hospital, to public scrutiny or promoting public health and safety. On the other hand, I am satisfied that the s. 22(2)(h) factor, and possibly the s. 22(2)(e) factor as well, favour protection of the audited physicians' personal information in these reports. In reaching this conclusion, however, about the relevance of s. 22(2)(e) or (h) to disclosure of the audited physicians' personal information in these audit reports, I am not suggesting the

result would be the same for information about the existence, progress or result of billing recovery proceedings under the *Medicare Protection Act* against a physician respecting allegations of improper patterns of practice or billing. That issue is not before me in this inquiry.

[19] I will now address information that the Ministry withheld from the audit reports other than the audited physicians' names, positions and practitioner numbers. This information is also personal information if it is about an identifiable individual. Statistical data or other anonymized information about MSP billings, trends or averages are not personal information. The question is whether, without the names, positions or practitioner numbers of the audited physician, the rest of the disputed information in the audit reports could, if disclosed, reasonably be expected to identify individuals.

[20] The applicant says the audited physicians have no personal privacy interests to protect because "lists of named doctors and what they billed the medicare program yearly have been published in the Vancouver Sun". The Ministry and the audited physicians respond that the "Blue Book" of gross MSP payments to individual physicians, groups, clinics and hospitals—which the *Financial Information Act* requires to be published annually—is not the same information as the information that has been withheld from the audit reports.

[21] In my view, the point goes further. It seems to me that, if the billing figures in the audit reports could be matched to the gross MSP payments to an audited physician as published in the Blue Book, disclosure of the billing figures in the audit reports would disclose to the applicant (and the public) the identities of the physicians audited with respect to possible overlap between their sessional and fee-for-service MSP billings. That information is not published in the Blue Book and is precisely what the audited physicians object to being disclosed.

[22] Whether the disclosure of information can reasonably be expected to identify an individual is a question of fact. Financial or occupational information may relate to an individual, but be anonymized on its face. The information will not be personal information unless it is about an identifiable individual. There may be circumstances, however, when information that is on its face anonymous can reasonably, even easily, be connected to an identifiable individual.

[23] This access request relates to one named hospital. There is *in camera* evidence before me about the number of physicians who deliver the medical service involved. There is also *in camera* evidence about already widely-publicized information bearing on the identifiability of the audited physicians if the disputed information is disclosed even without revealing their names, positions or practitioner numbers. I have concluded that in the specific circumstances of this case, the Ministry's determination that the disputed information was personal information should be upheld. For the same reasons as I have explained above, I also find the applicant has not shown that disclosure of the disputed information would not be an unreasonable invasion of the personal privacy of the audited physicians under s. 22(1).

[24] **3.3 Public Interest Disclosure** – Section 25(1) of the Act can apply to both personal and non-personal information. It has been discussed on many occasions, including in Order 01-20, [2001] B.C.I.P.C.D. No. 21, Order 02-38, and, most recently, in Order 03-41. As I said in Order 02-38, at para. 53:

> The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[25] There is no compelling need for public disclosure without delay of the personal information that the Ministry has withheld from these audit reports. The existence of the audit reports—and the issue they concern—has been publicly known for some time. The applicant has not persuaded me that the health or safety of the public requires disclosure, immediately, of the disputed information in the audit reports.

4.0 CONCLUSION

[26] I find that s. 22 requires the Ministry to refuse access to the disputed information and, under s. 58(2)(c) of the Act, I require the Ministry to refuse access. I find that the Ministry is not required by s. 25(1) to disclose the disputed information.

December 17, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia