

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2016-3201-AP-1728

Date: December 16, 2016

"Case about non-disclosure of physician's Medicare billing information"

INTRODUCTION

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act") pursuant to a complaint filed by the Applicant requesting the Commissioner to carry out an investigation into this matter.
2. On February 23, 2016, the Applicant submitted a Request to receive:

"The breakdown of all payments to individuals, partnerships or corporations or other entities that are included in the 2014-15 Medicare Payment of \$364,370,996."
3. The amount above is listed in the Province's Public Accounts for the 2014-2015 fiscal year as the total of all payments made under the New Brunswick Medicare system.
4. The Department responded by letter dated April 15, 2016, refusing access to the information in full.
5. In doing so, the Department relied on an exception to disclosure found in paragraph 30(1)(c) of the Act that allows a public body to refuse to disclose information if such disclosure could reasonably be expected to harm the economic or financial interests or negotiating position of a public body or the Province of New Brunswick, including information the disclosure of which could reasonably be expected to result in a financial loss to a public body or to the Province of New Brunswick or prejudice the competitive position of or interfere with or prejudice contractual or other negotiations of a public body or the Province of New Brunswick.
6. The Department believed that releasing or publishing information regarding payment to individual fee-for-service physicians could reasonably be expected to interfere with negotiations with the New Brunswick Medical Society.
7. The Applicant disagreed and filed a Complaint with our Office on May 4, 2016.

BACKGROUND

8. In an earlier case, the Applicant had requested information of this nature from the Department in January 2015 for the fiscal year of 2013-2014. At that time, the Department responded by providing payments amounts but decided to redact the names of physicians as well as groups of physicians (categories of 5 or less), relying on section 8 of the *Medical Services Payment Act* that it could not provide those names and also relying on the privacy provisions set out in Part 3 of the *Right to Information and Protection of Privacy Act*.
9. The Applicant complained to our Office, challenging the Department's reliance on the confidentiality provisions of the *Medical Services Payment Act* as grounds to refuse access, and questioned what provision of the *Right to Information and Protection of Privacy Act* would serve to protect the physicians' names in this context. The Applicant stated that the refusal disclose the physicians' names in that context was inconsistent with the proactive disclosure of salaried employees' salary ranges and the total amount of payments made to external suppliers.
10. Our investigation resulted in a Report of the Commissioner's Findings (**2015-AP-2316-1261**) issued on January 28, 2016. We found as follows:

In practice, we understand that the Province negotiates a contract with the New Brunswick Medical Society, a professional association that represents physicians, for compensation on a fee-for-service basis. That agreement sets out the fees that physicians may invoice the Medicare plan for providing eligible services.

It is safe to state that physicians who provide services under the Provincial Medicare plan and receive payment on a fee-for-service basis are under contract to supply insured services on behalf of the Department, and as such, they would be captured in the deeming provision found in 21(3)(g) above. This provision would permit disclosure of financial or other details of their contract without constituting an unreasonable invasion of their privacy, including the names of physicians with their corresponding Medicare billing information.

We are aware that this analysis would come as a surprise to private practice physicians who have not been subject to this level of disclosure of their Medicare billings to the public to this extent in the past. As indicated above from media reports, physicians felt that making this information public did not tell the full story as to how they in fact use those earnings to operate their practices, i.e., that they use these earnings to pay staff salaries, pay rent, purchase

equipment, and so on. In doing so, physicians were explaining that these amounts were not akin to straight salaries.

We have come across similar concerns in the past from third parties who do business with Government. Due to the coming into force of the *Act* in 2010 and its broader access rights, third parties were now required to accept that more of their personal and financial information would be disclosed. For instance, lawyers hired by the Province to provide legal opinions or represent a department in a lawsuit, could expect their name and total amount of their legal fees to be made public. Lawyers in private practice, likewise, do not receive payment for services as salaries but rather as earnings to permit them to operate their private offices with staff, rent, etc. The same applied to private consultants or private sector service providers to government. In these cases, we were required to look to the deeming provision found in paragraph 21(3)(g) of the *Act* in determining disclosure.

On the other hand, the present case which involved private practice physicians' billings to Medicare under the *Medical Services Payment Act*, so this factor required us to consider not only the deeming provision but also the protection afforded under that statute as well.

Moreover, we noted that the *Medical Services Payment Act* has governed the working relationship between physicians and the Province over the past 50 years (since the 1960s), including how the Department treated information regarding physicians' Medicare billings.

For these reasons, we recognized why the *Medical Services Payment Act* remained for the Department a predominant factor in its decision about what information it could disclose to the Applicant in this case.

Likewise, the *Medical Services Payment Act* became an important consideration for us in the final conclusion of this investigation.

We understood the Department's obligation to strike the right balance between government's need to be transparent while respecting physicians' privacy. When the Department acknowledged that the status quo could not remain, it still could not move towards greater disclosure of physicians' billings until it had given notice to the medical profession of its intention to do so and with express legislative authority to release more of their personal information.

Notwithstanding our analysis that there was no conflict or inconsistency between the *Medical Services Payment Act* and the *Right to Information and Protection of Privacy Act*, we could not base our findings about the disclosure of physicians' names solely on the *Right to Information and Protection of Privacy Act* in the circumstances.

CONCLUSION – NO RECOMMENDATION

We therefore find that in the circumstances of this case, and taking into account all of our analysis, observations and findings above, the Department could not move towards greater disclosure until it had given notice to the medical profession of its intention to do so, which it did when the Province passed amendments in 2015 to the *Medical Services Payment Act*.

These amendments now allow for more disclosure about physicians' Medicare billing information, including their names.

In the circumstances, and for all of the above reasons, we do not recommend the release of physicians' names that coincide with the Medicare billing information that was released to the Applicant for the 2013-2014 fiscal year in this case.

11. It is on the strength of those findings in January of 2016 and the Department's intentions to publish the information that the Applicant pursued this interest and requested the same information once again in February of 2016, but without success.

OUR INVESTIGATION – Informal resolution attempts

12. As part of our investigation, we met with officials of the Department on September 26, 2016, and again on November 15, 2016 to gain insight into the Department's decision to refuse access to the requested information in this case.
13. As in all access to information complaints we investigate, we hoped to resolve the matter informally given the background of this case and in respect of the Department's obligations under the *Right to Information and Protection of Privacy Act*, consistent with Government's disclosures of public servants' salary ranges and total payments made to external service providers and contractors.
14. Regrettably, we were unable to do so. We therefore issue the present Report of the Commissioner's Findings in conclusion of this matter.

FINDINGS

15. We find that the Department could not refuse to provide access to the requested information based on paragraph 30(1)(c) of the *Act*. First, we point out that this exception to disclosure can only apply where it is shown that releasing the information

could interfere with or prejudice negotiations. This means that the decision to refuse to release the requested information must be somehow connected to or be pertinent to the negotiations. Otherwise, simply raising the fact of the negotiations without showing a link between them and the release of requested information cannot be said to be interfering with such negotiations.

16. When the Department received the Request, it was in negotiations with the New Brunswick Medical Society regarding the Medicare plan. To its credit, the Department first considered releasing the information as it was required to do so; however, where the Department was incorrect was in deciding that its on-going negotiations were connected to the disclosure of the requested physicians' remuneration, and deny the Applicant's access rights on such basis.
17. We find that the exception under paragraph 30(1)(c) could not be brought into play to refuse to grant access the Medicare billings amounts by named physicians to the Applicant in this case.

RECOMMENDATION

18. Based on all of the above, the Commissioner recommends under section 73 of the *Act* that the Department of Health release to the Applicant the breakdown of all payments to individuals, partnerships or corporations or other entities that are included in the 2014-15 Medicare Payment of \$364,370,996, as requested.
19. In accordance with section 74 of the *Act*, the Department of Health will have **until December 31, 2016** to inform the Commissioner and the Applicant, in writing, of its decision regarding the recommendation.

Dated at Fredericton, NB, this _____ day of December, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner