

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF HEALTH** to disclose the individual MSI billings of Nova Scotia physicians, with their names, for the years 2000 to the present.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** January 28, 2005

**ISSUE:** Whether disclosing the names of Nova Scotia physicians, with their MSI billings, would be an unreasonable invasion of the doctors' personal privacy, pursuant to Section 20 of the *FOIPOP* Act.

In a Request for Review under the **Nova Scotia Freedom of Information and Protection of Privacy Act** (*FOIPOP*), dated October 4, 2004, Doctors Nova Scotia (DNS), as a third party, asked that I recommend to the Department of Health (the Department) that it reverse its decision to disclose the names of doctors along with their individual MSI billings. (While it is not the practice of the Review Officer to disclose the identities of third parties to an Applicant, in this case the submissions of each party to this Review were shared with the other at the request of the solicitor for Doctors Nova Scotia, formerly known as the Medical Society of Nova Scotia.)

While DNS had no objection to the disclosure of individual MSI billings, it argued that attaching the names of the doctors to the billings was contrary to the requirements of **Section 20** of *FOIPOP*, a mandatory exemption which obliges a public body to refuse to disclose personal

information if such disclosure constituted an unreasonable invasion of an individual's personal privacy. The relevant subsections of s.20 read:

### **Personal Information**

- 20** (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
  - (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
  - (c) the personal information is relevant to a fair determination of the applicant's rights;
  - (d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
  - (e) the third party will be exposed unfairly to financial or other harm;
  - (f) the personal information has been supplied in confidence;
  - (g) the personal information is likely to be inaccurate or unreliable; and
  - (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
- (f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

The Department, the Applicant and DNS made written submissions to this Review.

DNS made two, one before reading the other two submissions and one after. These two submissions will be summarized later.

*The Department's submission:*

- The Department follows a “pro-access” approach with respect to disclosure in accordance with the view of the Nova Scotia Court of Appeal that the FOIPOP Act be “interpreted liberally so as to give clear expression to the Legislature’s intention that such positive obligations would inure to the benefit of good government and its citizens.” In *O’Connor v. Nova Scotia*, 2001 NSCA 132 at paras 56, 57 and 58 Justice Saunders noted the uniqueness of the *FOIPOP*, which, unlike the wording in other access legislation in the country, requires public bodies to be “fully accountable” to the public.
- The Department has determined that the fees paid to physicians as part of the agreement between the government and DNS for services performed, plus the names “attached in a professional capacity” fall under Section 20(4)(f).
- In Review FI-97-59, the Review Officer agreed that physicians were not public servants as that term is understood, but noted that the Medical Act uses the words “in the public service of the Province” to describe the duties of physicians. It follows that physicians are contractors to the Province, through their sole bargaining agent, the DNS, because they provide services to the Province’s residents and are paid directly by the Province’s MSI program.
- The provisions of the *Health Services and Insurance Act*, which require arrangements for the provision of insured services, is complied with, in part, by the Government’s agreement to provide funding when those insured services are provided by physicians. There are three ways to meet the requirements of this agreement: The Master Agreement negotiated by DNS representing the physicians; contracts between individual physicians, DNS and the Province; and contracts between various groups/departments of physicians, (primarily for specialist services), DNS and the Province.

- While it is acknowledged that patients are the direct recipients of physician services, they are not a party to any agreements. Billing information is derived from personal information related to a patient, but this level of information is not being requested or being released. The billing information is private only as it relates to the patients. This has no bearing on disclosing the name and gross amount that physicians have billed to the Province. Physician billing information does not include patient information. The relationship between the Department and physicians is a contractual/financial one which relates directly to various agreements which the Province has with physicians.
- The billing numbers do not reflect the earnings of physicians. Office overhead and staff costs etc. must be taken into account.
- Disclosing names in a professional capacity and attached to remuneration does not constitute an unreasonable invasion of privacy. The salaries of all public servants as well as teachers and professors are publicly available. Teachers are paid by School Boards, which are funded by the Department of Education. To do less with physicians, also paid from the public purse, would be unfair and inconsistent with accepted practice. Amounts paid to contractors by the Department of Health and other departments and agencies are disclosed in the Supplement to the Public Accounts Report.

*The Applicant's submission:*

- The Department was not asked for billing per patient or any breakdown of where the funds paid to physicians go. In *O'Connor*, Justice Saunders said: "Public bodies should avoid technical interpretations of an Act that is designed to promote openness and accountability."
- "The cost of health professionals is the single largest budget line for the Department of Health. Direct billing by physicians for insured services constitutes a large part of that overall item. This information is tantamount to understanding the broader issues of health financing."
- The Applicant does not agree with the argument that the information sought is the personal information of the physicians. On the provincial Registry of

Joint Stock Companies one can find dozens of examples of physicians who have registered or incorporated their professional name for business purposes. Physicians are private contractors who entered into contracts with the government to provide services for a fee to the residents of Nova Scotia.

- Physicians in Nova Scotia should not expect any greater degree of privacy than any other person or firm who receives government funding for a service rendered.
- In an earlier Review Report (FI-04-12), involving merit pay for senior government officials, the Review Officer recommended disclosing the figures with the names. While there may be a distinction between employees of the province and physicians, the principle that the release of information about public monies paid to individuals is an unreasonable invasion of privacy was not supported by the Review Officer.
- The request for physicians' individual billings is a reasonable one because they would not reflect a physician's salary or reveal personal financial information.
- Physicians are contractors who provide a service and the information should be disclosed under s.20(4)(f).

*The third party's submissions:* (before reading the submission of the Department and Applicant)

- Section 20(4)(f) does not apply because the information sought cannot be characterized as arising from "a contract to supply goods and services to a public body." The physicians are individual professionals providing services to private, individual patients "in accordance with a statutory scheme, pursuant to which all residents of the province are entitled to uniform terms and conditions in relation to payment of the cost of insured medical services."
- "The relationships between the physician and patient in relation to which billing information is generated are private. Neither the individual participants nor the relationships themselves attract a public character by virtue of the statutory scheme to provide public funding for related services"

- The fact that the service provided by doctors is insured through public funds does not render the physician an employee or agent of a public body. The services provided are between a doctor and patient, both of whom are private participants.
- Section.20(3)(f) applies because the information at issue is personal information and describes the physicians' finances and income.
- Under s.20(2) a public body is directed to consider "all of the relevant circumstances" in determining whether the disclosure of the information under s.20(1) would be an unreasonable invasion of an individual's privacy.
- Nothing in the way the request has been described to the third party would suggest that "disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny"[s.20(2)(a)]
- The approach of *Atlantic Highways v. Nova Scotia* (1997) 162 N.S.R. and of *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. would tend to support the disclosure of the billing information but not the names of the physicians.
- The *FOIPOP* Act should be interpreted in such a way as to give maximum effect and minimum interference as between these competing rights of access and privacy.
- In FI-02-31 the Review Officer concluded that disclosing the names of Sobey's executives would not be desirable for the purpose of subjecting the activities of government to public scrutiny.

*The third party's submission* (after reading the other submissions):

- Does not agree with the interpretation of *O'Connor* by the Department and the Applicant. While the Court commented on the need for "full" accountability, "the decision expressly did not address the matters in issue in this application, protection of third party's privacy interests."

- Neither the Department nor the Applicant have offered a clear explanation or reason why the disclosure of the names of the physicians is necessary to meet the objective of public accountability of expenditures made by the Department.
- Common law interpretation has established the necessity of trying to strike a fair and appropriate balance between the competing interests of accountability and privacy.
- To extend the Applicant's rationale for public accountability to its logical conclusion would it be equally necessary to disclose the names of the patients?
- The agreements between the Medical Society and the Province should not effectively negate the rights of privacy of individual physicians. The agreements are a practical necessity of the decision to establish a mechanism to provide health care services.
- The agreements are bargained without an express or implied waiver of the rights of privacy. If this were so the issue should be part of the bargaining process.
- The Review Officer's report, FI-97-59, in no way recommends disclosure of the nature contemplated in this case. This request extends well beyond the "disclosure of total amounts set aside for physician billings."

### **Conclusions:**

I thank all three parties for the extensive submissions they made. While they covered a wide range of issues relevant to the protection of personal privacy, the case rests on the interpretations of s.20. Justice Moir in *Cyril House*, S.H. 160555, April 20, 2000 (unreported) laid

down a four-step process for determining whether or not the disclosure of personal information would constitute an unreasonable invasion of personal privacy:

- (1) Do the disputed documents contain “personal information” within the meaning of the Act?
- (2) If so, is disclosure of the personal information deemed not to be an unreasonable invasion of privacy under conditions set out in s.20(4)?
- (3) If s.20(4) does not apply, is the disclosure presumed to be an unreasonable invasion of privacy pursuant to s.20(3)?
- (4) Does the balancing of all the relevant circumstances, including those listed in s.20(2), favour disclosure?

According to *Cyril House* if s.20(4) applies there is no need to consider the other subsections.

I disagree with the Applicant that the information sought does not contain the personal information of the doctors. An individual’s name is among the definitions of “personal information” found in Section 3(i).

The issue with respect to s.20(4)(f) is whether or not fees paid for services provided by doctors to patients in accordance with a contract signed between the government and Doctors Nova Scotia are “financial and other similar details of a contract to supply good and services to a public body.”



In my opinion what doctors are paid under MSI billings, is for a service to the Department of Health in accordance with a contract agreed to by the parties. I do not accept the argument that because the service is provided to individual patients it, therefore, is not a service to the government. The doctors have entered into a contract with the government and are providing a service to the government. Monies paid to them by government will provide medical service to residents of Nova Scotia.

Although I found many of the arguments of the three parties interesting and arguable I need not address them now that I have concluded the records containing the billing amounts and names of the doctors fall under s.20(4)(f).

**Recommendations:**

That the Department inform Doctors Nova Scotia in writing, within 30 days of receiving this report, of its intention to disclose the records in dispute to the Applicant.

**Dated** at Halifax, Nova Scotia this 28<sup>th</sup> day of January, 2005.

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Darce Fardy, Review Officer