Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3617

Appeal PA14-596

Ministry of Health and Long-Term Care

June 1, 2016

Summary: The record at issue in this appeal, created in response to a request by a journalist, sets out the total dollar amounts paid annually to the top 100 OHIP billers, their names and their medical specialties, for the years 2008-2012. The ministry disclosed the dollar amounts and most of the specialties, but withheld the physicians' names and some of the specialties under the personal privacy exemption at section 21(1) of the *Act*. One of the parties to the appeal also raised the third party information exemption at section 17(1) of the *Act*. The appellant claims that the public interest override in section 23 applies. In this order, the adjudicator finds that: (1) the record does not contain personal information, and as a consequence, section 21(1) does not apply; (2) section 17(1) also does not apply; and (3) there is a compelling public interest in the disclosure of the record that would clearly outweigh the purposes of these exemptions if they applied. The ministry is ordered to disclose the record in its entirety to the appellant.

Statutes and Regulations Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(a)(i), 1(b), 2(1) (definition of "personal information"), 2(3), 17(1)(a), (b) and (c), 23, 52(2), (4) and (13); *Health Insurance Act*, R.S.O. 1990, c. H-6, as amended, sections 15(1), 16(1), (3) and (5), 16.1 and 38(1); R.R.O. 1990 Reg. 552, s. 38.4(1); *Legislation Act, 2006*, S.O. 2006 c. 21, Sched. F, section 87; and the *Public Sector Salary Disclosure Act*, S.O. 1996, c. 1, Sched. A.

Orders and Investigation Reports Considered: Orders M-430, MO-2363, MO-2563, MO-2927, P-373, P-778, P-1502, P-1505, PO-1880, PO-1933, PO-2204, PO-2225, PO-3200, PO-3207, PO-3435 and PO-3577; and Privacy Complaint Report I96-119P.

Cases Considered: *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891; [2002] O.J. No. 4987 (C.A.); *Dunsmuir v. New Brunswick,* 2008 SCC 9; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3; *Worker's Compensation Board v. Ontario (Assistant Information and Privacy Commissioner)*, (1998) 41 O.R. (3d) 464, 1998 CanLII 7154 (C.A.); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C 108, 1999 CanLII 1104 (C.A.); and *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 6175.

OVERVIEW:

[1] The appellant, a journalist, submitted a request to the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> … records on the top 100 [Ontario Health Insurance Plan (OHIP)] billers for each of the five most recent years such data is available.
>
> I would like a breakdown of the dollar amount billed, medical specialty and names of billing doctors.

[2] The ministry generated a 13-page record containing the requested information. The record contains five separate tables, each entitled, "Top 100 Ontario Fee-For-Service [FFS] Physician Payments by Specialty based on Professional Billings." The record contains a separate table for each of the years 2008, 2009, 2010, 2011 and 2012. Each table consists of columns setting out the Physician Rank (1-100), Physician First Name, Physician Last Name, Physician Specialty, and Professional Fee for Service (FFS) Payments. The FFS column shows only the total annual payments by OHIP to each of the physicians.

[3] From this description of the record, it is evident that while the request sought access to the dollar amounts "*billed*" by the top 100 billers for each of the five years from 2008 through 2012, the record generated by the ministry in response to the request shows the total "fee-for-service *payments*" to each of these physicians. Accordingly, although the request and many of the representations provided by the parties to this appeal refer to "billing" information, the record actually reflects payments. As a consequence, the information in the record that corresponds to what is frequently described in this order as "billing" information is, in fact, payment information. Also, as explored later in this order, the amounts billed by a physician are not necessarily the same as the amounts paid.

[4] The ministry issued a decision granting partial access to the requested information, and relied on the exemption in section 21(1) (personal privacy) of the *Act* to deny access to the information it withheld. Full access was granted to the columns

listing the Physician Rank and FFS Payments. Partial access was granted to the column listing the Physician Specialty, with some of the identified specialties redacted from the record. Access to the first and last names of the physicians was denied in full.

[5] The ministry's decision stated:

> It is reasonably foreseeable that some of the specialty information, combined with the billing information, can reasonably lead to the identification of the physicians who billed these amounts and constitute an unjustified invasion of personal privacy under the personal privacy section 21(3)(f) of the *Act*.

[6] In a portion of the record that has already been disclosed, the ministry explains the methodology it used to generate the tables:

- The top 100 billers were identified based on their total payments on [FFS] billings for each fiscal year from 2008 to 2012.
- Specialty allocation was based on the specialty under which the physician submitted 50% or more of their billings for the fiscal service year.

[7] The record also contains notes, which have been disclosed, indicating that the sources of the information are the Claims History Database and the Corporate Provider Database. The notes also explain that the payments reflected in the record are limited to FFS billings.

[8] The appellant filed an appeal of the ministry's decision to deny access to the withheld parts of the record. She also indicated her position that there is a compelling public interest in the disclosure of the physicians' names, along with their OHIP billings. As a result, the possible application of the "public interest override" in section 23 of the *Act* is at issue in this appeal.

[9] The appeal was streamed to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[10] The adjudicator initially assigned to this appeal identified that a large number of physicians may be affected by this appeal. He sent notification letters to approximately 160 physicians, notifying them of the appeal and inviting them to contact this office if they were interested in receiving more information or participating in the appeal. A large number of the physicians who received notification letters indicated their interest in participating in this appeal.

[11] The adjudicator then sent a Notice of Inquiry to the ministry and the notified physicians who had indicated their interest in participating. He also sent it to organizations ("interested organizations") that represent the interests of some or all of the notified physicians, as they may be able to present useful information to aid in the

determination of this appeal.

[12] The ministry, the interested organizations, and many of the notified physicians (the "affected parties") provided representations. The appeal was subsequently transferred to me to complete the inquiry. As a result of the representations received, I added the mandatory exemption at section 17(1) of the *Act* (third party information) as an issue in this appeal.

[13] I then sent a Notice of Inquiry to the appellant inviting her to provide representations, and provided her with the complete representations of the ministry and one of the interested organizations, as well as a summary of the main non-confidential arguments made by the ministry, the interested organizations and affected parties. The appellant responded with representations.

[14] Subsequently, I sent a Reply Notice of Inquiry to the ministry, the interested organizations and the affected parties, inviting them to provide reply representations. With the Reply Notice of Inquiry, I included a complete copy of the representations of the appellant, the ministry and one of the interested organizations, as well as a copy of the summary of non-confidential arguments made by the ministry, the interested organizations and affected parties that I had previously sent to the appellant. A number of affected parties and one of the interested organizations provided reply representations. The ministry indicated that it would not provide reply representations.

[15] One of the affected parties argued that the ministry ought to have claimed the exemptions in section 18(1)(a), (b) and/or (c) (economic or other interests) because disclosure could reasonably be expected to prejudice the economic interests of the ministry, and/or be injurious to the financial interests of the Ontario government, or to the government's ability to manage the economy. The affected party does not expressly seek to raise this exemption itself. As noted in Order M-430, only in rare cases would an affected party be permitted to do so.[1] The affected party has requested confidentiality for the portion of the representations setting out detailed arguments on this issue and accordingly, I will not include them here. I have, however, reviewed these submissions in detail. I am not satisfied that this is one of the rare cases where the affected party should be permitted to rely on section 18(1) where the ministry has chosen not to do so. I will therefore not refer to this issue again.

[16] Counsel for a number of affected parties submits that, because the appellant did

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[1] As stated in Order M-430: "As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party."

not make representations with respect to the application of the claimed exemptions in this appeal:

> . . . there is no basis to grant what is being sought by any Applicant. It is her role and responsibility to make out the case for disclosure in situations such as this where the Ministry has decided, after considering and applying the provisions of the Act, not to provide all of the information being sought by the Applicant.

[17] This argument cannot succeed. Section 53 of the *Act* makes it clear that the ministry bears the burden of proving the application of the exemptions it has claimed.[2] Similarly, where affected parties rely on the section 17(1) and 21(1) exemptions, as they do here, they bear the burden of proving their application.[3] Moreover, it is clear that the Commissioner is not required to simply accept "uncontradicted" evidence. The Commissioner is ". . . still required to decide whether or not the exemptions applied. The legislature intended that fact finding and the weighing of the contents of the written submissions be dealt with by the Commissioner."[4]

[18] In addition, a number of parties opposed to disclosure have made arguments based upon harms that they fear if the record is disclosed. If the record contained personal information, these purported harms would be considered under the personal privacy exemption in section 21(1). However, in this appeal, they are not relevant to the determination of whether the record contains personal information. The potential for harm of a more commercial nature is considered in the discussion of section 17(1), below.

[19] More generally, I have reviewed these arguments, many of which were submitted with a request that they be kept confidential. I have concluded that they would not, for example, support the application of section 20 of the *Act* (danger to safety or health)[5] because they either: (1) do not draw a sufficient linkage between disclosure and the endangerment of safety or health, and/or (2) are too speculative to meet the requirement that harm "could reasonably be expected to occur"[6] in the event of disclosure. I am also not satisfied by the evidence that harm could reasonably be expected to occur as the result of added risk factors arising from disclosure of the information at issue where it is already known in the community that these individuals are physicians. Nor has any party suggested that section 20, or any other exemption

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[2] Section 53 states: "Where a head refuses access to a record or part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head."
[3] *Miller Transit v. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139 at para. 26.
[4] *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, (1998) 41 O.R. (3d) 464, 1998 CanLII 7154 (C.A.).
[5] Section 20 states: "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."
[6] In considering this issue I have applied the evidentiary standard outlined in paragraphs 156 and 157 of Order PO-3577.

that could address these types of harms, applies.

[20] One affected party also argues that disclosure of his name along with the other information about him in the record would be a violation of his rights under the *Canadian Charter of Rights and Freedoms.* He has asked that this portion of his representations remain confidential, so I will not set this argument out here. However, his *Charter* argument is speculative and not supported by evidence, and I do not accept it. I will not refer to this issue again.

[21] In this order, I have determined that:

- the record does not contain personal information, and therefore cannot be exempt under section 21(1);
- the information in the record was not "supplied" to the ministry, and the evidence does not support a conclusion that the harms in section 17(1) could reasonably be expected to occur; for these reasons, section 17(1) does not apply; and
- in the alternative, if the exemptions in section 21(1) and/or 17(1) had been found to apply, the public interest override in section 23 would also apply.

[22] In the result, I am ordering the ministry to disclose the record in full.

[23] During this inquiry, the issue of public disclosure of the amounts paid to physicians under OHIP has been the subject of extensive discussion in the media, as evidenced by the substantial number of press clippings provided to me by the parties. This order is my independent and impartial decision under the *Act*. It is based on the evidence and argument I have received, and on my own analysis of the legal issues.

RECORD:

[24] The record consists of a 13-page document titled "RESPONSE FOI REQUEST: [File number]". The tables set out in the record include the following headings: "Rank", "Physician First Name", "Physician Last Name", "Physician Specialty", and "FFS Payments".

[25] The withheld information consists of physicians' first and last names; the physician speciality of the six physicians with the highest total OHIP payments for each of the years 2008-2012; and certain other physician specialties. Most of the physician specialties, and the total OHIP payments to each listed physician in each of these years, were disclosed by the ministry in response to the request.

ISSUES:

[26] The issues to be determined in this order are:

A. Does the record contain personal information within the meaning of section 2(1) of the *Act*?

B. If the record contains personal information, does the mandatory exemption at section 21(1) of the *Act* apply?

C. Does the mandatory exemption at section 17(1) of the *Act* apply?

D. Does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

A. Does the record contain personal information within the meaning of section 2(1) of the *Act*?

[27] Section 2(1) defines "personal information" as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[28] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[7]

[29] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[30] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[8]

[31] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[9]

Representations

The ministry

Legislation

[32] The ministry submits that, based on a plain reading of the *Act*, physicians' billings to OHIP are personal information. In support of this position, the ministry makes the following arguments:

- item (b) of the definition ("information relating to financial transactions in which the individual has been involved") applies;

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[7] Order 11.
[8] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

- item (h) of the definition (an individual's name where disclosure of the name "would reveal other personal information about the individual") applies;

- the opening words of the definition ("recorded information about an identifiable individual") are broad, and if this threshold is met, the information is personal information;

- the "business identity" exclusion in sections 2(3) and (4) does not apply, as the information goes beyond what is covered there and would reveal a substantial part of the physicians' income, as well as their financial transactions with the ministry from 2008-2012; and

- disclosing the severed specialties combined with a physician's position on the list could identify the physician.

The *Pascoe* decision

[33] The ministry goes on to point out that this office has consistently found that physicians' OHIP billing information is personal information. The ministry submits that this interpretation was confirmed by the Court of Appeal in *Ontario (Attorney General) v. Pascoe*.[10] In *Pascoe*, which resulted from a judicial review of Order PO-1880, the request was for a record of the top ten items billed to OHIP by the highest billing general/family practitioner in Toronto. The requester did not seek the physician's identity. This office had determined that the physician could not be identified if the requested information were disclosed.

[34] In particular, regarding the *Pascoe* decisions, the ministry submits:

> Both the Divisional Court and the Court of Appeal agreed with the IPC's conclusion that the billing information in the record did not reveal the physician's identity, but if it did, such information *would* fall within the definition of personal information. [Ministry's emphasis.]

[35] The ministry also submits that:

> Similarly, the Court of Appeal stated that the test to be applied in this case is: "[i]f there is a reasonable expectation that the individual can be identified from the information . . . *then such information qualifies . . . as personal information*". [Ministry's emphasis.]

[36] In summary, the ministry submits:

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[10] 2002 CanLII 30891; [2002] O.J. No. 4987 (C.A.)

> . . . that *Pascoe* confirms that billing information is personal information if the physician is identifiable.

[37] The ministry's representations suggest that the Divisional Court and Court of Appeal decisions in *Pascoe* should be seen as a determination by both courts that a physician's billing information is personal information. I disagree. That issue was not before either court. Instead, the issue was identifiability.

[38] Moreover, both the Court of Appeal and Divisional Court reviewed Order PO-1880 on a reasonableness standard, and both courts determined that the decision was reasonable. This is a significant point. A finding on judicial review that a decision was reasonable is not a finding that the interpretation being upheld is correct, or the only possible outcome. Rather, as the Supreme Court of Canada explained in *Dunsmuir v. New Brunswick*:[11]

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But *it is also concerned with whether the decision falls within a range of possible, acceptable outcomes* which are defensible in respect of the facts and law. [Emphasis added.]

[39] In *Pascoe*, the Court of Appeal was *not* deciding whether physicians' billing information is personal information. The second passage quoted by the ministry, and reproduced above, is in fact a quote from Order PO-1880, which was itself a quote from Order P-230. What the Court actually said is as follows:

> There are two *relevant and important matters that are not in dispute.* The first relates to the substantive test which should be applied, which the Commissioner set forth in her reasons. It is:

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[11] 2008 SCC 9 at para. 47.

> 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. [Emphasis added.][12]

[40] From the foregoing discussion, two things become clear: (1) *Pascoe* is *not* a finding that physicians' billing information is personal information, and (2) even if the Court *had* found that such an interpretation is reasonable, this would not preclude other outcomes. Accordingly, I do not accept the ministry's submission that the Court "agreed" that identifiable physician billing information "would fall" within the definition of personal information, or the implicit submission that this would be determinative in the present appeal. The same analysis also applies to the Divisional Court's decision.

[41] In summary, I do not accept the ministry's submission that *Pascoe* stands for the proposition that physicians' billing information is personal information if the physicians are identifiable.

Other decisions

[42] The ministry refers to a number of other decisions in support of its submission that physicians' billing information is personal information:

- Order P-1502, which found that a list of physicians who prescribed the home oxygen program for patients was the physicians' personal information;
- Order P-1505, which found that the amount of claims paid for a specific service code to a particular billing number describes financial transactions within the meaning of item (b) in the definition of "personal information" and constitutes the personal information of the physician linked to the billing number;
- Order PO-1933, which reached the same conclusion as Order P-1505 about billing/payment processes followed by physicians and the ministry in the normal course of administering the OHIP system;
- Order PO-2204, which found that the amounts the top 10 billing general practitioners/family doctors in Toronto billed OHIP in a given year, the fee codes of the top 10 items billed most frequently, and the gross amount paid, were the personal information of one of the physicians because there was a reasonable expectation that she would be identifiable;
- Order PO-3200, which found that disclosing the names of physicians who had billed OHIP for a particular type of surgery would reveal an amount paid to them by the ministry, and this qualifies as personal information; and

[12] at para. 2.

- Order PO-3435, which found that a record disclosing services provided by a physician under the Alternative Payment Plan (APP),[13] rather than amounts billed under FFS, does not reveal the physician's income or financial activities. The ministry submits that a corollary of this conclusion is that FFS payments *are* personal information.

[43] At this point, however, it is important to note that the principle of binding precedent, or *stare decisis*, does not apply to require administrative tribunals to follow their own previous decisions. As stated by the Supreme Court of Canada in *Weber v. Ontario Hydro*:[14]

> The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by stare decisis. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate. In labour arbitration, the arbitrator is not bound to follow the decisions of other arbitrators, even when similar circumstances arise. . . .

[44] Although they are not binding on me, I will refer to Order P-1502 and the other decisions I have just listed, that were cited by the ministry, in the "Analysis" section, below.

Business information and personal information

[45] As the ministry notes, the Notice of Inquiry invited the parties to comment on recent orders of this office deciding that billing information relating to other professions is not personal information, and therefore not exempt under section 21(1). The Notice of Inquiry specifically mentions Orders MO-2927, MO-2363 and PO-3207.

[46] The ministry states:

> These orders are based on a 2 part "capacity and context" test developed by former Assistant Commissioner Tom Mitchinson in Order PO-2225, for distinguishing between personal and professional information:
>
> .... the first question to ask ... is: "in what context do the names of the individuals appear"? Is it a context that is *inherently personal*, or is it one such as a business, professional or official government context that is removed from the personal sphere? ... The analysis does not end here. I

[13] The APP is an alternative model for paying physicians. Payments of this type are not included in the record at issue, which focuses instead on "Fee for Service" or FFS payments.
[14] [1995] 2 S.C.R. 929, 1995 CanLII 108 at para. 14.

must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is *inherently personal* in nature? [Ministry's emphasis.]

Applying this test, the IPC determined that the invoices at issue in the 3 appeals referred to in the Notice of Inquiry, related to individuals in their professional capacity, and that the "context in which the [information appears] is not inherently personal, but is one that relates exclusively to the professional responsibilities and activities of the affected party".

The Ministry respectfully submits that neither the test nor the distinction underlying it is found in the Act; the only reference to "professional information" is in ss. 2(3) and (4), provisions that apply narrowly to "professional/business *identity* information." Consequently, the IPC's test is based on a purely contextual, rather than statutory, analysis.

Moreover, since "information relating to 'financial transactions in which the individual has been involved" falls expressly within the definition of personal information in the Act, creating a distinction between "financial transactions" that result from an individual's professional activities as opposed to his/her personal activities, is an interpretation of the phrase that is not supported by the plain wording of the provision.

As the Supreme Court of Canada reiterated in *John Doe v. Ontario (Finance)*[15] the modern approach to statutory interpretation requires the words of a provision to be read "in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature".[16]

Nothing in section 2, or any other provision of the Act for that matter, indicates the legislature's intention to carve out "professional information" – a concept not found or defined in the Act – from the scope of the otherwise broad and unlimited definition of personal information, and thereby exclude it from the privacy exemption as well as from the privacy protection provisions of Part III of the Act.

The Ministry respectfully submits that if the legislature had intended that information relating to an individual's professional or business activities – such as financial business transactions or activities, and professional

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[15] 2014 SCC 36

[16] R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21

> responsibility and competency issues – not be included in the definition of personal information, it could have created a clear exclusion for this category of information. As the Supreme Court of Canada stated in *John Doe v. Ontario*, "[H]ad the legislature wanted to exclude records containing policy options from the s. 13(1) exemption, it could have included them in the s. 13(2) exception." By analogy, had the legislature wanted to exclude records containing "professional activity information" from the s. 2(1) definition, it could have included them in the ss. 2(3) exception.
>
> A further, significant implication of the distinction is that if information is considered "professional", then an institution can – according to the IPC's interpretation – disclose it unilaterally, in the absence of an access request, without regard to the disclosure prohibition in s. 42 or the notice provision in ss. 28(1)(b). In doing so, however, the institution nevertheless runs the risk of breaching the Act: disclosing information that in its view is professional, but may in fact be personal. Relying on the IPC's test alone, without a clear, statutory definition of "professional information", increases that risk. The same holds true for an institution's collection and use of such information without regard to the privacy restrictions and obligations set out in ss. 38(2)-41 of Part III.

[47] These submissions are, in effect, an argument that Order PO-2225, and other orders that apply its interpretation, are wrongly decided. Further, this is a submission to the effect that the distinction outlined in Order PO-2225, between personal information and information relating to a business, profession or office, should be abandoned. I disagree. The ministry's submissions in this regard suggest that the Legislature's use of the word "personal" as the adjective to describe the category of "personal information" should be ignored in the exercise of statutory interpretation. To do so would fail to consider these words in their "grammatical and ordinary sense," the very error the ministry warns against in its argument.

[48] Following the line of the ministry's submissions to their logical conclusion, almost all work generated by public employees would become personal information and subject to mandatory exemption under section 21 unless one of the exceptions in section 21(1) applies. For example, if the modifier "personal" does not mean "relating to an individual in their private capacity, as opposed to their business, professional or official capacity," then "the personal opinions or views of the individual," identified in item (e) of the definition, would include work product that might be subject to an exemption claim under section 13(1) (advice and recommendations). This interpretation ignores the purpose of the *Act* that "information should be available to the public" and could render section 13(1), and possibly other exemptions as well, redundant.

[49] Moreover, although the word "person" is sometimes interpreted as including a corporation,[17] possibly implying that "personal" can encompass business-related information, the context and wording of the definition of personal information in section 2 of the *Act* make it clear that the term is intended to refer to individuals.[18]

[50] For all these reasons, I agree with the distinction between business and personal information identified in Order PO-2225 and other decisions of this office. I do not accept the ministry's submission that the "modern principle" of statutory interpretation requires this interpretation to be rejected. Rather, in my view, the modern principle supports it.

[51] The ministry also makes an argument based on a hypothetical view of what kind of financial information institutions might be expected to have:

> The Ministry submits that institutions typically have custody or control of "information relating to an individual's professional or business financial transactions." An institution would rarely have records of financial transactions that arise from an individual's personal sphere, such as bills for the purchase of goods or services for personal consumption, that are completely unrelated to an individual's professional activities (ie. bills for food or amenities that do *not* arise from an individual's work and are therefore *not* expensed to the institution). Reading the definition of personal information so narrowly as to include only financial transactions in which the individual has been involved in his/her non-professional, non-business capacity) is not supported by the "grammatical and ordinary sense" of ss. 2(1)(b), and excludes a broad category of "financial transaction" records that are typically within an institution's custody or control.

[52] The ministry provides no evidence to support its view of what this hypothetical institution "typically" would have under its custody or control. This submission is impressionistic and easily refuted. There are many instances where institutions would clearly collect and possess information pertaining to financial transactions involving individuals in their personal capacity: for example, programs providing social assistance and income support to individuals; government rebate programs; and police investigations, to name only a few.

[53] Accordingly, in the "Analysis" section, below, I will consider the previous decisions of this office making the distinction between personal information and information in a business, or professional context, as well as previous decisions

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[17] See the definition in section 87 of the *Legislation Act, 2006*, which states that "'person' includes a corporation."

[18] The primary definition of "person" in Oxford's online dictionary is "A human being regarded as an individual." See http://www.oxforddictionaries.com/us/definition/american_english/person.

determining that physicians' OHIP billings are personal information.

Affected parties and interested organizations

Initial representations

[54] Either directly or through their counsel, more than seventy affected party physicians provided representations in response to the initial Notice of Inquiry in this appeal. Three interested organizations did so as well. Some of these representations contain arguments also made by the ministry, already set out above, and I will not repeat these here.

[55] The following is a summary of additional non-confidential representations provided by these parties:

- the definition of "personal information" should be given a "broad and expansive" interpretation;[19]
- the information at issue is about an "individual", and not about a corporation or other type of person that is not an "individual";
- payments may reveal a substantial portion of a physician's income, and their financial transactions with the ministry;
- disclosure of physicians' names guarantees that the information is identifiable;
- doctors are not government employees and operate as independent contractors;
- some doctors practise through professional corporations and the corporations are the recipients of payments by OHIP;
- even where the physician practises under a corporate entity, the billing information can permit a reasonable estimate of income and allows for comparison of income between physicians;
- where the physician practises through a corporation, the billing information discloses something of a personal nature, as contemplated in Order PO-2225,

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[19] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 68. In the context of a distinction between business information and personal information, I do not accept this argument for the same reason I rejected the ministry's argument that Order PO-2225 is wrongly decided. That same reasoning also applies to the decisions under the *Personal Information and Electronic Documents Act* (*PIPEDA*) cited by this same affected party, finding that some employment work product is personal information. In addition, *PIPEDA* is a different statute and applies in the context of private businesses, not public sector bodies, and its definition of "personal information" is different, and less detailed, than the definition in the *Act*.

because it relates to the physician as a shareholder and an employee, and these capacities are inherently personal;

- billing information reveals something of a personal nature about the physician;
- an individual's personal information may be so inextricably linked to information about a corporation that information about that company can comprise the personal information of the individual;
- an individual's name may reveal other attributes such as sex or ethnic origin;
- section 16(1) of the *Health Insurance Act* (*HIA*)requires that all physicians submit their bills to OHIP "personally," that payments are made "personally" to each physician and also received "personally;"
- disclosure may also reveal financial information about the physician's direct family, including minor children; and
- section 2(3) of the *Act* does not apply.

[56] In addition, some parties provided the following further representations that are relevant to the issue of whether the record contains personal information, although in some cases they appear in representations aimed at the personal privacy exemption in section 21(1):

- the information is unlikely to be accurate or reliable as it presents a false picture of physicians' incomes – it does not take account of office, personnel, lab, equipment, facility, and/or hospital expenses;
- overhead costs can be very high; and
- some physicians practise in a group in which one physician's number is used for billing purposes, so the person appears to be a very high biller and the dollar amount of billings is therefore misleading.

[57] The argument that a physician's total billings are not reflective of personal income because they do not take account of overhead and other types of expenses is repeated by a significant number of affected parties and interested organizations in their representations.

[58] With respect to the line of cases referred to in the Notice of Inquiry finding that billings in other professions do not constitute personal information, the affected parties and interested organizations have provided submissions, including the following:

- the physicians do not have a contractual relationship with the ministry;

- in Orders MO-2363, PO-3207 and MO-2927, which relate to billings of other professionals, there was no information or evidence to establish a co-relation between the fee information sought and the affected parties' personal income, while in the case of physicians, there is a co-relation between billings and personal income;

- lawyers and other professionals submit invoices to multiple clients, but physicians bill a single payor, OHIP, and as a result, physicians' billing information has a stronger co-relation to individual incomes than fee amounts charged by other professionals; and

- the cases relating to other professionals are distinguishable because physicians do not provide services to the ministry, but to patients, and are compensated by OHIP, and the rationale for disclosing billings by other professionals does not apply here.

[59] With respect to this last group of submissions, I would observe that the distinction being drawn between professional fees charged by service providers who are hired directly by public bodies, on the one hand, and physicians on the other, does not assist in establishing that payments to physicians should qualify as personal information. The fact is that both groups provide professional services, regardless of the contractual arrangements they work under.

Reply Representations

[60] For the most part, the reply representations provided by the affected parties and interested organizations do not add any substantive arguments to those already referred to in my description of the initial representations, above.

[61] Counsel for a number of affected parties refers to the previous orders of this office, such as those identified by the ministry and listed above under "Other decisions," and submits that nothing has changed to ". . . justify any different interpretation of the legislation at this time."

Appellant's representations

[62] The appellant's representations are primarily directed at the public interest override, discussed below. Her arguments do not specifically address whether physicians' total OHIP payments, accompanied by name and specialty, constitute personal information.

Analysis

Previous Decisions and the definition of "personal information"

[63] As I have already noted, previous decisions of this office have found that the

OHIP billing information of identifiable physicians qualifies as personal information. In doing so, they have relied on the definition of personal information in section 2, and in particular, on the inclusion of "financial transactions in which the individual has been involved" in item (b) of the definition. Some also rely on item (h) of the definition, "the individual's name where it appears with other personal information . . .". Item (b) raises the question of whether commercial billings are transactions involving an "individual," and item (h) raises the question of whether total dollar amounts paid by OHIP to physicians are "other personal information."

[64] Privacy Complaint Report I96-119P finds that the name of a doctor who was identified by a staff member of the Minister of Health as "Ontario's No. 1 biller, charging more to OHIP than any other doctor in the province," was personal information. This conclusion was reached on the basis that this was information related to OHIP billings, which were found to be "information relating to financial transactions in which the individual has been involved" under item (b) of the definition.

[65] Orders P-1502, P-1505, PO-1933, PO-2204 and PO-3200 all rely on item (b) of the definition of personal information in section 2(1) to conclude that OHIP billing information relating to identifiable physicians is their personal information. Order PO-3200 also refers to paragraph (h) of the definition in reaching this conclusion. In addition, Order P-778 refers to the substance of items (b) and (h) of the definition of personal information in section 2(1) and concludes that, because it is connected to billing information, the number of laboratory tests ordered by named physicians is their personal information.

[66] In Order PO-3435, Assistant Commissioner Sherry Liang dealt with access to a list of services provided by a named surgeon on a specified date. Because the surgeon was not billing OHIP based on FFS but was, instead, compensated on a monthly basis pursuant to an Alternative Payment Plan (APP), she found that disclosure would not reveal what the surgeon was paid in relation to these services and the information at issue was therefore not personal information. It has been submitted that, as a corollary of this decision, physicians' OHIP billings must be considered personal information. I disagree. Order PO-3435 is distinguishable from the circumstances of this appeal because it did not deal with FFS payments.

[67] However, Order PO-3435 also identifies that the determination that physicians' OHIP billings in previous orders are personal information can be "contrasted" with the treatment of billing information concerning other professionals. In that regard, Order PO-3435 states:

> As the parties have noted, a number of IPC orders have considered the issue of whether OHIP billings reveal personal information of doctors. In these orders, this office has concluded that OHIP billings that can be connected with specific doctors are their personal information. For example, in Order P-1502, the Commissioner found that payment to a

> physician for services rendered in connection with the prescription of home oxygen services was a "financial transaction" within the meaning of section 2(1)(b) of the *Act*, and therefore qualified as personal information. I followed this above approach in Order PO-3200.
>
> Interestingly, the above approach can be contrasted with the treatment of other professionals whose billing information has been ordered disclosed under the *Act*. In Order PO-3207, I found that information about legal fees paid to a lawyer by a hospital was not exempt from disclosure under the personal privacy exemption, as it was not personal information.[20] In Orders MO-2363 and MO-2927, among others, this office found that the details of fee arrangements between government institutions and professional consultants did not qualify as the personal information of the consultants.

[68] Assistant Commissioner Liang did not have to reconcile these two lines of cases in Order PO-3435 because the previous orders were distinguishable on the facts. In this appeal, the two apparently divergent lines of cases identified by the Assistant Commissioner must be addressed.

[69] The template in Order PO-2225, which I have already agreed with in my review of the ministry's representations, above, is intended to assist in understanding how the term "individual" in the preamble of the definition of personal information, as well as the wording of items (b) and (h) of the definition, would apply to information in the business, professional or official sphere. Seen from that perspective, the mere fact that a physician received an annual total dollar amount of OHIP payments in the context of his or her medical practice is not sufficient to conclude that these are "financial transactions in which *the individual* has been involved" within the meaning of item (b) of the definition, nor "other personal information relating to *the individual*" in item (h), or for that matter, "recorded information about *an identifiable individual*"[21] in the preamble of the definition.

[70] In summary, the two-step analysis in Order PO-2225 was developed to facilitate the determination of whether information in a business, professional or official context is about an "individual" and is therefore personal information, or whether it is information about a business, profession or office. The fact that it has not been followed with respect to physicians' billing information is an anomaly that must be addressed. I will apply this template in the discussion that follows.

[71] I recognize that, in taking this approach, I am departing from the analysis undertaken in Privacy Report I96-119P and Orders P-778, P-1502, P-1505, PO-1933, PO-2204 and PO-3200. As I have already noted, one of the affected parties submits

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[20] See also Orders PO-3245 and PO-2568.
[21] [Emphases added.]

that nothing has changed since those cases were decided to justify any different interpretation of the legislation at this time. I disagree. In my view, the divergent approach to professional fees noted by Assistant Commissioner Liang in Order PO-3435 provides a compelling rationale for applying the same template across the board in determining whether information is properly considered "personal information" in a business, professional or official context.

[72] As I have already noted, *stare decisis* does not apply to the previous decisions of tribunals.[22] Although applying the template in Order PO-2225 to physicians' billing information is a departure from the approach taken in a number of previous orders of this office, which could be seen as a form of inconsistency, this approach actually supports consistency of decision-making, which is also seen as a valuable objective in judicial commentary on tribunal adjudication.[23]

Are physicians' OHIP billings their personal information or are they more properly characterized as business information?

[73] In Order PO-2225, former Assistant Commissioner Tom Mitchinson provided a two-step analysis template to assist in determining whether information in a business context is personal information. The request in that case was for the names of landlords who owed money to the Ontario Rental Housing Tribunal as a result of failure to pay a fee, administrative fine or any Tribunal ordered costs, together with the amount owing. In developing that template, Assistant Commissioner Mitchinson stated:

> Previous decisions of this office have drawn a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity:
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> • In Order M-118, former Commissioner Tom Wright ordered the partial disclosure of mailing lists compiled by the City of Toronto that included the names and addresses of individuals who had expressed an interest in certain municipal properties. Commissioner Wright distinguished between the personal or business capacity of the named individual. The distinction did not turn on whether or not the name as it appeared on the list was that of an individual, but rather on whether there

[22] See *Weber v. Ontario Hydro*, cited above.
[23] See, for example, *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at 968.

was evidence indicating that the individual was acting in a personal or business capacity.

- In Order M-454, former Adjudicator John Higgins found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but "information [that] relates to the ordinary operation of the business".

- Order P-710 dealt with records that contained the names of individuals and corporations who were vendors of goods and services to the Liquor Control Board of Ontario. Adjudicator Donald Hale found that the names of individuals should be disclosed as the identifying information related to "the business activities of these individuals" and as such did not qualify as their personal information.

- In Order P-729, former Adjudicator Anita Fineberg found that the amount of financial assistance received from the Ontario Film Development Corporation received by a named individual applicant (as opposed to a corporation, sole proprietorship or partnership) related to the business activities of that individual and could not be characterized as personal information.

Based on the principles expressed in these orders, the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the Income Tax Act and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

I recognize that in some cases a landlord's business is no more sophisticated than, for example, an individual homeowner renting out a basement apartment, and I accept that there are differences between the individual homeowner and a large corporation that owns a number of apartment buildings. However, fundamentally, both the large corporation and the individual homeowner can be said to be operating in the same "business arena", albeit on a different scale. In this regard, I concur with the appellant's interpretation of Order PO-1562 that the distinction

> between a personal and a business capacity does not depend on the size of a particular undertaking. It is also significant to note that the [*Tenant Protection Act*] requires all landlords, large and small, to follow essentially the same set of rules. In my view, it is reasonable to characterize even small-scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.
>
> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[74] In this case, the annual total amounts of OHIP payments to each of the top billing physicians have already been disclosed. It is the physicians' names and, in some cases, their specialties, that remain at issue. A superficial analysis would find that the names, viewed separately, are not personal information because of section 2(3), and that a physician's specialty or area of practice is also not, in and of itself, personal information. That would miss the essential issue here, which is whether the names and specialties, when connected to each physician's total annual payments from OHIP, qualify as personal information. That question turns on whether the payment information is, itself, personal information.

[75] In my view, the application of the first part of the two-step analysis in Order PO-2225 is relatively straightforward. The provision of medical services is a professional and/or business activity. Accordingly, I conclude that the act of submitting billings to OHIP and receiving remuneration for those medical services is in a business or professional context that is removed from the personal sphere. This is true whether or not the physician's practice is carried on by a corporation, and whether or not it is a sole practice or a group of physicians providing services.

[76] The next question to ask is whether disclosure of the names and specialties, when connected to the total annual OHIP fee payments to each physician, would reveal something that is inherently personal in nature.

[77] Very compelling evidence in that regard is provided in the context of the argument that the information is not accurate or reliable[24] because it presents a false

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[24] These arguments were made in the context of section 21(2)(g) of the *Act*, which establishes a factor favouring non-disclosure where "the personal information is unlikely to be accurate or reliable." Although not related to the personal information issue, it is interesting to note that the Supreme Court of Canada rejected the argument that information should be withheld from disclosure because it might be "misleading" in *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 at para. 224: "The courts have

picture of physicians' incomes. The foundation of this argument is that the OHIP payment figures represent gross revenue, and are "inaccurate" because allowable business expenses such as office, personnel, lab, equipment, facility and/or hospital expenses have not been deducted. This argument is made by a significant number of affected parties. Payments that are subject to deductions for business expenses are clearly business information. Since it is not an accurate reflection of personal income, it does not reveal anything that is "inherently personal in nature."

[78] As already noted, I have received an argument to the effect that an individual's personal information may be so inextricably linked to information about a corporation that the corporate information would also qualify as personal information. It has also been suggested that OHIP payment information reveals something of a personal nature about the physician. I conclude that both of these arguments are refuted by the repeated submission that billings are not an accurate reflection of personal income.

[79] In addition, I note that a number of parties argue that section 17(1) applies on the basis that the billing information is commercial and/or financial information whose disclosure could reasonably be expected to cause commercial harm. Such an argument is inconsistent with the view that the OHIP billing and payment information is personal in nature.

[80] As well, the arguments that physicians are not government employees and operate as independent contractors, and that some physicians practise through corporations and the corporations are the recipients of payments by OHIP, both support the conclusion that the OHIP payments are business information and not personal information.

[81] I also disagree with the submission that, where the physician practises through a corporation, the billing information discloses something of a personal nature because it relates to the physician as shareholder and employee, capacities which are said to be inherently personal. As has been pointed out repeatedly in the submissions made by affected parties, the OHIP payments do not reflect personal income. They do not indicate what the physician receives as shareholder or employee.

[82] As previously noted, the OHIP payment totals have already been disclosed without physicians' names and, in some cases, without specialty information. The ministry withheld the names and specialties because, in its view, the withheld information would identify the physicians and the payment information would then

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often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party [citations omitted]. If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed."

qualify as personal information.

[83] In the circumstances of this appeal, finding that the payment information does not qualify as personal information would mean that disclosing the physicians' names, which are otherwise excluded from the definition of personal information under section 2(3), would not reveal personal information. Similarly, such a finding also means that the withheld specialties are not personal information. Section 2(3) provides that personal information does not include the "name" or "designation" that identifies the individual in a business, professional or business capacity. The application of section 2(3) also disposes of the argument that the physicians' names are personal information because they may reveal sex or ethnicity.

[84] Based on the foregoing analysis, I find that the information at issue is not personal information within the meaning of section 2(1), and I find further that its disclosure would not reveal personal information.

[85] Before leaving this subject, several points remain to be addressed.

[86] One of these points arises from representations I have received that attempt to distinguish the line of cases finding that professional fees in other occupations are not personal information. While these orders may provide support for the view that physicians' OHIP billings are not personal information, I am not relying on them as determinative of the outcome in this appeal. Rather, the outcome depends on the application of the law, including the template set out in Order PO-2225, to the particular facts of this case, which I have done in the preceding paragraphs.

[87] In addition, the representations in this appeal contain references to the possibility that the OHIP payment figures may include "technical" fees, which cover the use of equipment, and related costs. Although it is not clear, based on the submissions before me, whether or not this is the case, it does not affect the outcome of whether the OHIP payment figures are personal information. As already discussed, the FFS payments are not personal information, and any component of those payments relating to equipment-related costs would also not qualify as personal information. Accordingly, no part of the payment is personal information regardless of whether technical fees are included.

[88] Another argument has been put forth to the effect that the payment information also reveals personal information about the direct family and/or children of the physician. This appears to arise from the view that the income of the physician would spill over to that individual's spouse and/or children. This argument fails for two reasons: (1) as already noted, OHIP payment information does not equate to a physician's personal income; and (2) I am not aware of a single case where the income of an individual has been found to be the personal information of relatives. If it were, those relatives would be entitled to request this information as if it were their own. This would be an outlandish and inappropriate result.

[89] And finally, section 16(1) of the *HIA*[25] has been invoked as the foundation of an argument that OHIP billings are the physician's personal information. This section states:

> An account or claim submitted in the name of a physician or practitioner in conjunction with the billing number issued to the physician or practitioner, and any payment made pursuant to the account or claim is deemed to have been,
>
> (a) submitted personally by the physician or practitioner;
>
> (b) paid to the physician or practitioner personally;
>
> (c) received by the physician or practitioner personally; and
>
> (d) made by and submitted with the consent and knowledge of the physician or practitioner.

[90] Section 16.1 of the *HIA* permits the physician to direct that payments may be made to "such person or entity as may be prescribed and in such circumstances and on such conditions as may be prescribed," and section 16(3) indicates that section 16(1) applies even where that has been done. In addition, section 16(5) states that:

> in this section, "billing number" means the unique identifying number issued by the General Manager to a physician, practitioner or health facility f*or the purpose of identifying the accounts or claims for insured services rendered by that physician, practitioner or health facility*. [Emphasis added.]

[91] The effect of these provisions is to tie the payments to the physician, practitioner or health facility who has submitted them, and not just to an OHIP billing number. This serves an important accountability purpose that is unrelated to the concept of "personal information" under the *Act*. Moreover, section 16(5) of the *HIA* makes it clear that an account deemed to be "personal" under section 16(1) can actually refer to a billing by organizations rather than individual physicians. In addition, as noted in section 87 of the *Legislation Act*, *2006*, "person" includes a corporation. Within this statutory context, I conclude that the use of the term "personally" in section 16(1) of the *HIA* does not dictate the meaning of "personal information" in the *Act*, where it clearly refers to individuals, nor does it dictate that OHIP payments must be found to be "personal information."

[92] Rather, that determination is to be made by applying the template in Order PO-2225, as I have done above, where I found that the OHIP payment information in the

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[25] *Health Insurance Act*

record relates to a business or a profession, and does not reveal anything about physicians that is "inherently personal in nature."

[93] In summary, I have found that the information at issue is not personal information within the meaning of section 2(1), and further, that its disclosure would not reveal personal information.

B. If the record contains personal information, does the mandatory exemption at section 21(1) of the *Act* apply?

[94] Section 21(1) of the Act states, in part:

> A head shall refuse to disclose *personal information* to any person other than the individual to whom the information relates except, [Emphasis added.]

[95] Because I have found that the information in the record is not personal information, I find that section 21(1) does not apply.

C. Does the mandatory exemption at section 17(1) of the *Act* apply?

[96] A number of affected parties claim that the section 17(1) exemption applies. In particular, these parties refer to sections 17(1)(a), (b) and (c). Other affected parties submit that section 17(1) does not apply because the information in the record is personal information.

[97] Counsel for a substantial number of affected parties submits that it would be "a stretch" to apply this exemption to physicians' names. The ministry does not claim that this exemption applies, and although invited to provide representations on it at the reply stage, the ministry did not do so. The appellant did not address section 17(1) in her representations.

[98] In these circumstances, having found that the information in the record does not qualify as personal information, and that the personal privacy exemption in section 21(1) therefore does not apply, it is necessary to consider the possible application of the mandatory exemptions in sections 17(1)(a), (b) and (c).

[99] These sections state:

> 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, 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; . . .

[100] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[26] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[27]

[101] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

PART 1: TYPE OF INFORMATION

[102] In this case, the affected parties claim that the information is commercial and/or financial information. These types of information have been discussed in prior orders.

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[28] The fact that a record

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[26] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[27] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[28] Order PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[29]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[30]

[103] In my view, the information at issue, which consists of the physicians' names and some of their specialties would, if disclosed along with the payment amounts that were disclosed previously, reveal their total annual FFS payments under OHIP. Taken together, this information pertains to the buying, selling and exchange of services, and therefore qualifies as commercial information.

PART 2: SUPPLIED IN CONFIDENCE

SUPPLIED

[104] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[31]

[105] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[32]

[106] The affected parties who rely on section 17(1) submit that their billing information was "supplied in confidence" to the ministry. For the most part, however, the representations I have received do not explain the process by which physicians submit their fees to the ministry for payment. One of the interested organizations submits that "[p]hysician billing codes are submitted directly to the [ministry] for payment."

[107] Several other affected parties asked that their representations on this point be kept confidential. However, they also do not explain the process by which fees are submitted for payment. Where they also argue that disclosing the payment information would permit accurate inferences to be drawn about other confidential information they supplied to the ministry, they do not provide persuasive evidence to back up these claims.

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[29] Order P-1621.
[30] Order PO-2010.
[31] Order MO-1706.
[32] Orders PO-2020 and PO-2043.

[108] Having reviewed these submissions, it was evident that further information was required in order to contextualize the "supplied" issue. This context is provided by legislative requirements concerning physician's OHIP claims.

[109] Section 15(1) of the *HIA* states:

> A physician shall submit all of his or her accounts for the performance of insured services rendered to an insured person directly to the Plan in accordance with and subject to the requirements of this Act and the regulations, unless an agreement under subsection 2(2) provides otherwise.

[110] Section 38.4(1) of R.R.O 1990, Regulation 552, states, in part:

> It is a condition of payment of a claim for an insured service rendered to an insured person in Ontario that the claim include the following information:
>
> 14. The fee code that, in the circumstances in which the service was rendered, correctly describes the service as specified,
>
> in the schedule of benefits, if the service was rendered by a physician,
>
> . . .
>
> 15. In the case of a service other than a laboratory service described in section 22, the amount of the fee being claimed.

[111] In addition, the ministry's *Resource Manual for Physicians*[33] states:

> The ministry recommends daily or weekly submissions of claims to ensure timely adjudication of claims files and to aid in the subsequent reconciliation of rejected claims.[34]
>
> Claims must be submitted within six months of the service date. Claims submitted more than six months after the service has been rendered will not be accepted for payment unless there are extenuating circumstances as defined by ministry policy.[35]

[112] The *Resource Manual for Physicians* sets out eight full pages of error codes which, when invoked, would mean that, at first instance at least, a physician's claim

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[33] Version 2.0 dated October 2015.
[34] at p. 4-8.
[35] at p. 4-104. See also O. Reg. 22/02.

under OHIP would not result in a payment being made.[36]

[113] From the foregoing, two facts that have a bearing on the "supplied" issue emerge.

[114] First, the total annual payment figure set out in the record for each listed physician is not a figure that was submitted, *per se*, to the ministry by the physician. The physicians submit their bills over time, and do not provide a total annual figure to the ministry. Accordingly, the total payment figure shown in the record for each physician was not "supplied," but rather, was compiled by the ministry using its own calculations. As this figure is compiled from individual billings submitted by physicians, disclosure would also not lead to "accurate inferences" being drawn about information that was actually supplied.

[115] Second, there are many reasons for which claims can be rejected. Therefore, the total amount paid to a physician during a given year will not necessarily correspond to the total amount that physician submitted in billings.

[116] From this, I conclude that the information in the records about payments to physicians was not "supplied" to the ministry within the meaning of section 17(1). This conclusion is supported by *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*[37] (*WCB*). In that case, the Ontario Court of Appeal found that the decision in Order P-373 was reasonable. Order P-373 had found that ranked lists of employers, arranged by the amount of penalty surcharges they were required to pay under several accident prevention programs of the board, were not "supplied" to the board. Order P-373 stated:

> Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.
>
> In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.

[117] In concluding that the decision in Order P-373 was reasonable, the Court of Appeal stated:

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[36] at pp. 4-15 through 4-22.
[37] (1998) 41 O.R. (3d) 464, 1998 CanLII 7154 (C.A.)

> 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.

[118] In my view, the circumstances of this appeal are closely analogous to those described in *WCB*. Accordingly, I find that the information in the record about payments to physicians was not "supplied" to the ministry.

[119] As discussed previously, the payment amounts have already been disclosed, and the information at issue consists of the payees' names and, in some cases, specialties. It is clear that physicians' names and specialties are not confidential; the public nature of this information is a necessary aspect of providing their professional services. The key is whether the information, taken as a whole, was "supplied in confidence."[38] Based on the foregoing analysis, it is clear that it was not.

[120] Therefore, I find that part 2 of the test has not been met. As all three parts of the test must be met in order for section 17(1) to apply, I find that it does not.

PART 3: HARMS

[121] Although I have found that part 2 of the test is not met, and section 17(1) therefore does not apply, I will nevertheless review the harms arguments advanced under part 3 for the sake of completeness.

[122] The parties resisting disclosure must provide evidence of the potential for harm. They must demonstrate a risk of harm that is well beyond the merely possible or speculative although they need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[39]

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[38] On the issue of confidentiality, section 38(1) of the *Health Insurance Act* provides that "The persons listed in subsection (1.1) shall preserve secrecy with respect to all matters that come to their knowledge in the course of their employment or duties pertaining to insured persons and any insured services rendered and the payments made for those services, and shall not communicate any such matters to any other person except as otherwise provided in this Act, the Personal Health Information Protection Act, 2004 and the Freedom of Information and Protection of Privacy Act." The "persons listed in subsection (1.1)" are individuals employed in the administration of health insurance. Section 38(1) is clearly intended to protect the privacy of patients, and in any event, it contains an exception for disclosure under the *Act*.

[39] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-4.

[123] The failure of a party resisting disclosure to provide evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[40]

Sections 17(1)(a) and (c)

[124] The harms identified in sections 17(1)(a) and (c) arise where disclosure could reasonably be expected to:

- prejudice significantly or interfere significantly with the competitive position or contractual negotiations of a person, group of persons, or organization [17(1)(a)]; or

- result in undue loss or gain to any person, group, committee or financial institution [17(1)(c)].

[125] As there is some overlap in these concepts, I will deal with these two sections together. Section 17(1)(b) is concerned with similar information no longer being supplied to the ministry, and I will address it separately, below.

[126] The affected parties and interested organizations who rely on this exemption (or rely on it in the alternative) submit that disclosure could reasonably be expected to lead to the harms identified in sections 17(1)(a) and/or (c) by:

- inviting competition by demonstrating success in regional markets;

- creating leverage for competitors to adopt a fairness argument that a physician does not need any more business;

- creating undue gain or loss as a result of competitors gaining an advantage;

- damaging the physician's reputation by identification as a high biller, and leading patients or referring doctors to transfer their business elsewhere;

- resulting in frivolous complaints to the College of Physicians and Surgeons of Ontario (CPSO); and

- damaging the profession's ongoing fee negotiations with the ministry by creating a false impression of physicians' incomes without regard to the fact that they pay overhead and other expenses.

[127] These submissions do not rise beyond the level of mere allegation or speculation.

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[40] Order PO-2435.

For example, the argument that the public will see the payments as the physicians' actual personal income is belied by the absolute and marked insistence by so many of the affected parties that this is false. It is difficult to imagine that physicians, either individually or through their professional organizations, would sit by and let that impression go unchallenged. And the appellant herself acknowledges that these payments do not reflect physicians' actual personal income.

[128] With regard to the argument about patients or referring doctors going elsewhere because someone is a high biller, it is, in my view, equally likely that this would be seen as a marker of success and competence, and could assist the physician to retain clients and referrals, or even increase them.

[129] Nor is it self-evident that complaints to the CPSO could reasonably be expected to result from disclosure. Higher billings, without more, provide no proof of misconduct.

[130] Similarly, other arguments that various affected parties have asked to remain confidential are not supported by evidence, and are, rather, stated as though their validity is self-evident, which it is not.

[131] I find that these arguments do not meet the standard of proof set out in *Ontario (Community Safety and Correctional Services)*, cited above, that the evidence provided must be well beyond the merely possible or speculative.

[132] In addition, counsel for one group of physicians refers to the harms it had advanced on behalf of its clients as part of its argument that the personal privacy exemption at section 21(1) applies. I found, above, that this exemption did not apply on other grounds, namely that the record does not contain personal information. These arguments, as well as others provided by counsel for this group of doctors, are as follows:

- the physicians may suffer pecuniary harms in future contract negotiations with hospitals, staff and employees, with respect to budget allocation and operating room time, because if hospitals are aware that someone is a high OHIP biller, operating room time and funding will be reduced;

- similarly, negotiations with suppliers and employees will be negatively impacted if physicians' gross income is revealed;

- donations to hospital foundations may be decreased;

- disclosure is likely to adversely affect physicians, their families and their children, especially in smaller cities; and

- patients may feel uncomfortable or ask for loans.

[133] Like the other harms arguments summarized above, these submissions do not

rise beyond the level of mere allegation or speculation. For example, the argument that budget allocations or operating room time would be reduced, without more explanation, is simply not credible. Nor are the other arguments about negotiations with staff or suppliers, given that it is commonly understood that gross billings are simply that; they are gross business revenue prior to expenses being deducted, and are clearly not a reflection of profitability or personal income. Nor is there any sufficient explanation as to why hospital foundation donations could reasonably be expected to be reduced. As well, the arguments relating to patient discomfort, loan requests (which could easily be refused), or negative impact on physicians' families, are not demonstrably linked to commercial harm. I find that these submissions do not meet the standard of proof set out in *Ontario (Community Safety and Correctional Services)*, cited above, that the evidence provided must be well beyond the merely possible or speculative.

[134] Based on the analysis set out above, I find that a reasonable expectation of harm under sections 17(1)(a) and (c) has not been established, and part 3 of the test is therefore not met in relation to those sections.

Section 17(1)(b)

[135] The harm identified in section 17(1)(b) arises where disclosure could reasonably be expected to "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."

[136] I have already found that the total payments to physicians in the record were not, in fact, "supplied" within the meaning of section 17(1). Based on this, and the other reasons outlined below, I have concluded that section 17(1)(b) does not apply.

[137] One of the affected parties has provided affidavit evidence from a physician who is the former Chief Executive Officer (CEO) of a medical research organization (the organization) that analyses the performance of the health care system and many other aspects of medical care. The affiant provides information about himself in an attempt to qualify as an "expert," but in my view, his expertise does not entitle him to decide the very issue before me in my review of section 17(1)(b), namely, whether physicians could reasonably be expected to no longer provide information to the ministry. That is the role of the adjudicator.

[138] This affected party submits that "[t]he harm in this context is the significant potential that physician-identified billing data will no longer be supplied – as it is now – within a culture of trust that allows the [ministry] to make these data (with personal identifiers) accessible for independent analysis by knowledgeable and experienced researchers."

[139] The affected party submits further that the affiant "does not maintain . . . the Ontario physicians will stop submitting claims to OHIP should the IPC allow this claim and order the [ministry] to disclose physician-identified OHIP billing records. Rather, the

identified harm is the significant potential that the terms upon which physicians supply that information to the [ministry] will change." The objective is to continue to allow researchers ". . . timely and unrestricted access to these raw data including personal identifiers for physicians and their patients. . . ."

[140] Although patient information is not at issue in this appeal, this affected party submits that "[t]he culture of trust is fragile. It depends on physicians' continued confidence that data will be used appropriately. . . ." The affected party submits that physicians will use their political strength as a profession to oppose the current practice of disclosure to the organization and others like it.

[141] The public interest in continuing to receive this information is, according to the affiant, based on the nature of the work done by the organization of which he is the former CEO: analysis of physician payments as a driver of health system costs; analysis of "high users" of the health care system; and analysis of the "real world safety" of medications and "real world" effectiveness of other medical interventions.

[142] In other words, the position of the affected party, and the affiant, is that it is in the public interest that *the organization of which he is the former CEO, and others like it*, continue to receive raw data, including identifiers of both physicians and patients, from the ministry.

[143] This alleged harm is not the one identified in section 17(1)(b). Rather, that section refers to information no longer being supplied *to the institution*, which in this case is the ministry. As the affected party acknowledges, Ontario physicians will not stop submitting claims to OHIP. They are required to do so under section 15(1) of the *HIA*,[41] and to comply with all requirements of the regulations in that regard. As already noted, section 38.4 of Regulation 552 requires physicians to submit the fee code for the service being billed, as well as the amount of the fee charged. Section 38.4 also requires that fees be submitted under the physician's OHIP identification number, which identifies the physician, along with an additional code that identifies the physician's specialty.

[144] Given that the record at issue simply identifies the physician's name, specialty and the total annual payments to him or her by OHIP, and that coding to identify the physician and his or her specialty, and the amount of the fee claimed, must be provided in order for a fee claim to be processed, there is no prospect of the ministry no longer receiving this information from physicians. And, as I have already noted, the total OHIP payments to the physicians named in the record were not "supplied" to the ministry in any event.

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[41] Section 15(1) states: "A physician shall submit all of his or her accounts for the performance of insured services rendered to an insured person directly to the Plan in accordance with and subject to the requirements of this Act and the regulations, unless an agreement under subsection 2 (2) provides otherwise."

[145] My observations about the mandatory information that physicians must provide to the ministry when submitting OHIP claims are also noted by two other affected parties who take the position that section 17(1)(b) does not apply.

[146] Another affected party, who states that his representations are confidential, makes an argument under section 17(1)(b) relating to possible effects on physicians' practices if the information at issue is disclosed. This argument does not relate in any direct way to the supply of information to the ministry in connection with fee claims made to OHIP, nor does it overcome the analysis outlined above concerning the information that must be provided when physicians submit fee claims.

[147] Based on the analysis set out above, I find that a reasonable expectation of harm under section 17(1)(b) has not been established, and part 3 of the test is therefore not met in relation to that section. Having made this same finding in relation to sections 17(1)(a) and (c), above, I find that part 3 of the test has not been met.

Conclusions under section 17(1)

[148] All three parts of the section 17(1) test must be met for the exemption to apply. I have found that parts 2 and 3 are not met.

[149] Accordingly, I find that the record is not exempt under section 17(1).

D. Does the public interest override at section 23 of the *Act* apply?

[150] Having found that sections 21(1) and 17(1) do not apply, the record is not exempt from disclosure and I will order it to be disclosed, in its entirety, to the appellant.

[151] In the alternative, I have also considered whether, if the section 21(1) and/or section 17(1) exemptions had been found to apply, the public interest override at section 23 of the *Act* would apply.

[152] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphases added.]

[153] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Onus of Proof/Procedure under section 23

[154] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. The IPC has previously determined that in order to address this, the adjudicator will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[42]

[155] One of the affected parties has provided extensive representations on the process and the onus of proof in assessing the application of section 23.

[156] This affected party[43] disputes that there is a role for this office in reviewing the record to determine whether there is a compelling public interest in disclosure that clearly outweighs the purpose of the exemptions. This affected party also submits that because the nature of the record is known in this case, the appellant must, at a minimum, identify the nature of the public interest and why it is compelling. As well, this affected party objects to being invited to provide representations under section 23 before seeing the appellant's arguments.

[157] In my view, the submissions concerning this office's role in reviewing the record with a view to determining whether section 23 applies are based on a fundamental misunderstanding of the nature of the adjudication process mandated under the *Act*. As noted in section 52(1), the Commissioner's adjudication process is known as an "inquiry." That in itself suggests a model that is not strictly adversarial, and allows for a more inquisitorial approach. I also note that inquiries conducted by the Commissioner have the following distinctive features:

- the *Statutory Powers Procedure Act* does not apply [section 52(2)];
- the Commissioner may "enter and inspect any premises occupied by an institution" [section 52(4)]; and
- parties are not entitled, as of right, to be present during, or to comment on, the representations made to the Commissioner by other parties [section 52(13)].

[158] The Legislature has entrusted the application of section 23 to the institution, at first instance, and then to the Commissioner, who has the expertise to decide this issue.[44] In my view, it is entirely appropriate for the Commissioner, in an inquiry, to

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[42] Order P-244.
[43] One of the interested organizations also makes this point in its reply representations.
[44] *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108, 1999 CanLII 1104 (C.A.), at para. 2. Leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.).

review the record with a view to determining whether section 23 applies, taking into account the arguments of the parties.

[159] In addition, I note that the appellant did provide detailed representations concerning section 23 (see below), which were provided in full to the ministry, the interested organizations and the affected parties when they were invited to provide reply representations. Many of the affected parties, including the one who made these arguments, provided reply representations.

[160] Accordingly, I conclude that the process followed in this case is consistent with the Commissioner's legislative mandate and the principles of fairness.

[161] In reply representations, the affected party who raised these objections also notes that the appellant referred, in her appeal notice, to a compelling public interest in the disclosure of the physicians' names as well as their OHIP billings. There is some suggestion that this may not include the undisclosed specialty information in the record. I disagree. The appellant has appealed the ministry's decision to deny access to the withheld information in the record. In her representations, she argues that "there is a compelling public interest to release physician-identified OHIP billing data." In my view, the appellant is arguing that the public interest override applies to all of the undisclosed information in the record.

DOES SECTION 23 APPLY?

[162] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[45] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[46]

[163] A public interest is not automatically established where the requester is a member of the media.[47]

[164] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[48]

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[45] Orders P-984 and PO-2607.
[46] Orders P-984 and PO-2556.
[47] Orders M-773 and M-1074.
[48] Order P-984.

[165] Any public interest in non-disclosure that may exist must also be considered.[49] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[50]

[166] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[167] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[51]

Representations

The appellant

[168] The appellant submits:

> With an annual budget of $51 billion, the health ministry consumes 42 per cent of the entire provincial budget. At $11.8 billion, spending on OHIP makes up a significant portion of this.
>
> I believe there should be as much public disclosure as possible surrounding this considerable outlay of taxpayer dollars.
>
> We live in a time when there is a growing expectation of transparency from public institutions, especially in relation to the allocation of taxpayer dollars.
>
> Transparency leads to more accountably, which, in turn, leads to better use of taxpayer dollars.
>
> . . .
>
> Around the world, compensation transparency is increasingly commonplace, especially when it involves public funds. In Canada, both Manitoba and British Columbia already release physician-identified billing data. And Ontario releases the identities and salaries of public servants who make more than $100,000 annually.
>
> . . .

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[49] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[50] Orders PO-2072-F, PO-2098-R and PO-3197.
[51] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above at footnote 44.

> Lastly, I would like to point out that the Information and Privacy Commission has previously seen fit to release compensation information about individuals who are paid from the public purse. It did so in 2010, in relation to an appeal launched by the York Regional Police Association, which had sought information about the police chief and two deputies.[52]

[169] The appellant also mentions the current negotiations between the Ontario government and the Ontario Medical Association in relation to physicians' compensation, and argues that the public deserves to have as much information as possible, including physician-identified billing information. She also refers to a number of media articles and comments by politicians calling for public disclosure of information about payments to physicians under OHIP, and other public discussion of this issue.

The ministry

[170] The ministry included a number of arguments disputing the application of section 23 in its initial representations.[53] Some of these arguments, such as the lack of evidence of a public interest or public coverage of this issue provided by the appellant, must be dismissed because the appellant has provided such argument in her representations, which were received after the ministry made its initial submissions. As already noted, the appellant's representations were then given to the ministry (and affected parties and interested organizations) when they were invited to provide reply representations. The ministry did not respond to the appellant's arguments, although it was invited to do so.

[171] On the substantive issue concerning section 23, the ministry submits that the undisclosed information in the records would not inform the citizenry about the activities of government or assist in the expression of public opinion or the making of political choices. Rather, in the ministry's submission, it would only serve prurient interests. The ministry also submits that the assertion of a general "right to know" is not sufficient to establish a compelling public interest. As well, the ministry asserts that there is a public interest in the FFS amounts paid to the top 100 billers, and that this information, without their names, has been disclosed.

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[52] A reference to Order MO-2563, which was the subject of the judicial review that was dismissed by the Divisional Court in *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, 2012 ONSC 6175.

[53] The ministry refers to Order PO-1933, in which section 23 was found not to apply to the names of physicians who inappropriately billed OHIP. As noted in the *stare decisis* discussion earlier in this order, this decision is not binding on me. Moreover, it is distinguishable from the record at issue here, which is not concerned with inappropriate billing; rather, this is a comprehensive record showing the amounts paid to physicians who received the highest OHIP payments over a five-year period, which requires a different analysis. The ministry also refers to Order PO-1639, which did not apply section 23 to information about public funding to racetracks because the interest in question was private, and no far-reaching impact was established. Again, that order is distinguishable and does not dictate the outcome here.

[172] Accordingly, the ministry submits that there is no compelling public interest in disclosure, and in the alternative, if one is found to exist, it does not clearly outweigh the purpose of section 21(1), which is the exemption the ministry relies on to deny access to the information it withheld.

Affected parties and interested organizations

[173] The affected parties and interested organizations repeated some of the ministry's submissions. In addition, they made further arguments in both their initial and reply representations. The arguments made by the affected parties are voluminous and wide-ranging. Many of the affected parties asked that their representations be treated confidentially. In this circumstance, it is not possible to set out and individually address every single submission I have received. The most useful approach is to review these submissions under the following category headings:

- measured against previous jurisprudence, is there a compelling public interest in disclosure?
- do other accountability mechanisms exist?
- is there a public interest in non-disclosure?
- what are the consequences of disclosure for physicians?
- by ordering disclosure, would the IPC be trespassing in an area that should be addressed by legislation?
- what is the impact of Order MO-2563 and *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*?
- if there is a compelling public interest in disclosure, does it clearly outweigh the purposes of the exemptions?
- other arguments.

[174] I will now review the representations under each of these category headings.

Measured against previous jurisprudence, is there a compelling public interest in disclosure?

[175] Some of the representations submitted by the affected parties and/or interested organizations raise arguments that have been the subject of previous jurisprudence, including the following:

- there is no compelling public interest in disclosure;

- disclosure does not provide the public with information about activities of government;
- the amounts billed to OHIP by the province's top billing physicians have been disclosed and this is enough to satisfy the public interest;
- disclosure of the physicians' names without disclosure of the services represented by the billings is of no value to the public, providing no insight to how health care dollars are spent or allocated;
- the information does not provide context about the volume of work performed by the physician, the complexity of the work, or overhead costs related to the performance of services; and
- there can be no public interest in disclosing unreliable information.

[176] I do not accept the submissions relating to the accuracy or reliability of the information, its alleged lack of context, or that the information provides no insight into how health care dollars are spent or allocated. On the first two points, I have already referred to the Supreme Court of Canada's judgment in *Merck Frosst* (see footnote 24, above), where the Court stated:

> If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it.

[177] On the third point, I conclude that the information in the record, which shows not only the dollar amounts paid to physicians, but their specialty area, does in fact provide insight into how health care dollars are spent.

[178] I will return to the arguments about whether the information already disclosed, without the names of the physicians, is sufficient to meet the public interest, and whether disclosure would provide information about the activities of government, in the "Analysis" section below.

Do other accountability mechanisms exist?

[179] Previous orders relating to section 23 indicate that the existence of another public process or forum for addressing the public interest can be significant in assessing whether section 23 applies.[54]

[180] The affected parties and/or interested organizations submit that:

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[54] See, for example, Orders PO-3480 and PO-3577.

- disclosure would not promote accountability;
- disclosure will not reduce OHIP billing fraud;
- the public already has information about the OHIP claims system, including the OHIP schedule of benefits for physician services;
- there are multiple existing mechanisms to scrutinize the reasonableness and integrity of a physician's OHIP billings, such as audits by the General Manager of OHIP, or an investigation by the CPSO;
- OHIP occasionally contacts patients to determine whether they actually received the medical services for which OHIP has been billed;
- OHIP also monitors billing patterns and periodically conducts audits of billing practices;
- physicians are also subject to governance by the CPSO;
- the Institute of Clinical Evaluative Sciences (ICES) already conducts major health systems including research into: (1) physician payment and productivity analyses, and (2) high cost users of the health care system; and
- the OHIP Schedule of Benefits sets out the cost of each service billable to OHIP, and other information such as what has already been disclosed in this case or a breakdown of billings by specialty or region could also be released without compromising privacy.

[181] The view that section 23 will not apply where there is another public process or forum for addressing the public interest applies in situations where specific activities or behaviour are under investigation. In this case, the public interest argument relates to transparency. Satisfying this interest requires that members of the public be able to independently understand and make political choices about government spending. This is not an interest that can be adequately addressed by other accountability mechanisms. For this reason, I do not accept these arguments and will not refer to them again.

Is there a public interest in non-disclosure?

[182] As already noted, any public interest in non-disclosure must be considered in the determination of whether a compelling public interest exists. In this regard, the affected parties and/or interested organizations submit that:

- disclosure may harm the trust that must exist between physicians and others, including patients;

- disclosure may negatively affect donations to hospital foundations; and

- disclosure could result in physicians in smaller communities considering early retirement, and this may negatively impact the public by reducing service to already underserviced locations.

[183] These alleged harms are highly speculative, and without further evidence, I am not satisfied that they demonstrate a public interest in non-disclosure. Without diminishing the force of this analysis, I note that two other provinces of Canada, namely Manitoba and British Columbia, have legislation requiring the disclosure of physician-identified billing data, as identified by the appellant. I have not been presented with evidence to demonstrate that negative impacts such as those alleged here have developed in those provinces as a consequence of this information being disclosed.[55]

What are the consequences of disclosure for physicians?

[184] This heading is, in some ways, similar to the last one (public interest in non-disclosure), although in this case, some of the submissions relate more to a private interest in non-disclosure. The affected parties and/or interested organizations submit that:

- disclosure will not improve physician performance or encourage meeting performance targets or teamwork;

- disclosure has the potential to cause unnecessary complaints to the CPSO, or make physicians the victims of harassment and/or criminal activity;

- physicians will be required to defend their OHIP billings;

- disclosure may cause physicians to reduce their caseloads;

- the only purpose to be served by releasing individual physicians' names is to permit the use of the information already released out of context in a manner that could cause substantial harm to the physicians;

- the personal safety of physicians may be threatened by disclosure;

- disclosure to a media requester will amplify the harms that would result, as the appellant's objective is to "craft a front-page story"; and

- releasing the names seems more an exercise in voyeurism and public shaming than an exercise in transparency.

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[55] I further observe that a number of physicians are employed directly by institutions such as hospitals, and their names and incomes are publicly disclosed under the *Public Sector Salary Disclosure Act*. No evidence has been provided to suggest that any of these harms have occurred as a result.

[185] I will begin with the last two bullet points. I do not accept these allegations, which are completely at odds with the approach taken by the appellant in this case. Her representations are entirely concerned with transparency, which is a very important consideration in assessing whether or not there is a compelling public interest in disclosure.

[186] For essentially the reasons mentioned under the last heading, the other points raised here are highly speculative and no persuasive evidence has been presented to support them.

By ordering disclosure, would the IPC be trespassing in an area that should be addressed by legislation?

[187] Some of the representations suggest that the disclosure of physician-identified billing information is the province of the Legislature and no concern of the IPC. And further, the Legislature has addressed the disclosure of public sector income in the *Public Sector Salary Disclosure Act* (*PSSDA*) and chose not to include physicians.[56] In particular, I have received the following arguments relating to this point:

- the appellant's representations concerning the existence of a legislative mandate for disclosure of physicians' payment information in other provinces demonstrates that this is a matter for legislation, rather than one that should be decided by the courts or administrative tribunals;

- physicians' billing information differs from sunshine list information because the former includes amounts paid for overhead, expenses, etc., while the latter does not; and

- there is a bill before the legislature intended to address this situation: Bill 78, the *Transparent and Accountable Health Care Act, 2015*.

[188] I do not accept these arguments. The record at issue is a record that is subject to the access provisions of the *Act*. The question of its disclosure in response to a request must therefore be decided based on the provisions of the *Act*. I have already concluded, above, that the claimed exemptions do not apply. A finding that the public interest override applies in this case could not accurately be characterized as trespassing in the legislative arena. Rather, it is applying a provision of the *Act* that has been found to be within the Commissioner's expertise.[57]

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[56] As noted in the preceding footnote, income information about physicians who are employed by institutions is, in fact, subject to disclosure under the *PSSDA*.

[57] See *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above at footnote 44.

What is the impact of Order MO-2563 and *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*?[58]

[189] In Order MO-2563, upheld on judicial review in *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner*, the Commissioner found that the public interest override applied to information about the salary and pay for performance bonuses of the Police Chief and other senior officers.

[190] In this appeal, I have received the following representations that attempt to distinguish that case:

- unlike the situation in Order MO-2563, where the adjudicator referred to individuals who enter the public service accepting that their salaries may be exposed to public scrutiny, physicians are not public servants and would never have contemplated that their billing information might become public; and

- disclosure of a public servant's salary and benefits, as was done in Order MO-2563 and *York (Police Services Board) v. (Ontario) Information and Privacy Commissioner* is distinguishable from this appeal because the disclosure here would only reveal the amount billed, without reference to overhead and other expenses.

[191] As explored in more detail below, the discussion of transparency in the use of public funds in that case is highly relevant in the present appeal. Its relevance is not diminished by a distinction between employees and others who receive public funds.

If there is a compelling public interest in disclosure, does it clearly outweigh the purposes of the exemptions?

[192] In their representations, the affected parties and/or interested organizations have included the following arguments that address this aspect of section 23:

- if there is a compelling public interest, it does not clearly outweigh the purpose of the exemptions;

- privacy protection, the purpose of section 21(1), is a core purpose of the *Act* and the public interest would have to be overwhelming in order to overcome this purpose;

- the invasion of privacy that would result from disclosure is magnified by the potential for media publication, meaning an ongoing and unnecessary invasion of privacy;

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[58] 2012 ONSC 6175

- once the information is disclosed, the damage will have been done, and it will not be possible to place the information in context without an examination of each physician's practice;

- there is no compelling interest in disclosure that would clearly outweigh the purpose of section 17(1).

[193] In my view, these arguments are impacted by the limited nature of the information to be disclosed. I will refer to this again in the discussion of whether a compelling public interest clearly outweighs the purpose of the exemptions, below.

Other arguments

[194] I have received the following additional submissions that must be addressed:

- the fact that others support the appellant's view that the information should be disclosed is irrelevant and would be inadmissible in court; and

- public disclosure of the physicians' names would not assist with respect to ongoing negotiations between the Ontario government and the Ontario Medical Association.

[195] The first of these two points relates to the appellant's reliance on statements by other commentators and by politicians which, in her submission, support the need for greater transparency. Although I disagree that these stated views would always be irrelevant, I have not reproduced these arguments in my summary of the appellant's representations, above, because I do not need to rely on them in order to reach a conclusion about whether disclosure is desirable in order to promote transparency.

[196] Similarly, although the appellant refers to the existence of negotiations between the Ontario government and the Ontario Medical Association, this is not a significant factor in deciding whether the public interest override applies. Again, the issue relates to transparency in a broader sense. I would make the same finding whether or not these negotiations were taking place.

Analysis

[197] Having reviewed the extensive representations provided by the parties, I have concluded, for the reasons that follow, that there is a compelling public interest in the disclosure of the record. I have also concluded that this compelling public interest clearly outweighs the purposes of both the section 17(1) and 21(1) exemptions in the circumstances of this appeal.

Compelling Public Interest

[198] As the appellant points out, Ontario's health care system consumes a large

portion of the provincial budget, and payments made to physicians under OHIP represent a significant portion of this spending.

[199] In addition, I find it significant that the physicians whose total annual payments are included in the record are being paid very substantial amounts of money from the public purse. As already noted, the dollar amounts paid to individual physicians in the five years reflected in the record have been disclosed, while the physicians' names and, in some instances, their specialties, have been withheld. Accordingly, the dollar figures are public, and I will therefore refer to them here for the purpose of illustrating this point.

[200] In fiscal year 2012, the last year for which the record contains figures, the physician who received the highest annual amount under OHIP received payments of over $6,100,000. The physician whose total annual OHIP payments ranked at number 100, or the lowest amount included, received payments of over $1,400,000.

[201] I am aware that these payments do not reflect the physicians' personal income, as they represent gross revenue that does not take overhead expenses or payments to other physicians or staff members into account. Nevertheless, it is an inescapable fact that these payments consume a substantial amount of the Ontario government's budget, and regardless of the fact that the physicians are not public servants, these amounts reflect payments for public services provided to the public and paid for by taxpayers.

[202] There is, moreover, no question that substantial expenditures of public funds do relate to the public interest. Seen in that context, there is a clear relationship between the record and the *Act*'s central purpose of shedding light on the operations and activities of government. I therefore find that there is a public interest in the disclosure of the record.

[203] This view is consistent with the principle of transparency in relation to government spending and contracts. In my view, the concept of transparency, and in particular, the closely related goal of accountability, requires the identification of parties who receive substantial payments from the public purse, whether they are providing services to public bodies under contract or, as in this case, providing services to the public through their own business activities under an umbrella of public funding. The transparency principle also encompasses the undisclosed specialty information in the record, whose disclosure would provide further information about how public funds are used.

[204] In addition, given the significant public discussion of this issue, which is evident from the media clippings from a number of different sources that were provided by the appellant with her representations, I am satisfied that the information in the record "rouses strong interest or attention," and I find that the public interest in this information is therefore "compelling."

[205] The public interest in transparency in relation to the expenditure of public funds is referred to in *York (Police Services Board) v. Ontario (Information and Privacy Commissioner).*[59] In finding the adjudicator's decision in Order MO-2563 to be reasonable, the Court quoted the following passage from that order:

> The public has a right to know to the fullest extent possible how taxpayer dollars have been allocated to public servants' salaries, and this has particular force with respect to public servants at senior levels who earn significant amounts of money paid out of the public purse. Certainly, the *PSSDA* is one important tool for ensuring such openness and transparency. However, in my view, to limit disclosure to only those amounts that are disclosed under the *PSSDA* seems incongruent with the government's commitment to openness and transparency and, in turn, accountability for the allocation of public resources.

[206] I acknowledge, as many parties have pointed out, that physicians are not public servants and the amounts paid to them are not salary dollars or reflective of their personal income. These payments are, nevertheless, substantial public expenditures and the same principle of transparency applies.

[207] Many parties have also pointed out that the *PSSDA* does not apply to physicians.[60] In the passage I have just quoted, the adjudicator stated that limiting disclosure only to amounts mandated under the *PSSDA* seems incongruent with the government's commitment to openness and transparency. I agree. In my opinion, this principle applies with equal force to the payments made to physicians under OHIP that are set out in the record.

[208] In addition, some parties have referred to the statement in Order MO-2563 that "when an individual enters the public service, he/she accepts that his/her salary may be subject to public scrutiny," and have pointed out that physicians are not public servants. However, transparency does not begin and end with public servants. It applies to all major public expenditures. By any standard, the expenditures reflected in the record would have to be included in that category.

[209] I have taken into account the fact that, as identified above, previous orders have indicated that a public interest is not automatically established where the requester is a member of the media.[61] My finding that there is a compelling public interest in disclosure of the information in the record is not based on the fact that the appellant is a reporter.

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[59] cited above at footnote 58.
[60] However, as noted at footnote 55, income information about physicians employed by institutions is, in fact, subject to disclosure under the *PSSDA*.
[61] Orders M-773 and M-1074.

[210] The compelling nature of the public interest in the disclosure of the record finds further support in the substantial expenditures it outlines, and by the overall importance of the health care system to the people of Ontario.

[211] For all these reasons, I find that there is a compelling public interest in the disclosure of the record in its entirety.

Does the compelling public interest in disclosure clearly outweigh the purposes of the exemptions?

[212] As discussed extensively above, the compelling public interest in disclosure in this appeal is strongly related to the importance of transparency. The fundamental nature of this type of public interest is evident from section 1(a)(i) of the *Act*, which refers to the principle that "information should be available to the public." The record at issue provides insight into program spending in an area that, as noted by the appellant, consumes 42 per cent of the entire provincial budget.

[213] The question to be addressed here is whether this public interest clearly outweighs the interests that would be protected by sections 17(1) and 21(1) if they applied.

Section 17(1)

[214] As already noted, section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[62] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[63]

[215] While I have found, above, that the total annual payments made under OHIP to identified physicians qualifies as "commercial information" within the meaning of section 17(1), it is not finely textured information that reveals detailed information about a business. It is simply a dollar amount.

[216] With respect to the withheld specialty information, it is part of a physician's public persona, and unless it is public, the physician could not attract business in his or her area of practice. It is not an "informational asset" that requires secrecy in order to protect business interests.

[217] In view of the transparency interests identified above, as contrasted with the

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[62] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[63] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

nature of the information at issue, I find that the compelling public interest in disclosure identified above clearly outweighs the purpose of the section 17(1) exemption.

Section 21(1)

[218] The purpose of the section 21(1) exemption is the protection of personal privacy. This purpose is reflected in one of the purposes of the *Act*, as outlined in section 1(b), "to protect the privacy of individuals with respect to personal information about themselves held by institutions. . . ."

[219] The parties opposing disclosure claim that the presumed unjustified invasion of privacy in section 21(3)(f) would apply to the record. This section states that disclosure ". . . would constitute a presumed unjustified invasion of personal privacy where the personal information, describes an individual's finances, income, . . . financial history or activities. . . ."

[220] These parties also claim that: disclosure will lead to unfair harm [section 21(2)(e)]; the information is highly sensitive [section 21(2)(f)]; the information is unlikely to be accurate or reliable [section 21(2)(g)]; and its disclosure would be damaging to their reputations [section 21(2)(i)].

[221] In my view, however, given the limited nature of the financial information contained in the record, and the fact that specialty information, in and of itself, is clearly not personal information,[64] any privacy interest in the record would be, at best, limited. Moreover, since it is already known in the community that these individuals are physicians and/or specialists, I am not satisfied that the disclosure of the information in the record creates any significant added risk of harm to the physicians' privacy interests. I also note that the names of more than 100,000 individuals subject to the *PSSDA* are disclosed annually, including some individuals whose income is substantial.

[222] It is also significant that in *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*,[65] the Divisional Court upheld as reasonable a finding that compelling public interest in disclosure of salary information about the Chief and two senior officers clearly outweighed the purpose of the personal privacy exemption. As already noted, this was a judicial review of Order MO-2563. The Court quoted a passage from that order that included the following statements:

> In my view, the compelling public interest in disclosure of the withheld portions of the records at issue clearly outweighs the purpose of the section 14 exemption in this case. The public has a right to know to the fullest extent possible how taxpayer dollars have been allocated to public servants' salaries, and this has particular force with respect to public

[64] see section 2(3) of the *Act*.
[65] cited above at footnote 58.

> servants at senior levels who earn significant amounts of money paid out of the public purse. . . . In my view, the need for complete transparency in this case outweighs the limited privacy interests of the affected parties.

[223] The Court went on to state:

> It was open to the adjudicator to conclude that the privacy interests of the Chief and deputies in disclosure of this remaining information were somewhat attenuated. The adjudicator did in fact balance the interests of the persons affected and the public interest in transparency of salary and benefits afforded to public servants. . . . The result is well within the range of reasonable outcomes.

[224] As I have already stated, the discussion of transparency in the use of public funds in this decision is highly relevant in the present appeal. Moreover, given that actual salary information was at issue in *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*, whereas in this appeal, the financial information is gross revenue that does not disclose a physician's personal income, I conclude that the privacy interests in this case are less significant than they were in *York (Police Services Board) v. Ontario (Information and Privacy Commissioner)*.

[225] Given the importance of transparency in the use of substantial amounts of public money, contrasted with the limited privacy interest that would exist in this record if it contained personal information, I find that the compelling public interest in disclosure of the record clearly outweighs the purpose of the section 21(1) exemption.

ORDER:

1. I find that the undisclosed portions of the record are not exempt under section 21(1) or 17(1) of the *Act*.

2. I find in the alternative that if either of these exemptions applies, the public interest override in section 23 of the *Act* applies.

3. I order the ministry to disclose the record, in its entirety, to the appellant not earlier than **July 4, 2016** and not later than **July 8, 2016.**

Original Signed by: June 1, 2016

John Higgins
Adjudicator