



## **REVIEW REPORT 342-2019**

### **Ministry of Health**

**September 14, 2020**

#### **Summary**

The Ministry of Health (Health) received a request for the top billing physicians including specialty and location of practice and total amounts billed to Health for 2018. Health notified the 10 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. Upon review, the Commissioner found that subsections 19(1)(b), (c), 29(1) and section 21 of FOIP did not apply to the information. The Commissioner recommended that Health release the names of the physician's, their specialties and locations of practice and the total amounts billed to Health for 2018. In addition, the Commissioner recommended that Health release the payment 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 August 19, 2019, the Ministry of Health (Health) received the following access to information request from the Applicant:

I am seeking a list of the top billing doctors in Saskatchewan, including which region/city/town/village they practice in, area of practice (i.e. general practitioner), and including, the total amount billed to the Ministry of Health.

January 1, 2018 to December 31, 2018

- [2] In a letter dated October 18, 2019, Health responded to the Applicant indicating that access was denied pursuant to subsections 29(1), 19(1)(b), (c) and section 21 of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On October 28, 2019, my office received a request for review from the Applicant.
- [4] On November 18, 2019, my office notified Health and the Applicant of my office's intent to conduct a review. Health informed the 10 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 along with a copy of the record at issue.
- [5] Submissions were received from eight of the 10 physicians at different times before the deadline. In addition, although not a third party to this review, the Saskatchewan Medical Association (SMA) also sent a submission to my office.

## **II RECORDS AT ISSUE**

- [6] The record at issue is a one-page spreadsheet containing the names of 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice is located.
- [7] All of the information was withheld by Health pursuant to section 21 and subsections 19(1)(b), (c) and 29(1) of FOIP.

## **III DISCUSSION OF THE ISSUES**

### **1. Does the Commissioner have jurisdiction?**

- [8] Health is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Thus, the Commissioner has jurisdiction to conduct this review.

### **2. Does subsection 19(1)(b) of FOIP apply?**

[9] Health applied subsection 19(1)(b) of FOIP to the names of 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice is located. The physicians that provided submissions to my office also raised subsection 19(1)(b) of FOIP. In order for section 19 of FOIP to be engaged, the information at issue must involve a third party.

[10] In Review Report 082-2019, 083-2019, I found that the top 100 physician billers qualified as third parties pursuant to subsection 2(1)(j) of FOIP. The same reasoning applies in this case. Therefore, I find that the 10 physicians qualify as third parties for purposes of FOIP.

[11] 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;

[12] 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]).

[13] 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?

[14] 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?***

[15] 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.

[16] *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.

[17] 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).

[18] I previously found in Review Report 082-2019, 083-2019 that the total payment amounts paid to 100 physicians qualified as the financial information of each third party. The same information in the same context is at issue here so the same reasoning applies. I find that that the total payment amounts qualify as financial information of each third party.

[19] I also found in Review Report 082-2019, 083-2019 that the names of the physicians and their specialities qualified as commercial information in the context of that record and review only. The same information in the same context is at issue here so the same reasoning applies. I find that that the names of the physicians and their specialities qualify as commercial information in the context of this record and review only.

[20] I must now consider if the name of the cities or areas where the physician's practice is located qualifies as financial or commercial information. Based on the definitions above, the location of the physician's practices does not qualify as financial or commercial information. The locations are broad (in most cases large cities) and do not reveal anything specific to the third parties. This type of information is not considered third party information. Releasing a list of the cities would not reveal any third party information. As such, I find that the names of the cities where the physician's practice does not qualify as third party information and subsection 19(1)(b) does not apply. I will consider this information under the additional exemptions applied by Health – subsections 19(1)(c), 29(1) and section 21 of FOIP.

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

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

[22] 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.

[23] 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]).

[24] In Review Report 082-2019, 083-2019, I considered whether the 100 third parties supplied the names, specialities and total payment amounts for 2018. In that case, I found that what the third parties supplied was billing records. Health calculated a payment amount based on the rules in the Payment Schedule. Health's calculated amount is at issue for disclosure here, not the physician's billing records.

[25] The same information and circumstances are at issue in this case. Similar arguments have also been provided to my office. Therefore, I adopt the analysis on "supplied" from Review Report 082-2019, 083-2019 and apply it here. In conclusion, I find that the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice is located, were not supplied by the third parties within the meaning of subsection 19(1)(b) of FOIP.

[26] 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.

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

[27] 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;

[28] 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])

[29] 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]).

[30] 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.

[31] Health applied subsection 19(1)(c) of FOIP to the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician’s practice is located.

[32] In Review Report 082-2019, 083-2019, I considered the application of subsection 19(1)(c) of FOIP to the names of 100 physicians, their specialities and total payment amounts for 2018. In that case, I 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

physician's names, specialties and total payment amounts for 2018. As such, subsection 19(1)(c) of FOIP did not apply.

[33] Similar arguments pertaining to the expected harms that could reasonably be expected to result if the information were released were presented in that case. As such, I adopt my analysis and findings from Review Report 082-2019, 083-2019. Subsection 19(1)(c) of FOIP does not apply.

#### **4. Did Health appropriately apply section 21 of FOIP?**

[34] 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.

[35] Health applied section 21 of FOIP to the 10 physician's names, specialties, total payment amounts for 2018 and the name of the City where the physician's practice is located.

[36] For section 21 of FOIP, 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.

[37] *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, 10<sup>th</sup> 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.

- [38] *Possible* means capable of existing, happening, or being achieved; that which is not certain or probable (Pearsall, Judy, *Concise Oxford Dictionary, 10<sup>th</sup> Ed.*, (Oxford University Press) at p. 1117).
- [39] *Probable* means likely to happen or be the case (Pearsall, Judy, *Concise Oxford Dictionary, 10<sup>th</sup> Ed.*, (Oxford University Press) at p. 1139).
- [40] The above terms are not found in the Act. However, as noted at paragraph [28] of this report, the Supreme Court of Canada has introduced some of these terms.
- [41] 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.
- [42] *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).
- [43] *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).
- [44] *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).
- [45] 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).

[46] 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.

[47] I considered the same type of information and alleged harms in Review Report 082-2019, 083-2019. As I indicated in that report, 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 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 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.

[48] Therefore, I find that section 21 of FOIP does not apply to the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice is located.

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

[49] 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.

[50] If the information qualifies, the government institution must then consider whether it has authority to release the personal information pursuant to section 29 of FOIP. Section 29 of FOIP 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.

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

[52] Health asserted the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice was located constituted 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.

[53] I considered the same type of information in Review Report 082-2019, 083-2019. I found in that report that the physicians were operating in a context that was inherently of a business nature and not personal. As such, the the physician’s names, specialties and total payment amounts for 2018 did not qualify as personal information.

[54] The same information is at issue here. As such, I adopt my analysis and findings from Review Report 082-2019, 083-2019 to the circumstances in this case. In doing so, I find that the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician’s practice is located, does not qualify as personal information pursuant to section 24(1) of FOIP.

[55] 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.

[56] In conclusion, I have now found that none of the exemptions raised apply to the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician’s practice is located. Therefore, I recommend Health release this information to the Applicant.

*Public interest*

[57] In Review Report 082-2019, 083-2019, I acknowledged that there could be disagreement on my finding and recommendation to release so I pointed out that even if the information were to qualify as personal information, there was a strong argument to be made that Health release the information in the public interest pursuant to subsection 29(2)(o)(i) of FOIP.

[58] 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;

[59] I am dealing with the same information in this case as that of Review Report 082-2019, 083-2019. As I indicated in that report, 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 Authority, other hospital employees along with other public-sector workers are all publicly available but not physicians who bill the government.

[60] 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 recently dropped its legal fight to keep the same information from being released after a 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.

- [61] 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.
- [62] 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).
- [63] 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.

[64] 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.

[65] 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.

[66] My recommendation that Health release the record with the information requested stands, but I would further recommend that Health release the billing (payment) 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**

[67] I find that subsection 19(1)(b) of FOIP does not apply.

[68] I find that subsection 19(1)(c) of FOIP does not apply.

[69] I find that section 21 of FOIP does not apply.

[70] I find that subsection 29(1) of FOIP does not apply.

## V RECOMMENDATIONS

- [71] I recommend that Health release the names of the 10 physicians, their specialities, total payment amounts received for 2018 and the name of the City where the physician's practice is located.
- [72] I recommend Health consider section 65.1 of FOIP as a means to release payments for all physicians in the province going forward.
- [73] I recommend Health request the Minister of Justice amend the necessary Acts or regulations to enable it to publicly release physician remuneration on an annual basis similar to other provinces in Canada.

Dated at Regina, in the Province of Saskatchewan, this 14<sup>th</sup> day of September 2020.

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