

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: 2015-2316-AP-1261

Date: January 28, 2016

“Case about disclosure of Medicare billing information with physicians’ names”

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. The Applicant submitted a Request dated January 12, 2015 for "the breakdown of all payments to individuals, partnerships or corporations that is included in the fee for service amount of \$316,001,382." This amount is listed in the Province's Public Accounts for the 2013-2014 fiscal year as the total amount of all payments made under the New Brunswick Medicare system. In making the Request, the Applicant asked why a breakdown of this amount was not publicly reported, given that the salary ranges of all Provincial employees making over \$60,000 are disclosed, along with the exact amounts of payments made to all external suppliers.
3. The Department responded by letter dated January 23, 2015, granting partial access to the requested information, and enclosing a "detailed table with all payments made to all physicians." The Department explained that the Request was being denied in part in accordance with the confidentiality provisions found in section 8 of the *Medical Services Payment Act* and the restrictions on use and disclosure of personal information found in Division B of the Act. The name of each physician was withheld to comply with privacy and confidentiality provisions in these two statutes, and categories of physicians with five or less practitioners were grouped together for the same reasons.
4. The Applicant was not satisfied and filed a Complaint with our Office on February 16, 2015. In making the Complaint, the Applicant challenged 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 this context was inconsistent with the proactive disclosure of salaried employees' salary ranges and the total amount of payments made to external suppliers.

BACKGROUND

5. The question of the disclosure of physicians' names in relation to payments made in the context the public health care system is not a new issue in New Brunswick.
6. This question is also not unique to New Brunswick and has been controversial in other Provinces. While British Columbia and Manitoba have been disclosing physician names along with billing information for years, other Provinces have taken a different approach and will not disclose physician names in this context on the basis that it would be an unreasonable invasion of the physicians' privacy to do so (for example, Nova Scotia and Ontario).
7. Until recently, the Department's proactive disclosure practice with regards to Medicare payment information was to disclose the total global amount of physician payments made under the Medicare system annually in the Province's Public Accounts. Where more specific information was requested about Medicare billing amounts and payments, the Department would provide a breakdown of payments made per physician, without revealing physician names. The Department followed this same approach in responding to the Applicant's Request in this case.
8. The Department's approach was based on its understanding that it could not lawfully disclose further information that would identify individual physicians to the public without a specific authorization to do so in the *Medical Services Payment Act*, which governs the Medicare system in the Province.
9. In 2012, the Auditor General of New Brunswick conducted an audit of Medicare payments and issued a Report of Findings on the matter. In Chapter 2, one of the Auditor General's key findings was that the public reporting of doctor remuneration was incomplete and misleading. As a result, the Auditor General issued the following recommendation to the Department:

Similar to other government reporting of employee compensation and vendor payments, and to provide better accountability, we recommend that the Department public report total remuneration for each doctor, regardless of whether the doctor is paid via Fee-For-Service, salary, sessional or other alternative arrangements.

10. At that time, the Department informed the Auditor General of a legal opinion stating that the Department could not legally publish fee-for-service doctor remuneration by

virtue of section 8 of the *Medical Services Payment Act*, adding that the legislation would have to be amended to allow for the publication of doctor billing information.

11. Since that time, amendments to the *Medical Services Payment Act* were introduced on May 28, 2015 and came into force on June 5, 2015. The amendments added two new paragraphs to subsection 8(1), including paragraph (g.2).
12. For clarity, here is the text of subsection 8(1), with the recent amendments:

8(1) Every person employed in the administration of this Act shall preserve secrecy with respect to all matters that come to the person's knowledge in the course of that person's employment, and no such person shall release any information acquired in the course of that person's employment, except

(a) for purposes relating to the administration of this Act or as required by law,

(a.1) as required under section 11.1 of the *Family Services Act*,

(b) to a medical practitioner or an oral and maxillofacial surgeon for any purpose relating to entitled services that the medical practitioner or oral and maxillofacial surgeon has provided,

(c) upon the request or with the written approval of the person to whom the information relates,

(d) information relating to an entitled services that an entitled person has received may be released to a medical practitioner or an oral and maxillofacial surgeon if that entitled person is a patient of the medical practitioner or oral and maxillofacial surgeon, as the case may be,

(d.1) information may be released to the College of Physicians and Surgeons of New Brunswick for the purpose of regulating the quality or standards of professional services provided by medical practitioners who are members of the body, including for the purpose of an investigation,

(e) non-identifying medical information may be released,

(f) personal non-medical information may be released to departments, agencies and commissions designated under subsection (2) for the purpose of planning of services, health research and epidemiological studies,

(f.1) information relating to an account of a medical practitioner or an oral and maxillofacial surgeon for entitled services provided may be released to a regional health authority, as defined in the *Regional Health Authorities Act*, for the purpose of efficient delivery of health services,

(g) information relating to medical practitioner registration may be released to the New Brunswick Medical Society and to the College of Physicians and Surgeons of New Brunswick,

(g.01) personal information relating to a medical practitioner may be released to

(i) an agent of the provincial authority for the purpose of administering programs for the benefit of medical practitioners under an agreement referred to in subsection 4.1(1), and

(ii) the New Brunswick Medical Society for the purpose of negotiating an agreement referred to in subsection 4.1(1),

(g.1) information relating to oral and maxillofacial surgeon registration may be released to the New Brunswick Dental Society,

(g.2) information relating to the remuneration of a medical practitioner or an oral and maxillofacial surgeon for entitled services provided may be released for the purpose of public reporting,

(h) information may be released by the provincial authority, while acting in the capacity of the Minister, for the purpose of enabling the Minister to carry out the Minister's statutory duties under any Act, or

(h.1) Repealed: 2013, c.46, s.1

(i) information may be released to an employee of the Department of Health who is charged with a statutory duty for the purpose of carrying out that statutory duty.

(Underlined are the 2015 amendments)

13. We were pleased that the amendments would make more information publicly available on the question of how physicians are paid through the Medicare program as this demonstrated the Department's commitment to be more open and transparent in how it spends the public purse.
14. We must note that our investigation was being carried out while an on-going parallel debate continued between the Department and New Brunswick physicians regarding the impending disclosure of more information about physicians' Medicare billings. From that public debate reported in the media, physicians expressed strong concerns over the possible impact of having more details about their source of income being made public on their individual privacy as well as how they operate their professional practices as a business.
15. From our perspective, we recognized that the Department's new level of transparency could have a direct impact on physicians' privacy for the simple reason that an individual's source of income is considered to be personal information. On the other hand, governments everywhere are being asked to reveal more details, not less, about how the public's hard-earned tax dollars are spent, including in the public health care

- sector, which is one of the Province's biggest expenditures. More importantly, this move reflects a trend, albeit not without controversy, for governments to better inform their citizens how public health care funds are spent.
16. In light of this, we were tasked in this investigation with ensuring the proper balance between two competing interests: transparency in public sector health care spending in view of the Applicant's rights of access to the requested information, and the privacy rights of individual physicians that must be upheld unless there is lawful authority to disclose otherwise protected personal information.
 17. While the government was well aware of the need to be more transparent and provide more information to the public about physicians' Medicare billings, it also needed to ensure that it had lawful authority to do so. This, as well as based on legal advice the Department received on that very question, specific amendments to the *Medical Services Payment Act* introduced. These amendments were intended to and give the Department express authority to disclose physicians' remuneration for entitled services under the Medicare plan for the purposes of public reporting. In doing so, the Department also wanted to officially provide notice to physicians that the Province was proceeding with a greater level of public disclosure.
 18. Our investigation could not discount the reasons why the Department called upon its Government to pass specific amendments to the *Medical Services Payment Act* with a view to ensure that the Department would have the lawful authority to make more detailed Medicare billing information, including physician names, publicly available. That move would provide the requisite notice to physicians practicing in New Brunswick of this new disclosure standard in the future.
 19. With all of this in mind, we proceeded to investigate the present Complaint.

Information released to the Applicant

20. As we sought to resolve the matter informally to the satisfaction of both parties and in accordance with the rights and obligations set out in the *Act*, we held good discussions with Department officials, reviewed all elements of the Request, and obtained the Department's input on how it processed the Request, including the reasons why it was of the view that it could not lawfully disclose the physicians' names along with the corresponding Medicare billing information.

21. We were informed that the Medicare Decision Support System is a database maintained by the Department that is used to track and process all payments made under the Provincial Medicare system. This is an automated system and it is configured to produce reports based on the information entered into the system (Medicare staff input information into the system on an on-going basis, including when claims for payment are received). From this system, the Department can produce a report of all payments made to physicians (including salaried as well as private practice physicians) under the Medicare program for the fiscal year 2013-2014.
22. In the present case, the Department provided the Applicant with a report entitled "Consolidated Medicare Payments to New Brunswick Physicians by Specialty," which listed payments made under the Medicare program to each practicing physician (including salaried physicians and private practice physicians) in the Province during the 2013-2014 fiscal year. The report listed total amounts for each practicing physician (without identifying the physician by name) under the following categories:

Specialty	Fee-for-Service	Salary (& Benefits)	Sessional & Other	Adjustments	Total Payments
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23. Along with that report, the Department also provided a document containing explanatory notes with basic descriptions of the columns listed above (fee-for-service, salary and benefits, etc.) and what kinds of payments are included in these amounts; however, the Department did not indicate how the \$316,001,382 amount, as reported in the 2013-2014 Public Accounts, corresponded with the information provided.
24. On this point, Department officials explained to us that the amount reported in Public Accounts is a combined total of all amounts paid to physicians (both salaried and non-salaried physicians) under the Medicare program, and includes fee-for-service payments, salary amounts paid to salaried physicians, and other benefits that are paid through the Medicare program. In addition, the Department explained that the information provided to the Applicant included amounts under the "Sessional & Other" column that were not paid directly to the physician, but rather to either a Regional Health Authority or the New Brunswick Medical Society. These amounts were otherwise and separately accounted for in the Public Accounts reporting.
25. We found that these details were not clearly explained in the Department's Response, and on this point, we can appreciate that the information provided to the Applicant was somewhat confusing.

26. Of particular concern to the Applicant was that the information provided did not identify the physicians who had received payments from the Medicare program by name, instead identifying each by area of specialty only (ex.: anatomical pathology, general practice, etc.), along with the corresponding payments made under each of the above columns. Also, where a particular specialty had 5 or less physicians who had received payments under the Medicare program for that year, the specialty was not identified; instead, that information was reported as “specialty suppressed” along with the corresponding payment information.
27. In providing our initial assessment to the Department regarding the disclosure of physician names associated with health care billings, we invited the Department to reconsider its Response. To the Department’s credit, it carefully considered our findings but maintained its view that it did not have lawful authority to disclose physicians’ names along with billing information for the 2013-2014 fiscal year (as requested by the Applicant) because the amendments to the *Medical Services Payment Act* had only come into force in June of 2015. The Department was amenable to disclosing this information for the fiscal year 2014-2015 to the Applicant when that information became available.
28. The Department’s past practice was to provide a breakdown of Medicare billing information for each physician, but without disclosing individual physician names, and physicians practicing in the Province were well aware of that practice.
29. In light of all of these factors, and given the competing interests at play, we decided to conclude this investigation with the present Report of Findings under section 73 of the *Act* in order to publicly report on our analysis, observations and findings in this matter.

LAW AND ANALYSIS

Section 8 of the *Medical Services Payment Act* and prevailing clauses

30. As indicated above, the Department’s decision to refuse access to physicians’ names along with corresponding Medicare billing information was based on subsection 8(1) of the *Medical Services Payment Act* on the basis that names of physicians in this context were protected from disclosure. This was the legal advice the Department received on that question and the Department relied on that advice in responding to the Applicant’s Request. The Department was concerned that disclosing the physicians’ names in this

context could amount to a violation of the law, which is why it withheld the physicians' names in the Response.

31. The Department understood the need for transparency in how physicians are paid under the Medicare program and the disclosure requirements under the *Act*, but nonetheless maintained that it could only proceed in that direction with amendments to section 8 of the *Medical Services Payment Act*.
32. The Department viewed section 8 as a general prohibition on the disclosure of information related to the administration of that law, subject to the specific authorizations listed in paragraphs (a) to (i). According to the Department, those authorizations did not specifically allow for the disclosure of physician remuneration, along with the physician names, to the public. In addition, the Department considered the requested information to be the personal information of physicians also protected from disclosure under the *Right to Information and Protection of Privacy Act*.
33. In our assessment of the Department's rationale for refusing access to the individual physician names in this context, we pointed out that the *Act* is a statute of general application that grants the public a broad right of access to information held by public bodies. That right of access is subject to only limited and specific exceptions to disclosure found in sections 17 to 33. Further, the *Act* prevails over all other Provincial laws as a default, and that default is only trumped where it is found the *Act* is inconsistent with or in conflict with another Provincial statute and the other statute has an express provision to prevail over it in such cases (see subsection 5(2) of the *Act*).
34. This means that a public body can only rely on another statute to refuse access where there is a clear inconsistency or conflict with the rights of access provided under the *Act* and the other statute that expressly prevails to prevent access.
35. Where there is no inconsistency or conflict between the *Act* and another statute, the *Act* will continue to be the default law regarding access, and for that reason, the *Act* will prevail and guide the processing of an access request in keeping with the *Act's* specific provisions, as well its spirit and intent. That scenario also applies regardless as to whether the other statute contains a prevailing clause. There must be a finding that an inconsistency or a conflict with the *Act* exists in order to trigger the application of an express prevailing clause in another law.

36. In the present case, the Department did not refer to subsection 5(2) or indicate that there was a conflict or inconsistency between the Act and the *Medical Services Payment Act*. Rather, the Department indicated in its Response that the names of physicians were protected under both section 8 of the *Medical Services Payment Act* as well as the privacy protections under the Act. The Department did not find that there was an inconsistency or a conflict between these two laws, but rather that both statutes prohibited the disclosure of physician names along with Medicare billing information. Our analysis showed differently.

Analysis of subsection 8(1) of the *Medical Services Payment Act*

37. We carefully reviewed subsection 8(1) of the *Medical Services Payment Act* and found that its main purpose was to create a statutory obligation for employees and officials to keep the information they learn in the course of their duties confidential. Paragraphs (a) to (i) of subsection 8(1) set out exceptions to this general rule in order to allow certain kinds of information to be disclosed in some cases.
38. We noted that paragraph 8(1)(g.01) allowed for personal information about a medical practitioner to be released in two circumstances (for administering programs and for negotiating agreements), neither of which include public disclosure, thus these provisions did not apply in the present case.
39. Paragraph 8(1)(a) (“for purposes relating to the administration of this Act or as required by law”) and paragraph 8(1)(h) (“information may be released by the provincial authority, while acting in the capacity of the Minister, for the purpose of enabling the Minister to carry out the Minister’s statutory duties under any Act”), served as exceptions to allow disclosure of information where either the *Medical Services Payment Act* or another statute so authorized (“Provincial authority” is defined in section 1 as meaning “the Minister of Health and includes persons designated by the Minister to act on or behalf of the Minister”).
40. The Department is a public body under the Act and information that comes into its custody or control as a result of its role in the administration of the *Medical Services Payment Act* is still subject to the *Right to Information and Protection of Privacy Act*, including possible disclosure of this information in accordance with the law.
41. We did not find an inconsistency or conflict between the provisions of these two statutes, as there is nothing in subsection 8(1) of the *Medical Services Payment Act* that

- precluded disclosure where there was a right of access to information under the *Right to Information and Protection of Privacy Act*.
42. In our view, subsection 8(1) of the *Medical Services Payment Act* specifically authorized disclosure to take place where required by law or to enable the Minister to carry out statutory duties under any Act – which would include the *Right to Information and Protection of Privacy Act*.
43. As a result, we found that where information was subject to disclosure under the *Right to Information and Protection of Privacy Act*, paragraphs 8(1)(a) and 8(1)(h) would also authorize that same disclosure. Moreover, the converse was also true that where information was protected from disclosure under the *Right to Information and Protection of Privacy Act*, paragraphs 8(1)(a) and 8(1)(h) of the *Medical Services Payment Act* to protect that same information.
44. In short, there was no inconsistency or conflict to trigger either subsection 5(2) of the *Act* or the express prevailing clause found in subsection 8(3) *Medical Services Payment Act*. This meant that as per our interpretation of the interplay of these two statutes, the Department's decision regarding the disclosure of physician names along with corresponding Medicare payment information in this case should have been made entirely within the parameters of Part 2 of the *Act*, rather than based on that of the *Medical Services Payment Act*.
45. Based on our analysis, we then set out to determine whether physicians' names with corresponding Medicare billing information were protected from disclosure under the *Right to Information and Protection of Privacy Act*, based on the concern for the protection of their privacy.

Disclosure of physicians' names and the *Right to Information and Protection of Privacy Act*

46. The Department considered the physicians' names to be personal information warranting protection, but had not fully considered section 21 to determine whether the disclosure would constitute an invasion of privacy if released, as we explain below.
47. Section 21 seeks to guide public bodies in the release or protection of personal information of third parties found in their records. The definition of "personal information" found in section 1 includes a person's name as well as information about a

person's source of income or financial circumstances, activities or history. For this reason, we find that the names of physicians and respective Medicare billing information constitute the physicians' personal information.

Section 21: Third Party Personal Information

48. The rules governing access to personal information of third parties are found in section 21. Having said this, section 21 does not treat all third party personal information as protected from disclosure at all times. Rather, it will protect personal information where releasing the information would result in an unreasonable invasion of another person's privacy.
49. To assist in making this determination, subsection 21(2) provides examples of the kinds of personal information that are deemed to be an unreasonable invasion of privacy if disclosed, while subsection 21(3) deems the disclosure of certain kinds of personal information not to be an unreasonable invasion of privacy. For instance, subsection 21(2) deems certain kinds of personal information to be an unreasonable invasion of privacy if disclosed, including information about a person's employment and income; however, the analysis does not stop there. Subsection 21(3) stipulates that in some cases, some personal information cannot be protected as it would not constitute an unreasonable invasion of privacy to release that information to the public.
50. With this in mind, we looked to paragraphs 21(2) and 21(3) for guidance as to whether the disclosure of physician names along with their respective Medicare billing information would constitute an unreasonable invasion of their privacy.
51. Paragraph 21(2)(g) states the following:
- 21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party's privacy if
- (...)
- (g) the personal information describes the third party's source of income or financial circumstances, activities, or history...
52. It is clear that physician names and corresponding Medicare billing information describes physicians' source of income and provides details about their respective financial circumstances and activities, in that it would reveal details about the payments they received for providing services under the Medicare system.

53. Therefore, we looked to exceptions to disclosure for otherwise protected information that might be applicable, and considered paragraph 21(3)(g), which provides as follows:

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if
(g) the disclosure reveals financial or other details of a contract to supply goods or services to or on behalf of a public body...

54. Under the *Medical Services Payment Act*, practicing physicians can elect or "opt-in" to practice in accordance with that law and associated regulations. Eligible physicians who choose to do so invoice the Medicare plan directly for medical services they provide to patients (the public) who are entitled to receive these insured services. Payment is governed by paragraph 4.1(1) of the *Medical Services Payment Act*:

4.1(1) The provincial authority, with the approval of the Lieutenant-Governor in Council, may enter into an agreement with the New Brunswick Medical Society respecting the payment for furnishing entitled services on a fee for service basis in accordance with a tariff or a system of payment that provides reasonable compensation to medical practitioners.

55. 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.

56. 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.

57. 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.

58. 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.
59. 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.
60. 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.
61. 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.
62. Likewise, the *Medical Services Payment Act* became an important consideration for us in the final conclusion of this investigation.
63. 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.

64. 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

65. 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*.
66. These amendments now allow for more disclosure about physicians' Medicare billing information, including their names.
67. 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.

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

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner