Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 082-2019, 083-2019

Ministry of Health

August 17, 2020

Summary

The Ministry of Health (Health) received a request for the top 100 physician billers and all physicians that billed the medical system more than $1 million including physician name, specialty and total payment amounts received for 2018. Health notified the 100 fee-for-service physicians, most of whom objected to the disclosure of the information. Health responded to the Applicant advising that the information was being withheld pursuant to subsections 19(1)(b), (c), 29(1) and section 21 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Commissioner of the exemptions applied and the late response received from Health. Upon review, the Commissioner found that Health did not meet the legislated timeline when it responded to the Applicant. In addition, the Commissioner found that subsections 19(1)(b) and (c) of FOIP (third party information) did not apply, as the name, specialty and amounts paid were not supplied by the physicians. Further, the Commissioner found that the arguments put forward by Health and the physicians did not amount to a reasonable expectation of harm resulting from release of the information. The Commissioner also found that subsection 29(1) of FOIP (personal information) did not apply as the information was not "personal in nature" but rather about the physicians in their professional capacity. Lastly, the Commissioner found that section 21 of FOIP (danger to health or safety) did not apply. The Commissioner recommended that Health work to meet its legislated timelines. Further, that it release the physician's names, specialties and total payment amounts received for 2018. In addition, the Commissioner recommended that Health release the billing information for every physician in the province. Finally, that Health request the Ministry of Justice amend FOIP to identify physician remuneration as information that should be released.

I BACKGROUND

[1] On January 14, 2019, the Ministry of Health (Health) received the following two access to information requests from the Applicant:

> Please provide the names of all doctors who billed the medical system more than $1 million. Please include the doctor's name, area of specialization and the amount they billed. Year 2018.
>
> Please provide the names of the top 100 physician billers of the medical services plan. Please include the names, the amount they billed and their area of specialization if applicable. Year 2018.

[2] On February 8, 2019, Health responded to the Applicant indicating that a 30-day extension was needed to respond to the requests pursuant to subsection 12(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On February 11, 2019, Health provided notification pursuant to section 34 of FOIP to 100 separate third parties (physicians) advising that the information had been requested and invited the third parties to provide representations as to whether subsection 19(1) of FOIP applied. Health also invited the third parties to indicate whether any other exemptions under FOIP applied.

[4] On March 19, 2019, Health provided notice of its decision to the Applicant pursuant to subsection 37(1)(b) of FOIP indicating that, after careful consideration, it was denying access pursuant to section 21 and subsections 19(1)(b), (c), and 29(1) of FOIP. Further, it advised that the Applicant and the third parties had 20 days to request a review by my office. Finally, it advised that if no review was requested within 20 days, Health would close its file.

[5] On March 19, 2019, my office received a request for review from the Applicant.

[6] During my office's early resolution process, Health confirmed that the letter dated March 19, 2019, was its section 37 notice to the Applicant and not the section 7 response. At my

office's request, Health agreed to provide a section 7 response. In a letter dated, March 26, 2019, Health provided its section 7 response to the Applicant.

[7] On March 27, 2019, my office notified Health and the Applicant of my office's intent to conduct a review. Health informed the third parties (physicians) of the review. My office invited Health, the Applicant and the third parties to provide submissions. My office received a submission from Health on May 24, 2019.

[8] Submissions were received from 57 of the 100 physicians at different times before the deadline. One of the 100 physicians did not object to the release of the information. In addition, although not a third party to this review, the Saskatchewan Medical Association (SMA) also sent a submission to my office. It should be noted that more than half of the submissions appeared to be a coordinated response by the physicians and the SMA as the responses were worded verbatim.

II RECORDS AT ISSUE

[9] The record at issue is a three-page spreadsheet containing the names of 100 physicians, their specialities, and the total payment amounts received for 2018.

[10] All of the information was withheld by Health pursuant to section 21 and subsections 19(1)(b), (c) and 29(1) of FOIP. One third party also raised subsection 19(1)(d) of FOIP.

III DISCUSSION OF THE ISSUES

1. Does the Commissioner have jurisdiction?

[11] Health is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Thus, I have jurisdiction to conduct this review.

2. Did Health meet its obligations under sections 7 and 37 of FOIP?

[12] The Applicant requested my office review the timelines of the section 7 response and the section 37 notice to the Applicant.

Section 37 notice

[13] Section 37 of FOIP provides as follows:

> **37**(1) After a third party has been given an opportunity to make representations pursuant to clause 36(1)(b), the head shall, within 30 days after the notice is given:
>
> (a) decide whether or not to give access to the record or part of the record; and
>
> (b) give written notice of the decision to the third party and the applicant.
>
> (2) A notice given pursuant to clause (l)(b) is to include:
>
> (a) a statement that the third party and applicant are entitled to request a review pursuant to section 49 within 20 days after the notice is given; and
>
> (b) in the case of a decision to give access, a statement that the applicant will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 49.
>
> (3) Where, pursuant to clause (l)(a), the head decides to give access to the record or a specified part of it, the head shall give the applicant access to the record or the specified part unless, within 20 days after a notice is given pursuant to clause (l)(b), a third party requests a review pursuant to section 49.
>
> (4) Ahead who fails to give notice pursuant to clause (l)(b) is deemed to have given notice, on the last day of the period set out in subsection (1), of a decision to refuse to give access to the record.

[14] In its letter dated March 19, 2019, Health told the Applicant:

> ..[P]ursuant to sections 37 and 49 of the Act, both you and the third parties have 20 days from this notice to request a review of this decision by the Office of the Information and Privacy Commissioner (OIPC). A final response and closure of our file will occur after the 20 days have elapsed and only if we do not receive a notice from the OIPC that a review will be undertaken.

[15] The notice appears to be compliant with subsections 37(1)(b) and 37(2)(a) of FOIP. However, there are two issues with the notice:

1. Health should not have indicated that the file would be closed if the Applicant did not request a review in 20 days. Applicants have up to one year after receiving the section 7 response to request a review pursuant to subsection 49(2) of FOIP; and

2. The section 37 notice was provided past the extended 60-day deadline. The section 7 response should have already been provided by the time this notice was issued. However, the section 37 notice appears to contain all of the required elements for a section 7 response. I will discuss this further below.

[16] It appears that Health's section 37 notice of March 19, 2019 was also its section 7 response. There is nothing in FOIP that prevents a government institution from combining its section 7 response and its section 37 notice. Procedurally, this makes sense. If not, the Applicant ends up requesting a review within 20 days, as the Applicant did here, before the final section 7 response is issued. Technically, citing the provisions that Health is relying on to withhold the record is not required by section 37, but rather section 7. The section 37 notice simply has to indicate what the decision was made in terms of the third party information. There is often other information or records involved that do not engage third party interests but other exemptions in Part III of FOIP.

[17] Therefore, I find that government institutions may combine a section 7 response and a section 37 notice to an applicant. If a government institution decides to combine its section 7 response and its section 37 notice, it must ensure that all of the components required by both provisions are included in the response.

[18] It appears Health did that in this case when it included a paragraph in its section 37 notice indicating that access was denied pursuant to subsections 29(1) (personal information), 19(1)(b), (c) (third party information) and section 21 (danger to health or safety) of FOIP.

Section 7 response

[19] I am approaching this part of the analysis considering the section 37 notice as including the section 7 response. As such, calculating when the section 7 was required will be based on the March 19, 2019 letter.

[20] Subsection 7(2) of FOIP provides that the "head shall give written notice to the applicant within 30 days after the application is made:" However, an additional 30 days can be added in certain circumstances pursuant to section 12 of FOIP.

[21] Health received the access to information request on January 14, 2019. Within the first 30 days, Health responded to the Applicant indicating that an additional 30 days was needed. With an additional 30 days, Health should have responded to the Applicant by Friday March 15, 2019.

[22] Health's subsection 7(2) response to the Applicant was dated March 19, 2019. It should have been sent on March 15, 2019. This would appear to be four days late.

[23] Therefore, I find that Health did not meet its legislated timeline for issuing the subsection 7(2) response to the Applicant.

[24] I recommend Health work to meet its legislated timelines to ensure it is compliant with FOIP.

3. Does subsection 19(1)(b) of FOIP apply?

[25] Health applied subsection 19(1)(b) of FOIP to the names of the physicians, their specialities and the total payment amounts for 2018. The physicians that provided submissions to my office also raised subsection 19(1)(b) of FOIP. In order for section 19 to be engaged, the information at issue must involve a third party.

[26] Health has indicated there are 100 physicians that qualify as third parties in this matter. Health confirmed that each physician and associated payment amount represents only payments made through the Medical Services Program fee-for-service billings. The

physician's are referred to as "fee for service" physicians, because they practice medicine in the province and have a contract to bill the provincial government through the Medical Services Plan for each eligible service provided.

[27] Subsection 2(1)(j) of FOIP defines a third party as "a person, including an unincorporated entity, other than an applicant or a government institution". I find that each of the 100 physicians would qualify as third parties for purposes of FOIP.

[28] Subsection 19(1)(b) of FOIP is a mandatory exemption and provides:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> …
>
> (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[29] This provision is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain the confidentiality necessary to effectively carry on business with the private sector. However, third parties doing business with public institutions must understand that certain information detailing the expenditure of public funds might be disclosed (Office of the Ontario Information and Privacy Commissioner (Ontario IPC) Order PO-3845 at [62]).

[30] In order for subsection 19(1)(b) of FOIP to be found to apply, all three parts of the following test must be met:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

[31] I will now consider this three-part test.

1. Is the information in question financial, commercial, scientific, technical or labour relations information of a third party?

[32] In its submission to my office, Health indicated that the information is "financial information" of the physicians because it is information regarding monetary resources. Further, it asserted that the information constitutes "commercial information" because it pertains to the buying, selling and exchange of a physician's services. The physicians also submitted the information was financial and commercial information.

[33] *Financial* and *commercial information* have been discussed and defined in previous reports. These definitions are consistent with other jurisdictions:

> *Financial information* is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a third party.
>
> *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records.

[34] The definition of financial information includes information pertaining to "monetary resources". *Monetary* is defined as "of or pertaining to coinage or currency" (*The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 1821). *Resources* is defined as "one's personal capabilities, ingenuity" *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2549).

[35] The amounts listed under the column titled *Total 2018 Billings (Payments)* constitutes the amounts Health paid each physician for services provided to patients. I find that the total payment amounts qualify as the financial information of each third party (i.e. the 100 physicians).

[36] I must now consider if the names of the physicians and their specialities constitutes financial or commercial information of the physicians. At first glance, one might view the

physician names and specialities as akin to the names of businesses and the services they provide (e.g. plastic surgery, radiology etc.) which would not be commercial information. However, the fact that they are on the list reveals something of a commercial nature – that being, they are a physician who billed more than $1 million and where they stand relative to other physicians. For these reasons, I find that the physician's names and specialities qualify as commercial information in the context of this record and review only.

2. Was the information supplied to Health by the third parties?

[37] *Supplied* means provided or furnished (British Columbia Government Services, *FOIPPA Policy Definitions).*

[38] Information may qualify as "supplied" if it was directly supplied to a government 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.

[39] Whether third party information has been "supplied" to a government institution by the third party is a question of fact. The content rather than the form of the information must be considered (*Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at paragraph [157].

[40] In the submission from Health it described the total payment amounts for 2018 as follows:

> The Ministry also wants to clarify, that while the applicant's requests were for "the amount they billed", the Ministry has interpreted that to be, and has provided "the total billings" as reflected in the corresponding payments made through the Medical Services Plan. The amount a physician "bills" is not necessarily, the amount a physician is "paid". It is not uncommon within the medical community, Ministry staff or the public to refer to fee-for-service payments made to physicians as "billing information" and while the applicant has requested total billed amounts, it is assumed that the applicant is requesting information regarding total billings (payments) made to the physicians…

[41] Health and some of the physicians asserted that the information is an aggregate of information that was directly based on billing information provided by physicians to the

Medical Services Branch within Health for payment for the physician's services. Further, it asserted that *The Saskatchewan Medical Care Insurance Act* (MCIA) and its regulations provide the authority to the Medical Services Branch to remunerate physicians for the insured medical services they provide to patients. Physicians who have entered into a direct payment agreement with Health must bill their services (i.e. supply each and every billing detail required) to the Medical Services Branch in accordance with the *Payment Schedule for Insured Services Provided by a Physician* (Payment Schedule). Finally, it asserted that the Payment Schedule sets the conditions by which physicians can receive payment for each service and indicates the payment amount for each service.

[42] The Payment Schedule is a publicly available schedule of service codes and fees. My office reviewed the most recent version of the Payment Schedule dated October 2019 available online. On page 7 of the document it stated:

> 1. This Payment Schedule is effective for services provided on and after October 1, 2019. It lists a payment for each insured service which will be made at 100% unless the "Assessment Rules" indicate that payment for the service:
>
>   a. is included in the composite payment made for another service; or
>
>   b. is subject to an adjustment when billed in addition to another service.

[43] Previous versions have the same stipulation. As Health has identified, "[t]he amount a physician "bills" is not necessarily the amount a physician is "paid". As such, the total payment amounts for 2018 are the amounts calculated by Health using its own Payment Schedule and rules. The total payment amounts will not necessarily correspond to the total amount submitted in billings.

[44] Further, it would not be possible for "accurate inferences" to be drawn about the information (billing details) that was actually supplied by the physicians. The total payment amounts for 2018 is not finely textured information. It does not reveal detailed information about a business. It is a dollar amount based on a calculation done by Health. It is important to note that the fee-for service amounts (i.e. the amounts the physicians will

be paid for individual services) are the result of negotiation between the SMA (on behalf of physicians) and the Government of Saskatchewan.

[45] The total payment amounts for 2018 are akin to the total amounts paid to other third party businesses in negotiated contracts with government institutions. The name of a third party and the total amount the government institution paid it from the public purse are generally released and not viewed as having been supplied by the third party but rather mutually generated. Physicians working under the fee-for-service model are essentially contractors who bill the public insurance plan.

[46] The Ontario IPC Order PO-3617 arrived at a similar conclusion in a case that was closely analogous to this one. In that case, an applicant requested records on the top 100 Ontario Health Insurance Plan billers for each of the five most recent years and a breakdown of the dollar amount billed, medical speciality and names of billing doctors. The Ontario IPC Adjudicator determined that the information did not meet the test for that province's third party exemption, as the information was not deemed to have been "supplied" by the physicians. The Adjudicator ordered the information to be disclosed in full.

[47] The Ontario Medical Association and two groups of physicians sought judicial review of the Ontario IPC Adjudicator's Order. Upon judicial review, the Ontario Divisional Court found the IPC's decision to be reasonable and dismissed the application for judicial review (*Ontario Medical Association v. Ontario (Information and Privacy Commissioner)* 2017 ONSC 4090). The Ontario Court of Appeal also dismissed the appeals (*Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673). Finally, the Supreme Court of Canada dismissed the application for leave to appeal.

[48] In conclusion, what the third parties supplied was actual billing records, which Health used to calculate an amount based on rules in the Payment Schedule. Health's calculated amount is at issue for disclosure here, not the physician's actual billing records. Therefore, I find that the information was not supplied by the third parties within the meaning of subsection 19(1)(b) of FOIP.

[49] As all three parts of the test must be met, there is no need to consider the third. Therefore, I find that subsection 19(1)(b) of FOIP does not apply.

4. Does subsection 19(1)(c) of FOIP apply?

[50] Subsection 19(1)(c) of FOIP is a mandatory exemption and provides:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> …
>
> (c) information, the disclosure of which could reasonably be expected to:
>
> (i) result in financial loss or gain to;
> (ii) prejudice the competitive position of; or
> (iii) interfere with the contractual or other negotiations of;
>
> a third party;

[51] The provision establishes that the threshold that must be met for this provision to apply is the harm "*could reasonably be expected to*" occur. *"Could reasonably be expected to"* means there must be a reasonable expectation that disclosure could result in the harm alleged. The Supreme Court of Canada set out the standard of proof for harms-based provisions like subsection 19(1)(c) of FOIP as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…
>
> (*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at paragraph [54])

[52] The government institution and third parties do not have to prove that a harm is probable if the information is disclosed. However, the mere possibility of harm is also not sufficient.

Put another way, the test articulated by the Supreme Court of Canada is that the probability of the harm need only be reasonably expected; the test does not require probable or actual harm (*British Columbia Hydro and Power Authority v British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 (CanLII) at [88]).

[53] In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner),* (2012) BCSC 875 (CanLII), Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

[54] Health applied subsection 19(1)(c) of FOIP to the names of the physicians, their specialties and the total payment amounts for 2018. Most of the physicians also raised subsection 19(1)(c) of FOIP. In its submission, Health asserted that the attendant publicity surrounding publication of the information would interfere with contractual or other negotiations between the SMA and Health. Further, Health asserted that these negotiations were currently ongoing and the release of the information, along with the anticipated media and public attention, could reasonably be expected to result in negative impact on the physician's and the SMA's position in those negotiations. Finally, Health asserted that the "hard bargaining" that could result from political and/or public pressure due to the release of the information could reasonably result in financial loss to the physicians due to the harm to the physician's bargaining and negotiating positions. Some of the physicians made similar arguments. The agreement between the SMA and the Ministry of Health expired on March 31, 2017, and negotiations have been going on for at least two years.

[55] Health and the physicians' arguments of harm center on there being a lot of media and public attention on the information if released. There could be a lot of media attention, but there is equal possibility that there will not be. A possibility is not sufficient to meet the threshold. At least five other provinces in Canada publish the same information that is at issue here (British Columbia, Manitoba, Ontario, New Brunswick and Prince Edward Island). During the course of this review, the association representing doctors in Newfoundland and Labrador dropped its legal fight to try to keep doctors' billing information from being released. Part of the reason for dropping the legal fight was the outcome of the Ontario case and that the information was publicly available in other

provinces. Total payment amounts for physicians in these other provinces have been public knowledge for some time, decades in some cases. There is nothing to suggest physicians in these provinces are paid significantly less as a direct result of the information being made public. I am not suggesting that the threshold to be met is the harm be probable, but it must be well beyond a mere possibility. This type of evidence would have supported the assertion.

[56] Health and the physician's arguments do not rise beyond the level of mere possibility or speculation. No specifics have been provided. The evidence must be "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground between that which is probable and that which is merely possible.

[57] Therefore, I find that the arguments put forward by Health and the physicians do not amount to a reasonable expectation of harm resulting from release of the physician's names, specialties and total payment amounts for 2018. As such, subsection 19(1)(c) of FOIP does not apply.

5. Does subsection 19(1)(d) of FOIP apply?

[58] One of the physicians asserted that subsection 19(1)(d) of FOIP applied to the billing information. Subsection 19(1)(d) of FOIP is a mandatory exemption and provides:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> …
>
> (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;

[59] The two-part test that can be applied is as follows:

1. Is the record a statement of a financial accounting relating to a third party with respect to the provision of routine services?

2. Is the statement from a government institution?

[60] Both parts of the test would need to be met in order to find that subsection 19(1)(d) of FOIP applied.

1. Is the record a statement of a financial accounting relating to a third party with respect to the provision of routine services?

[61] In the submission from the physician, the following was asserted:

> [The physician] provides routine services to individuals and receives compensation from a government institution, the records disclosing the amounts paid by the government institution to [the physician] are therefore a statement of financial account…

[62] My office has not considered subsection 19(1)(d) of FOIP previously. However, I have considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) in Review Report 020-2016. In that case, an applicant made a request for a copy of a proposal submitted to the City of Lloydminster. I found that the portion of the record to which subsection 18(1)(d) of LA FOIP had been applied was background information and did not qualify as a "statement". Further, the record did not relate to a specific financial account. Although informative, that case does not assist me in this matter because this case involves very different information.

[63] Only one other jurisdiction in Canada has a similar provision. Subsection 24(1)(e) of the Northwest Territories' *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20 is similarly worded. A review of the limited cases in that jurisdiction did not provide anything that would inform my analysis in this matter.

[64] A "statement of a financial account" is not defined in FOIP. However, a *statement of account* can be defined as a report issued periodically by a creditor to a customer, providing certain information on the customer's account, including the amounts billed, credits given, and the balance due (Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1699.), a document setting out the items of debit and credit between two parties (Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 8.).

[65] I would not describe the record as a statement of a financial account or statement of account as defined above.

[66] Therefore, I find that the first part of the test has not been met. As both parts of the test must be met, there is no need to go further. As such, I find that subsection 19(1)(d) of FOIP does not apply.

6. Did Health appropriately apply section 21 of FOIP?

[67] Section 21 of FOIP is a discretionary exemption and provides:

> **21** A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

[68] Health applied section 21 to the names of the physicians, their specialities and the total payment amounts for 2018. Several physicians also raised this provision. It should be noted that this provision provides the "head" of a government institution the ability to exercise discretion to deny access or to release a record. The discretion is solely reserved under FOIP for the head. The following, although addressing third party arguments for non-disclosure in the federal review process, is useful on this point:

> However, if a discretionary exemption from disclosure is in question, even if the institution or the court were to be persuaded that the exemption applies, it does not follow that the requested information should not be disclosed as disclosure is essentially in the discretion of the institution in this situation (see section 3.1(a) of the text). Therefore, it is reasonable to conclude that arguments from a third party against disclosure on the basis of a discretionary exemption would not have the same utility, as in the case of a mandatory exemption, since they would not, even if successful, be determinative of the question of whether the requested information should be disclosed. Thus, there is a strong rationale for foreclosing a third party from raising discretionary exemptions while allowing such a party to raise mandatory exemptions.
>
> (See *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, p. 9-19. See also SK IPC Review Reports LA-2009-001 at [100] and F-2014-006 at [43])

[69] Therefore, the weight of this analysis is focused on Health's exercise of discretion and its rationale for applying the provision. The burden of demonstrating that the provision applies rests with Health pursuant to section 61 of FOIP.

[70] For section 21, the question that must be answered is "*could"* disclosure of the record threaten the safety or the physical or mental health of an individual? The threshold that must be met is "*could*" the harm occur. The threshold for "*could*" is somewhat lower than a reasonable expectation but well beyond or considerably above mere speculation. On the continuum, speculation is at one end and certainty is at the other. The threshold for "*could*" therefore, is that which is possible.

[71] *Speculative* means engaged in, expressing, or based on conjecture rather than knowledge. *Conjecture* is an opinion or conclusion based on incomplete information (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at pp. 1379 and 301). Speculation generally has no objective basis. If the harm is fanciful or exceedingly remote, it is in the realm of speculation or conjecture.

[72] *Possible* means capable of existing, happening, or being achieved; that which is not certain or probable (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at p. 1117).

[73] *Probable* means likely to happen or be the case (Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed*., (Oxford University Press) at p. 1139).

[74] The above terms are not found in the Act. However, as noted at paragraph [51] of this Report, the Supreme Court of Canada has introduced some of these terms.

[75] In determining whether this exemption should be applied, the government institution must assess the risk and determine whether there are reasonable grounds to conclude there is a threat to the safety or the physical or mental health of a person. The assessment must be specific to the circumstances under consideration. Inconvenience, upset or the unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger

the exemption. The threshold cannot be achieved based on unfounded, unsubstantiated allegations.

[76] *Safety* means the state of being protected from or guarded against hurt or injury; freedom from danger (*The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2647).

[77] *Physical health* refers to the well-being of an individual's physical body (Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 137).

[78] *Mental health* means the condition of a person in respect of the functioning of the mind (*The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 1220).

[79] To *threaten* means to be likely to injure; to be a source of harm or danger to (*The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3248).

[80] In Health's submission, the arguments put forward can be summarized as follows:

- Several of the physicians that provided representations to Health raised concerns for their safety and that of their family members, both in Canada and abroad;
- Some of the physicians are from Nigeria, Afghanistan, Libya and Mexico and have family, including parents, still residing there. Kidnapping is widespread in Mexico, Nigeria and Libya. If the kidnappers were aware the physicians had access to money, their family members in those countries could be kidnapped;
- Some of the physicians travel back to these countries to visit family;
- Some of the physicians are concerned they may become the targets of criminal activity through the disclosure of the information and that their "perceived personal wealth" may be linked with their personal information; and
- The physicians might experience bullying and harassment of their children.

[81] Health provided additional details in its submission of February 11, 2020. The additional details related to the specific physicians that originated from or have family remaining in high conflict zones and additional supporting arguments as to why the exemption applied to all of the information in the record. Safety concerns related to kidnapping, abductions and extortion risks due to originating from high conflict zones and having family still in those countries. The countries included Libya, Nigeria, Afghanistan and Mexico.

[82] At least five other provinces in Canada publish the same information that is at issue here (British Columbia, Manitoba, Ontario, New Brunswick and Prince Edward Island). Total payment amounts for physicians in these five provinces have been public knowledge for some time, decades in some cases. Manitoba has been making this information publicly available for the past 24 years (1996). British Columbia has been making it available for more than 50 years (1968). So the same information has been successfully released elsewhere for some time. Further, these provinces have similar provisions as Saskatchewan's section 21. It is already known that the individuals are physicians. They each operate a practice that is open to the public. Their names are searchable online which reveals they are physicians. The College of Physicians and Surgeons of Saskatchewan has a searchable public registry that contains a physician's practice location, education, qualifications, license history and discipline history. It is common knowledge that practicing medicine is a high paying profession and physicians make more than the average worker does. Health and all of the physicians that provided submissions pointed out that the Medical Services Branch Payment Schedule is already a public document and describes in great detail how, and how much, physicians are paid for individual medical services. All of this combined leads me to conclude the alleged harm does not meet the threshold.

[83] I will now address the arguments that releasing the information could lead to extortion, bullying, harassment of children, unfair treatment, vandalism, and threats. The arguments assert that because of the physicians' perceived wealth, the physicians and their families could experience these harms.

[84] I find these arguments fall more in the realm of speculation. The possibility of these harms are, in reality, exceedingly remote. Many people with perceived or actual wealth have

information about that wealth publicly available. I acknowledge there would be some upset and discomfort that accompanies release of this type of information.

[85] Therefore, I find that section 21 of FOIP does not apply to the names of the physicians, their specialities and the total payment amounts for 2018.

7. Did Health appropriately apply subsection 29(1) of FOIP?

[86] When dealing with information in a record that appears to be "*personal information*", the first step is to confirm the information indeed qualifies as personal information pursuant to subsection 24(1) of FOIP. Subsection 24(1) of FOIP has a number of examples of what could qualify as personal information. However, these examples are not all encompassing. Other types of information can also qualify. In order to qualify, two elements must exist:

1. An identifiable individual; and
2. Information that is "*personal*" in nature.

[87] If the information qualifies, the government institution must then consider whether it has authority to release the personal information pursuant to section 29. Section 29 provides that the information should be withheld unless there is consent to release or if one of the circumstances under subsection 29(2) or section 30 of FOIP applies which permits disclosure without consent.

[88] Therefore, our starting point is to determine if the information qualifies as "*personal information*" under the Act.

[89] Health asserted the physicians' names, specialties and total payment amounts for 2018 constitute personal information as defined at subsections 24(1)(b), (j) and (k) of FOIP. These provisions provide as follows:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:
> …

> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
> …
> (j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or
>
> (k) the name of the individual where:
> (i) it appears with other personal information that relates to the individual; or
> (ii) the disclosure of the name itself would reveal personal information about the individual.

[90] In Health's submission, the arguments put forward can be summarized as follows:

- By disclosing the physician's specialty, Health would be disclosing information relating to the education of the individuals.
- By disclosing payments made to the physicians, Health would be disclosing information relating to financial transactions in which the individuals have been involved, as well as information concerning their finances and assets.
- By disclosing the information, it would lead to misunderstanding by the public. The figures disclosed would be perceived to be the individual physicians' personal income or salary, failing to take into account the significant overhead costs and expenses physicians incur in their practices.

[91] Several of the physicians made similar arguments to my office.

[92] To meet the first element, it must be reasonable to expect that an individual could be identified if the information were disclosed (SK OIPC Review Report LA-2013-001 at [57]). If the names were removed, the information would no longer relate to identifiable individuals, would not be personal information and subsection 29(1) of FOIP would not bar disclosure. As the names of physicians are included in the record, there are identifiable individuals. The first element is met.

[93] For the second element, I must determine whether the information is "*personal"* in nature. Use of the word "*personal*" as the adjective to describe the type of information being considered in subsection 24(1) of FOIP is a clear indication that the Legislature intended

for the provision to cover information that is "*personal*" in nature. To ignore this would be to fail to follow the modern approach to statutory interpretation. In *John Doe v. Ontario (Finance*), [2014] 2 SCR 3, 2014 SCC 36 (CanLII), the court reiterated that the modern approach requires that words be "read in their entire context, according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature".

[94] The word "*personal*" is not defined in FOIP. However, the *Concise Oxford Dictionary* defines it as "of, affecting or belonging to a particular person; of or concerning a person's private rather than professional life" (*Concise Oxford Dictionary*, 10th Ed. (Oxford University Press) at p. 1065).

[95] When considering if information is personal in nature, the starting point is to consider what context the information appears and whether that context is inherently personal. When physicians are providing services in return for payment for those services, the physicians are operating in a business arena. The information relates exclusively to the professional responsibilities and activities of the physicians (names, specialties, amounts paid). It is in the context of their medical practices. Health's assertion that the amounts paid do not include "overhead costs and expenses the physicians incur in their practices" supports this point. The payments do not reflect the physician's personal income; rather they represent gross revenue that does not take overhead expenses or payments to staff and other physicians into account. Examples of other overhead expenses and payments could include leasing clinic space, utilities, paying office staff, maintenance of equipment, staff pensions, staff benefits, office supplies, cleaning costs, and so on. One physician asserted the cost of paying staff salaries was over 50% of the total payment amount received. Therefore, the payments are subject to deductions for business expenses. In *Ontario Medical Association v. Ontario (Information and Privacy Commissioner*, 2018 ONCA 673 (CanLII) at [26], the Ontario Court of Appeal stated:

> [26] In our view, where, as here, an individual's gross professional or business income is not a reliable indicator of the individual's actual personal finances or income, it is reasonable to conclude not only that the billing information is not personal information as per s. 2(1), but also that it does not describe "an individual's finances [or] income",

> for the purpose of s. 21(3)(f). As a result, we are not persuaded that s. 21(3)(f) demonstrates that the Adjudicator erred in concluding that the billing information was not personal information.

[96] As such, I find that the physicians are operating in a context that is inherently of a business nature and not personal. All businesses that operate and receive government funds are in the same position. The total amount received from a government contract (gross revenue) does not reflect its overhead expenses. Further, the total amounts paid to individual private businesses contracting with the Government of Saskatchewan are publicly released each year in the province's public accounts.

[97] The next consideration is whether there is something about the information that, if disclosed, would reveal something of a personal nature about the individuals. Even if the information appears in the business context, I must consider if its disclosure would reveal something that is inherently personal in nature. Disclosing the information would reveal:

- The individuals are physicians;
- What their specialty is;
- That their billing is among the top 100 in the province; and
- Their total amounts billed (or paid) for services (before business deductions).

[98] In my view, there is nothing present here that would cross over into the personal realm. The fact the individuals are physicians with specialties is information generally found on a business card, on the medical clinic's website or the College of Physicians and Surgeons of Saskatchewan's website. The amounts billed and the placement on the list of the top 100 arises in a business, not personal, context. Amounts the government pays to other contracted businesses from the public purse is generally made available and is understood to not constitute the personal information of the business owner. Types of business financial information is generally considered under the third party exemption at subsection 19(1) of FOIP. Subsection 19(1) of FOIP is intended to protect, where appropriate, certain financial information of third parties. One physician asserted the following, which is helpful in describing the type of information involved:

> I am concerned that this information may be perceived as personal income or salary by the public rather than gross billings for a professional corporation with significant business expenses.

[99] Having carefully considered the representations from all parties to this review, I find that the names of the physicians, their specialties and the total payment amounts for 2018 are not inherently personal in nature. As such, the second part of the test is not met. Therefore, the information does not constitute personal information.

[100] Ontario IPC Order PO-3617, *Ontario Medical Association v Ontario (Information and Privacy Commissioner),* 2017 ONSC 4090 (CanLII) and *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 673 (CanLII) arrived at similar conclusions. Further, the Supreme Court of Canada dismissed the application for leave to appeal that decision. The circumstances of this review are closely analogous to those described in the Ontario IPC Order and subsequent court case.

[101] In Health's submission to my office, it asserted that the Ontario case was not directly applicable in Saskatchewan because the Ontario *Freedom of Information and Protection of Privacy Act* was significantly different from Saskatchewan's FOIP. It asserted that subsection 2(3) of the Ontario Act provides that "[p]ersonal 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." Health asserted that Saskatchewan's FOIP does not have this provision or any provision similar to it.

[102] It is correct that Saskatchewan's FOIP does not have an equivalent to Ontario's subsection 2(3). However, subsection 2(3) of Ontario's Act was not the only factor that led to the outcome in the Ontario case. The primary consideration for the Ontario case was whether the information was "personal in nature". Both Ontario and Saskatchewan's Acts contemplate what is personal in nature. As I noted earlier, subsection 24(1) of FOIP is intended to cover "personal" information. My office has often made a distinction between personal and business information. Information that might be considered personal in one context might be considered business or professional in another. For example, information

that appears on a business card, in a professional directory or on a website, including names, business titles, business addresses and phone numbers are generally considered business information, not personal information (see for example SK IPC Review Reports F-2010-001, F-2012-006, F-2013-007, 158-2016 and 277-2016). This kind of distinction is made not only in this province, but also in all other Canadian jurisdictions (NFLD IPC Report A-2016-019 at [31]).

[103] Further, Ontario IPC Order PO-3617, affirmed that business or professional information must be distinguished from inherently personal information, and that this distinction is much broader than simply business contact information. This distinction is necessary, and can be made whether or not it is explicitly incorporated in the legislation. As the Ontario decision points out:

> 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.

[104] I adopt similar reasoning here. If subsection 24(1) of FOIP did not mean "personal" as in relating to an individual in a private capacity, as opposed to a business, professional or official capacity, then "financial transactions" identified as personal information at subsection 24(1)(b) of FOIP would include financial transactions of a business that might be subject to an exemption claim under subsection 19(1)(third party information). This would render subsection 19(1) of FOIP and possibly other exemptions redundant.

[105] As I have found the information does not constitute personal information, I find that Health did not appropriately apply subsection 29(1) of FOIP to the information.

[106] In conclusion, I have now found that none of the exemptions raised apply to the physician's names, specialties and total payment amounts for 2018. Therefore, I recommend Health release this information to the Applicant.

Public interest

[107] There will be disagreement on my finding and recommendation so I wish to point out that even if the information were to qualify as personal information, there is a strong argument to be made that Health should release it in the public interest pursuant to subsection 29(2)(o)(i) of FOIP. Subsection 29(2)(o) of FOIP provides for a balancing of interests between the public and an affected individual. This provision provides as follows:

> **29**(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
>
> …
>
> (o) for any purpose where, in the opinion of the head:
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure;

[108] My office considered subsection 29(2)(o) of FOIP in Review Report 173-2018. In that Report, I established a three-part test for this provision. When determining if subsection 29(2)(o) of FOIP applies, the following should be considered:

1. Is the information "*personal information*"?
2. Is there a public interest in the information?
3. Does the public interest outweigh any invasion of privacy?

[109] I have already found that the information does not constitute personal information. However, to make the point that subsection 29(2)(o) of FOIP could apply, let us assume the first part of the test is met.

[110] For the second part of the test, in order to determine whether there is a public interest in the information, there must be a relationship between the information and the Act's central purpose of shedding light on the operations of a government institution or the Government of Saskatchewan. In Alberta Information and Privacy Commissioner Order 2006-032, criteria were established for assessing whether there was a public interest in information

that could justify granting a fee waiver. I first adopted these criteria for purposes of subsection 29(2)(o) of FOIP in Review Report 173-2018 at paragraph [23]. The criteria are as follows:

1. Will the records contribute to public understanding, debate or resolution, of a matter or issue that is of concern to the public or a sector of the public? Alternatively, would it, if the public knew about it? The following may be relevant:
    - Have others besides the applicant sought or expressed an interest in the records?
    - Are there other indicators that the public has or would have an interest in the records?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
    - Do the records relate to a personal conflict between the applicant and the government institution?
    - What is the likelihood the applicant will disseminate the contents of the records in a manner that will benefit the public?
3. If the records are about the process or functioning of the government institution, will they contribute to open, transparent and accountable government? The following may be relevant:
    - Do the records contain information that will show how the government institution reached or will reach a decision?
    - Are the records desirable for subjecting the activities of the government institution to scrutiny?
    - Will the records shed light on an activity of the government institution that have been called into question?

[111] The health-care system would be more open and transparent if the province made physician compensation available to the public as it does for the compensation to public servants that make more than $50,000 per year. Physician compensation represents a significant share of the provincial budget. Payments for fee-for-service in-province physicians, excluding the emergency coverage programs, totalled just over half a billion dollars ($548.3 million) in 2018-19 (Ministry of Health, Medical Services Branch, *Annual Statistical Report for*

2018-19 at p. 7). Salaries for physicians directly employed by the province are publicly available such as the salary of Saskatchewan's Chief Forensic Pathologist. Further, salaries for court judges, firefighters, police officers, university presidents, hospital employees, nurses, teachers, school board administrators, deputy ministers, the Ombudsman, the Provincial Auditor, the Information and Privacy Commissioner, the Chief Executive Officer for the Saskatchewan Health Region, other hospital employees along with other public-sector workers are all publicly available but not physicians who bill the government.

[112] Information about physician billing amounts has been the focus of access to information requests in other provinces including Ontario, Newfoundland and Labrador, and Nova Scotia. Ontario, New Brunswick, Prince Edward Island, Manitoba and British Columbia already release the information publicly. Manitoba has been making this information publicly available for the past 24 years (1996). British Columbia has been making it available for more than 50 years (1968). So the same information has been released elsewhere for some time. In the case of British Columbia and Manitoba, it has been released for decades now. The association representing doctors in Newfoundland and Labrador dropped its legal fight to keep the same information from being released after the case in Ontario was concluded in favor of release. In addition, it was recognized that other provinces have, or are, moving to release this type of information.

[113] Release would shed more light on the topic and lead to more transparency and accountability in terms of health care costs. In Ontario, the release of the information led to a closer look at the appropriateness of physician billing. Therefore, there is indication that the public would likely be interested in this information. Finally, there is a clear relationship between the record and FOIP's central purpose of shedding light on the operations and activities of government.

[114] For the third part of the test, one must weigh the public interest against the personal privacy interests of the individuals. In doing so, one should consider:

- The representations made by the affected individuals arguing against disclosure; and

- Whether the affected individuals' privacy rights should be given preference over the public interest that exists.

[115] Health did not provide any arguments as to why release was not in the public interest. Based on that, it appears Health did not consider subsection 29(2)(o) of FOIP. The physicians' arguments for subsection 29(1) of FOIP were considered earlier in this analysis.

[116] The goal of transparency and accountability in terms of sustainable health care costs outweighs any harm potentially resulting from disclosure of the physician billing information. Eighteen years ago, the Royal Commission on the Future of Health Care in Canada (known as the Romanow Commission) expressed concern that rising compensation for physicians could threaten efforts to contain health care costs (Commission on the Future of Health Care in Canada (2002), *Building on Values: The Future of Health Care in Canada – Final Report*, p. 102). In 2011, the Canadian Institute for Health Information (CIHI) found that physician compensation was amongst the fastest-growing drivers of health care costs over the previous decade (Canadian Institute for Health Information (2011), *Health Care Cost Drivers: The Facts*, p. vi).

[117] Currently, there is no public reporting of the amount paid to individual fee-for-service physicians within the public health insurance program. In order for Health to demonstrate proper accountability for over half a billion dollars in annual spending, the distribution of this spending should be publicly reported. It is in the public's interest for there to be a high level of transparency given the cost of this program. The total amounts paid to other publicly funded individual contractors in Saskatchewan are released. For example, the total amounts paid to individual private businesses contracting with the Government of Saskatchewan are publicly released each year in the province's public accounts.

[118] The Legislature has imposed a positive obligation upon government institutions to accommodate the public's right of access and, subject to limited exemptions, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will

be heard (*O'Connor v. Nova Scotia* [2001] N.S.J. No. 360 (C.A.)). The principle of transparency between government spending and contracting is essential for accountability. Physician services are procured under a contract under the umbrella of public funding.

[119] Therefore, regardless if Health agrees with my conclusion on subsection 29(1) of FOIP, Health has the ability to exercise its discretion and release the information. I recommend Health release the information in any event.

[120] My recommendation that Health release the record with the information requested stands, but I would further recommend that Health release the billing information for each and every physician in the province. Each of these physicians is a contractor receiving government funds and the public has a right to know. As noted above, other provinces do this now and have done it for some time.

IV FINDINGS

[121] I find that government institutions may combine a section 7 and a section 37 notice to an applicant.

[122] I find that Health did not meet the legislated timeline when it responded to the Applicant's access to information request.

[123] I find that subsection 19(1)(b) of FOIP does not apply to the names of the physicians, their specialities and the total payment amounts for 2018.

[124] I find that subsection 19(1)(c) of FOIP does not apply to the names of the physicians, specialities and total payment amounts for 2018.

[125] I find that section 21 of FOIP does not apply to the names of the physicians, their specialities and the total payment amounts for 2018.

[126] I find that subsection 29(1) of FOIP does not apply to the names of the physicians, their specialties and the total payment amounts for 2018.

V RECOMMENDATIONS

[127] I recommend that Health work to meet its legislated timelines to ensure it is compliant with FOIP.

[128] I recommend that Health release the names of the physicians, their specialties and the total payment amounts for 2018.

[129] I recommend Health release the billing information for every physician in the province.

[130] I recommend for clarity, that Health request the Minister of Justice amend *The Freedom of Information and Protection of Privacy Regulations* to identify physician remuneration as information that should be released.

Dated at Regina, in the Province of Saskatchewan, this 17th day of August 2020.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy Commissioner