OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-019

September 22, 2016

Department of Health and Community Services

Summary:

The Department received a request for Newfoundland and Labrador Medical Care Plan (MCP) billings listed by physician. The Department notified fee for service physicians, many of whom objected to the disclosure on the basis of either section 39 (disclosure harmful to business interests of a third party) or section 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015* and filed complaints with this Office. After reviewing submissions from the physicians and the Newfoundland and Labrador Medical Association, but before the investigation by this Office was completed, the Department decided not to disclose the responsive records, relying only on section 40. The Applicant then complained to this Office. The Commissioner concluded that the information in the responsive records was not personal information within the meaning of section 2. The Commissioner also concluded, in the alternative, that if the information was personal information, then the physicians fall into the category of persons retained under a contract to provide services for a public body, under section 2, and therefore disclosure of their remuneration was deemed not to be an unreasonable invasion of personal privacy under subsection 40(2). The Commissioner concluded, in the further alternative, that the disclosure of the physicians' remuneration was not an unreasonable invasion of privacy under subsection 40(5). The Commissioner therefore recommended that the information be disclosed.

Statutes Cited:

Newfoundland and Labrador: *Access to Information and Privacy Act, 2015,* SNL 2015, c. A-1.2, ss. 2(i), 2(u), 19, 39, 40(1), 40(2)(f), 40(2)(g), 40(5); *Labour Relations Act*, RSNL 1990, c. L-1, ss. 2(1)(k), 2(1)(m); *Workplace Health, Safety and Compensation Act,* RSNL 1990, c. W-11; *Medical Act, 2011,* SNL 2011, c. M-4.02; *Medical Care and Hospital Insurance Act*, SNL 2016, c. M-5.01; *Medical Care Insurance Act, 1999,* SNL 1999, c. M-5.1*; Insurance Companies Act*, RSNL 1990, c. I-10.

Ontario: *Freedom of Information and Protection of Privacy Act,* RSO 1990, c. F-31.
Nova Scotia: *Freedom of Information and Protection of Privacy Act,* SNS 1993, c. 5.

British Columbia: *Financial Administration Act*, RSBC 1996, c. 138.
Manitoba: *Public Sector Compensation Disclosure Act*, SM 1996, c. 60.

Authorities Relied On:

Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3; Ontario IPC Orders PO-2225, PO-3617; Newfoundland and Labrador OIPC Reports 2006-001, A-2009-008, A-2016-011 to A-2016-015; *Doctors Nova Scotia* v. *Nova Scotia (Department of Health),* 2005 NSSC 244; *Doctors Nova Scotia* v. *Nova Scotia (Department of Health),*2006 NSCA 59; *McBreairty v. College of the North Atlantic*, 2016 NLTD(G) 138.

Other Resources Cited:

Arbitration Award between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2003, available at www.nlma.nl.ca; Memorandum of Agreement Between Newfoundland & Labrador Medical Association and Government of Newfoundland and Labrador, 2009–2013, at www.*nlma.nl.ca;* Medical Care Plan Payment Schedule, Provider Registration Forms, at www.*health.gov.nl.ca*; Report of the 2014 ATIPPA Statutory Review Committee, 2015, at www.*atipp.gov.nl.ca*.

I BACKGROUND

[1] The Department of Health and Community Services ("the Department") received a request in April 2016, under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015"* or "the *Act")* for the following information:

> *"All MCP billings listed by physician for either calendar year 2015 or fiscal year 2015-16 in electronic format (excel or csv preferred)."*

These records contained the names of 1,407 physicians, listed by name, with specialty, and their total billing amount for the calendar year 2015. Those individuals are referred to as "fee for service" ("FFS") physicians, who practice medicine in the province and who bill the provincial government, through the Newfoundland and Labrador Medical Care Plan ("MCP") for each eligible service provided.

[2] The Department initially was uncertain about the application of the *ATIPPA, 2015* to the responsive records. First, the Department believed that disclosure of the information might be an unreasonable invasion of privacy under section 40 of the *Act.* In addition, the Department was concerned that disclosure might be harmful to the third party business interests of the physicians under the three-part test in section 39 of the *Act*. Therefore on May 27, 2016 the Department undertook the third party notification process provided for in section 19 of the *ATIPPA, 2015,* sending a notice directly to all physicians via their MCP billing addresses, and indirectly through the Newfoundland and Labrador Medical Association ("NLMA").

[3] In the notice, which was sent in the form of an MCP newsletter, the Department explained the access request, and advised physicians that within 15 business days they could either consent to the disclosure, or provide the Department with a submission, demonstrating why, under either section 39 or section 40, the records should not be disclosed. The Department also prematurely advised that whether or not a submission was provided to the Department, a physician could file a complaint with this Office, or appeal directly to the Supreme Court, Trial Division.

[4] The Department received several hundred submissions from physicians in response to the third party notice, as well as a response from the NLMA. The vast majority of the

responses objected to the disclosure. Thirteen consented to the disclosure. Many of the physicians who responded set out, in some detail, arguments about the harm that they asserted could or would result from the disclosure of the billings.

[5] During the first three weeks of June, 2016 this Office also received 18 complaints from individual physicians in response to the Department's third party notice, as well as a complaint from the NLMA on behalf of several hundred member physicians.

[6] This Office began the process of reviewing the complaints received. However, on June 22, 2016, prior to the completion of our review, the Department sent another letter to all FFS physicians, advising that after its review of the submissions received from doctors in response to the third party notification, the Department had concluded that no submissions met the three-part test for withholding information under section 39 of the *ATIPPA, 2015.* However, the Department advised it had concluded that disclosure of the information would constitute an unreasonable invasion of physicians' privacy under section 40 of the *Act.* The Department stated that therefore it had decided not to disclose the requested records.

[7] As a result of the Department's decision all of the third party complaint files opened by this Office were closed. However, on June 23, 2016, the Applicant filed a complaint with this Office objecting to the Department's decision. It is this complaint which is the subject of this Report.

[8] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation under subsection 44(4) of the *ATIPPA, 2015*.

[9] The Department and the Applicant both provided written submissions. While neither the FFS physicians nor the NLMA are parties to this complaint under the procedure set out in the *ATIPPA, 2015,* we recognize that both the physicians and their Association have a direct interest in the outcome. We therefore offered the NLMA an opportunity to make further submissions on the issue, and advised that submissions that had already been received in the earlier third party complaints would be considered in the present review. We also advised that we would send the NLMA a copy of this Report, thus ensuring that it would be entitled to be notified of the eventual decision of the Department.

II THE DEPARTMENT'S POSITION

[10] The Department states that FFS physicians are distinguished from salaried physicians, who are employees of the Regional Health Authorities, and physicians on the Alternate Payment Plan, who are paid by MCP through individual contracts, based on block funding arrangements.

[11] The Department argues that FFS physicians do not meet the definition of an "employee" under *ATIPPA, 2015*. The Department goes on to assert that FFS physicians are not "retained under a contract to perform a service for the public body." Rather, FFS physicians provide medical services to their patients, for which services they are paid by government (MCP).

[12] The Department argues that FFS physicians are independent contractors, who, while paid by government, are responsible for the establishment and operation of their own offices, determine when and where they work, and are not provided any employee benefits such as sick leave, pension plan, annual leave or health insurance benefits

[13] The Department provided a summary of submissions that it had received from physicians, objecting to the disclosure of the requested information.

[14] The Department concludes that because FFS physicians' billings include their personal names and specialties, in combination with financial information related to their MCP billings, the responsive record includes personal information of a third party as defined under *ATIPPA, 2015* subsections 2(u) and 2(cc).

[15] The Department concluded that release of the records would constitute an unreasonable invasion of the FFS physicians' personal privacy and therefore refused to release the requested records.

III THE APPLICANT'S POSITION

[16] The Applicant drew the attention of the Commissioner to a decision from the Ontario Information and Privacy Commissioner (Order PO-3617) that dealt with this same issue. It will be referred to later in this Report.

[17] The Applicant also referred to a passage from page 191 of the March 2015 report of the ATIPPA Statutory Review Committee:

> *The privacy of public employees needs to be balanced against the public's right to know how their tax dollars are spent. Contemporary values of transparency and accountability for public funds tip the balance in favour of disclosure.*

[18] The Applicant commented that what fee-for-service physicians get paid by taxpayers to perform services is no more personal than the salary of a nurse or a salaried physician that work in the same hospital. Billings by physicians are a significant expenditure in our healthcare system and like any other contractor providing a service for the province and billing for it, it is of legitimate public interest.

[19] The Applicant added that releasing a list without names (or without specialities) does not allow accountability because it is impossible to get further details about whether billings are legitimate or not.

IV THE NLMA'S POSITION

[20] The NLMA first points out that the MCP billings of individual physicians do not account for overhead costs, and therefore does not truly reflect a physician's annual income. It argues that publication of annual billings could affect a physician's business interests, in particular in negotiations with various others.

[21] The NLMA argues that the presumption in paragraph 40(2)(f) of the *ATIPPA, 2015* that it is not an unreasonable invasion of privacy to disclose the remuneration of an employee of a public body, does not apply to FFS physicians, who provide insured services to individual

patients, and do not receive remuneration for providing services for a regional health authority.

[22] In addition, the NLMA states that paragraph 40(2)(g) of the *ATIPPA, 2015* does not apply. It argues that the *Medical Care Insurance Act, 1999* does not create a contract requiring FFS physicians to supply services to a public body.

[23] Finally, the NLMA argues that the aim of holding the government to account, and subjecting the activities of the government and public bodies to public scrutiny, can be achieved by providing the requested information without identifying the individual FFS physicians. It argues that the remaining information, together with other publicly available information, would permit the public to assess such things as average annual billings per physician, the range of billings within a discipline, comparisons between disciplines and with other provinces, and so on.

V DECISION

Issue 1 - Whether the Information is Personal Information

[24] Personal information is defined by the *ATIPPA, 2015* in subsection 2(u) as follows:

> *(u) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*

> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions, except where they are about someone else;*

[25] At first glance, it appears that the information in the responsive record may be personal information. It is recorded information, and it appears to be about identifiable individuals. It consists of a twenty-page table with a number of columns. There are two columns containing the last and first names of individual FFS physicians. Individuals' names are included in the definition of personal information in paragraph 2(u)(i) above.

[26] Another column contains the physician's provider number. An "identifying number … assigned to the individual" is stated to be personal information in paragraph 2(u)(iv).

[27] Another column identifies the physician's specialty, for example general practice, internal medicine or radiology. That might be considered to be information about the individual's employment or educational status, under paragraph 2(u)(vii).

[28] The final column gives a dollar figure for the calendar year 2015. That might be considered to be information about the individual's financial status, under paragraph 2(u)(vii).

[29] This same issue arose in an early Report from this Office – Report 2006-001 – involving the Department of Health and Community Services. In that Report, it was accepted by all parties at the outset, and by my predecessor, that the billings of FFS physicians constitute personal information. The review proceeded on that basis, to a conclusion that nevertheless the information ought to be disclosed, pursuant to the exception that the disclosure involved the financial details of a contract to supply services to a public body.

[30] A similar issue arose in another Report from this Office – Report A-2009-008 – in which it was accepted, without argument, that the names and titles of FFS physicians are personal information. That Report also reached the conclusion that the information nevertheless ought to be disclosed, on the basis that it was information about the position and functions

of employees of a public body. I will return to the findings and conclusions of those Reports later.

[31] However, this Office has often made a distinction between personal and business information. Information which might be considered to be personal information in one context may be considered to be business or professional information in another. For example, when information appears on a business card, on company or office letterhead, in a professional directory, or on a website, and whether it consists of the names of individuals, their business titles, their business addresses and phone numbers, or their business e-mail addresses, it is generally all considered business information, not personal information. This is so even where an individual operates a business from a home address, without separate business contact information. This kind of distinction is made not only in this province, but in all other Canadian jurisdictions.

[32] In Ontario, there have been a number of *FIPPA* decisions from the Information and Privacy Commissioner concluding that information about physicians' billings, that identified the individual physicians, was personal information. However, those decisions were not consistent with other decisions that distinguished between personal information and business or professional information in other contexts. On June 1, 2016 the Ontario IPC issued a decision involving the Ministry of Health and Long-Term Care (Order PO-3617) which rationalized the two divergent lines of cases, and concluded that information about the billings of FFS physicians is not personal information.

[33] The June 2016 Ontario decision (Order PO-3617) affirms that business, professional or official 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.*

[34] The Ontario decision (Order PO-3617) takes as its starting point a 2004 decision (Order PO-2225) involving the Ontario Rental Housing Tribunal, in which the records requested contained the names of landlords who owed money to the Tribunal. Order PO-2225, followed in many subsequent Ontario decisions, describes a two-step test for distinguishing personal information from business information:

> *Previous decisions of this office have drawn a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "**about the individual**" within the meaning of the* section 2(1)*.*
>
> *. . .*
>
> *Based on the principles expressed in these orders, the first question to ask in a case such as this is: **"in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?** In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the Income Tax Act and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.*
>
> *. . .*
>
> *The analysis does not end here. I must go on to ask: **"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?***
>
> *(emphasis added)*

[35] The adjudicator in Ontario Order PO-3617 went on to apply the above two-step test, and concluded that fee-for-service physicians' billing information is professional and business information, not personal information.

[36] The same analysis can be used to interpret and apply the definition of "personal information" in the *ATIPPA, 2015*. We can first ask, as the Ontario adjudicator did, what is

the context in which the information appears? Is it "inherently personal" or is it a business, professional or official government context? In my view, it is clear that the context, the provision of medical services, is a professional or business activity. Submitting billings for those services, and receiving remuneration from the government, is a professional or business activity that is removed from the personal sphere.

[37] The second question then is, would disclosure of the names and specialties of the FFS physicians, along with the billings, "reveal something that is inherently personal in nature." There were a number of submissions from physicians and the Department advancing arguments that are relevant to this question.

[38] For example, many of the physicians and the NLMA, who made submissions opposing disclosure of the information, argue that the gross billings of a physician are misleading, and not an accurate representation of personal incomes, because they do not take into account the expenses involved in operating a medical practice, such as office rent, staff salaries, equipment and supplies, and so on. But as the Ontario decision points out, payments that are subject to deductions for business expenses are clearly business information. The very fact that it is arguably not an accurate representation of personal income means that it is not personal information.

[39] The argument that physicians are not employees, but independent contractors, made by both the Department and the NLMA, also supports a conclusion that the records of payments by MCP to FFS physicians are business information, not personal. If FFS physicians are independent contractors, how are they different from any other professional or business person providing services for a public body? In numerous cases in this province and in other Canadian jurisdictions, contracts for the provision of legal services, for consulting services, for financial and accounting services, for management services or for security services have been found to be business, rather than personal information.

[40] I conclude that because the context in which the requested information appears is a professional or business context, not an inherently personal one, and because its disclosure would not reveal anything inherently personal in nature, the information is not personal information within the meaning of subsection 2(u) of the *ATIPPA, 2015*.

[41] I am aware that in reaching this conclusion I differ from the conclusions of my predecessors in Reports 2006-001 and A-2009-008. Those decisions did not have the benefit of the thorough discussion in the Ontario decision, Order PO-3617, to which I have referred above. They also predate the enactment of *ATIPPA, 2015*, which must be interpreted in a manner consistent with its purposes, including increasing transparency and accountability in government.

[42] If, as I have concluded, the information in the responsive record is business information, not personal information, then its disclosure does not fall under the exception in section 40 of the *ATIPPA, 2015*. Instead, that would have to be evaluated under the exception in section 39 (disclosure harmful to the business interests of a third party). The Department, however, has already concluded that none of the submissions arguing in favour of withholding the information can meet the test in section 39. Therefore the section 39 test is not before me. The Department's June 22, 2016 decision was based solely on the application of section 40, and it is that decision that is the subject of the present complaint. If the information is not personal information, and I conclude that it is not, then section 40 does not apply to it, and it must be disclosed.

Issue 2 - If the Information is Personal Information, Must it Be Withheld?

[43] If, however, it were concluded that the information is personal information, then Section 40 of the *ATIPPA, 2015*, which deals with the disclosure of personal information, becomes applicable. Upon consideration of section 40, however, I have also come to the conclusion that the information must be disclosed.

[44] Section 40 reads as follows:

> *40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where*
>
> *(a) the applicant is the individual to whom the information relates;*
>
> *(b) the third party to whom the information relates has, in writing, consented to or requested the disclosure;*

(c) there are compelling circumstances affecting a person's health or safety and notice of disclosure is given in the form appropriate in the circumstances to the third party to whom the information relates;

(d) an Act or regulation of the province or of Canada authorizes the disclosure;

(e) the disclosure is for a research or statistical purpose and is in accordance with section 70;

(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;

(h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;

(i) public access to the information is provided under the Financial Administration Act;

(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;

(k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not for the benefit;

(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including

(i) personal information that is supplied in support of the application for the benefit, or

(ii) personal information that relates to eligibility for income and employment support under the Income and Employment Support Act or to the determination of income or employment support levels; or

(m) the disclosure is not contrary to the public interest as described in subsection (3) and reveals only the following personal information about a third party:

(i) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

(ii) receipt of an honour or award granted by or through a public body.

(3) The disclosure of personal information under paragraph (2)(m) is an unreasonable invasion of personal privacy where the third party whom the information is about has requested that the information not be disclosed.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation;

(c) the personal information relates to employment or educational history;

(d) the personal information was collected on a tax return or gathered for the purpose of collecting a tax;

(e) the personal information consists of an individual's bank account information or credit card information;

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(g) the personal information consists of the third party's name where

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party; or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(5) In determining under subsections (1) and (4) 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 province or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or 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 or validating 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;*
>
> *(h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant;*
>
> *(i) the personal information was originally provided to the applicant; and*
>
> *(j) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.*

[45] Section 40 of the *Act* has been discussed in a number of recent Reports of this Office (A-2016-011 to A-2016-015) in what some refer to as the "sunshine list" cases. As can be seen above, section 40 is a mandatory exception to disclosure. However, it is conditional: section 40 prohibits disclosure of personal information only "where the disclosure would be an unreasonable invasion of a third party's personal privacy." As discussed in the above referenced Reports, determining what constitutes an unreasonable invasion of privacy involves, potentially, three steps in the application of the section.

[46] The first step in the analysis is to determine whether the information in question is personal information. Although I have concluded, in the previous section of this Report that it is not, I will treat it, for the purposes of the analysis in this section of this Report, as if it is personal information.

[47] The second step is to determine if the information falls into one of the categories in subsection 40(2). If it does, then its disclosure is deemed not to be unreasonable invasion of privacy. That will end the section 40 analysis.

[48] If, however, the information is found not to fall into one of the categories in subsection 40(2), the analysis proceeds to the third step, in which it must be determined whether it falls into one of the categories in subsection 40(4). If it does, its disclosure is presumed to be an

unreasonable invasion of privacy. That presumption can be rebutted by evidence to the contrary. In that case, it will be necessary to conduct the analysis called for in subsection 40(5), to determine whether the disclosure would be unreasonable and therefore prohibited by subsection 40(1).

[49] Finally, in a case where the information does not fall into any of the categories in either subsection 40(2) or 40(4), it will also be necessary to conduct the analysis called for in subsection 40(5).

[50] There are a number of categories included in subsection 40(2) that need to be examined in order to complete the second step in the analysis.

Paragraph 40(2)(g)

[51] One of those categories is paragraph 40(2)(g): it is not an unreasonable invasion of privacy if "the disclosure reveals financial and other details of a contract to supply goods or services to a public body."

[52] An interpretation of that provision was relied on in Report 2006-001 to justify disclosure of the requested information.

> *[45] …the agreement between physicians and government is a contract as contemplated by section 30(2)(g)* [now 40(2)(g)]. *It is true that the physician is administering medical services to the patient, but the reimbursement for those services comes directly from government in accordance with a detailed agreement, to which both parties are signatories.*
>
> . . .
>
> *In my opinion, MCP billings reflect a contractual service provided to the Department of Health and Community Services. Clearly, the agreement to pay physicians under the MCP program facilitates the provision of medical services to the citizens of this Province through the use of public funds.*

[53] Report 2006-001 cited on a decision of the Nova Scotia Supreme Court in *Doctors Nova Scotia* v. *Nova Scotia (Department of Health)*, 2005 NSSC 244, which found that a similar provision of the Nova Scotia legislation justified the disclosure of doctors' billings. However, that decision was later overturned by the Nova Scotia Court of Appeal in *Doctors Nova Scotia* v. *Nova Scotia (Department of Health)*, 2006 NSCA 59. The Court of Appeal held that

doctors' services are supplied to patients, not to the government, and that therefore the provision did not apply.

[54] In the Nova Scotia cases, it was not disputed at either level that information about fee for service billings was personal information. Secondly, there was no discussion at either level about whether physicians in Nova Scotia could possibly fall into the category of "employee" as defined by the Nova Scotia legislation. Therefore the *Doctors Nova Scotia* decisions are of limited assistance to me. However, while I make no determination in the present case with respect to the applicability of paragraph 40(2)(g), the findings in Reports 2006-001 and A-2009-008 will be of assistance with the issue of whether there is a contractual relationship between the government and FFS physicians.

Paragraph 40(2)(f)

[55] Paragraph 40(2)(f) deems information not to be an unreasonable invasion of privacy if "the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff." The central question here is whether FFS physicians can be said to be "employees" within the meaning of that term.

[56] The Department says FFS physicians do not meet the definition of "employee" under *ATIPPA, 2015*. That term is referred to in section 2(i), which reads as follows:

> *(i) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;*

[57] It is notable that this is not an exhaustive definition. It simply says that the term "includes a person retained under a contract to perform services for the public body." It does not say what else the term may or may not include. For guidance we have to look at what the term is taken to mean in other contexts. Dictionaries generally define an employee as someone who is hired to perform services for another in return for pay. But definitions may be different, or emphasize different aspects, depending on the context.

[58] For example, the *Labour Relations Act,* in paragraph 2(1)(m) defines it as:

> *(m) "employee" means a person employed to do skilled or unskilled manual, clerical or technical work and includes a professional employee and a dependent contractor but does not include a manager or superintendent or other person who, in the opinion of the board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations;*

It can be seen that this definition, in the labour relations context, emphasizes the distinction between employees and managers, for the purposes of that *Act*, to serve the needs of labour relations and collective bargaining, and, in particular, management of the unionized workplace.

[59] The *Workplace Health, Safety and Compensation Act*, by contrast, does not define "employee" at all. However, it defines "worker" to include such disparate categories as persons with contracts of employment or apprenticeship, learners without contracts, persons working in return for shares in a voyage, even executive, managers and directors. It is apparent that this definition has been constructed very broadly, so as to capture an extremely large proportion of individuals in workplaces for the purposes of health, safety and compensation.

[60] The definition of "employee" needs to be interpreted in such a way as to suit the purposes of the *ATIPPA 2015*. Those purposes are set out in subsection 3(1) which states:

> *3. (1) The purpose of this Act is to facilitate democracy through*
>
> *(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;*
>
> *(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and*
>
> *(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.*

[61] Those are the core principles underlying the *ATIPPA, 2015*, and it is with reference to democracy, transparency and accountability that we must interpret the meaning of the term "employee."

[62] This view of the interpretation of terms in the *ATIPPA, 2015* accords with the decision of the Supreme Court in *McBreairty v. College of the North Atlantic*, 2016 NLTD(G) 138, in paragraphs 186-187:

> *[186] The term "employee" has a traditional meaning of someone who is employed by another. In addition, in this Act, the meaning has been extended to include "a person retained under a contract to perform services for the public body". In my view, the Legislature in using this expanded language obviously intended to go beyond the traditional meaning of employee in relation to the activities involving a public body.*
>
> *[187] The use of the word "includes" suggests that the Legislature was not restricting the definition of "employee" to its ordinary or traditional meaning or to a person retained under a contract to perform services. It is, therefore, reasonable to find that the Legislature purposely drafted the definition as it did to allow it to be considered in circumstances other than those noted in the previous sentence. Each set of circumstances would have to be assessed on its particular facts. For example, if an individual were part of an institutional structure (the College) and was performing a service that assisted the College to carry out its mandate, it is not unreasonable to find that the individual is an employee for the limited purposes of this Act. That interpretation would certainly be in keeping with the principle set out in Merck Frosst Canada Ltd. v. Canada (Health) that such legislation must be given a broad and purposive interpretation. I, therefore, find that in the circumstances of this matter, the individual in question is an employee of the Respondent within the meaning of that term in para. 2(e) of the Act.*

[63] In order to determine whether, for the purposes of the *ATIPPA, 2015,* FFS physicians fall into the definition of "employee" it is necessary to look at the way the relationship is established between FFS physicians and the government, what it consists of and what the mutual obligations are. On review I have concluded that physicians practice in the context of a contractual relationship with the government of the province, through the Department and MCP, to "perform services for the public body."

[64] First, the practice of medicine in the province is entirely governed by statutes and regulations. Under the *Medical Act, 2011*, physicians must first register in order to be able to practice. (There is a similar *Health Professions Act* covering other health professions).

[65] The College of Physicians and Surgeons in Newfoundland and Labrador is a self-governing body, created by the *Medical Act, 2011*, which regulates the practice of medicine

in the public interest. The College is given the responsibility of setting qualifications and licensing physicians to practice, establishing the scope and standards of practice, investigating complaints and imposing discipline. Essentially, all professional issues relating to the practice of medicine are the responsibility of the College, under the *Medical Act, 2011.*

The Insurance Plan Issue

[66] The program by which physicians are compensated in Newfoundland and Labrador is set out in the *Medical Care Insurance Act, 1999*. (This statute is due to be replaced by the *Medical Care and Hospital Insurance Act,* which is scheduled to come into force in October 2016. However, for the purposes of this Report, the relevant provisions will not materially change).

[67] Whatever it might have originally been, and despite the fact that the legislation and the MCP website use the language of insurance, the program is not now an insurance plan as that term is generally understood. For an example in Newfoundland and Labrador legislation, see the *Insurance Companies Act*, section 2(x):

> *"insurance" means the undertaking by a person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;*

[68] An insurance plan is a contractual relationship, commonly called an insurance policy, between two parties, the insurer (typically an insurance company) and the insured. The insured makes a periodic payment to the insurer (the premium) and in return the insurer promises to indemnify the insured – to pay an agreed sum (the benefit) to the insured on the happening of a certain event, typically a financial loss. In order to receive the benefit, the insured has to submit a claim to the insurer. At its simplest, the insurer pools the funds received as premiums, in order to form a fund out of which claims are paid.

[69] Under the MCP scheme, there are no premiums paid, either by individuals, group beneficiaries or employers. There is no separate insurance fund out of which claims are to be paid – the entire amount of billings paid out by MCP comes from the government's

Consolidated Revenue Fund. Except in unusual circumstances, such as where a patient receives medical services outside the country, there are no claims – patients do not present claims to MCP for reimbursement.

[70] In my view MCP is not an indemnification model at all. It stands in contrast to health care benefit plans and automobile or property insurance. There is no contract of insurance between patients and MCP. Rather, MCP simply provides the gateway for persons resident in the province to register (and every person resident in the province is required to register). Upon registration each person receives a unique identifier number, and thereafter has the right to receive basic medical services without charge. While the legislation, as well as MCP in its publications, uses some of the language of insurance, the program does not (except in unusual circumstances) reimburse patients for claims for "insured services." What it actually does is compensate physicians for medical services provided to residents.

[71] There is no contractual relationship between the physician and the patient for payment. The physician provides the medical service to the patient, on request and with consent. However, the patient provides no consideration – no payment, act or promise in return for the services received.

[72] There is a fixed scale of fees for "insured" services. The scale of fees is not set unilaterally or arbitrarily by the Minister. The NLMA is actively involved. The *Medical Care and Hospital Insurance Act* provides that

> *46. The medical association and the dental association shall be consulted by the minister with reference to the rates of payments to be made under this Act in respect of insured services provided to beneficiaries by practitioners, the manner and form in which the payments to practitioners shall be made and changes in connection with payments and, where in the opinion of the minister it is necessary, with reference to general questions of principle concerning the practices of medicine and dentistry.*

[73] See also the Medical Payment schedule, an excerpt from which reads:

> *Additions, deletions and changes to be made to the Payment Schedule require recommendation by MCP and approval by the Minister of Health and Community Services, in consultation with the Newfoundland and Labrador Medical Association (NLMA).*

The Memorandum of Agreement

[74] That "consultation" takes a number of forms, including negotiations with the NLMA on behalf of physicians. The NLMA is itself a statutory body, created under the *Medical Act, 2011*. It represents the political, clinical and economic interests of the province's medical profession, and periodically negotiates a Memorandum of Agreement with the government, covering, among other things, compensation to be paid for physicians' services. It appears from the news releases and other documents, from both the government and the NLMA, that this negotiation process is very similar to the collective bargaining process between the government and public sector trade unions.

[75] That bargaining process also produces a similar result – a legally binding agreement between the NLMA, on behalf of physicians, both fee-for-service and salaried, (all of whom are required by statute to be members of the NLMA), and the government, covering all of the negotiated terms and conditions under which physicians provide their services. In the Memorandum of Agreement the government commits to paying physicians in accordance with the scale of fees. The physicians, for their part, "…commit to provide, in accordance with the negotiated payment schedule/salary rate, the insured services which have been traditionally funded through MCP and which the public might reasonably expect to be available, subject to resources and skill limitations." The parties have agreed to binding arbitration as the dispute resolution mechanism for negotiations.

[76] This was the conclusion reached previously in both Report 2006-001 and Report A-2009-008. While Report 2006-001, an excerpt from which was quoted above, applied that conclusion to an interpretation of paragraph 30(2)(g), the forerunner of paragraph 40(2)(g) in the *ATIPPA, 2015*, the way in which the conclusion was reached is equally applicable to the interpretation of paragraph 40(2)(f):

> *I earlier concluded that the MOA between the NLMA and the Province is a contract. As such, I believe the information at issue is information that is exchanged in accordance with a negotiated contract and has not been "supplied" as contemplated by section 27(1)(b) of the ATIPPA. The MOA is explicitly an agreement between two parties and is signed by both of those parties, indicating a negotiation process. In fact, Government has recently reached a new MOA with the NLMA and in announcing this new agreement confirmed that the terms were negotiated. In a news release dated 15*

> *February 2006, Executive Council and the Department of Health and Community Services said that "Minister [Finance and President of Treasury Board] said negotiations with the NLMA have been ongoing since September of this year and is pleased those talks have resulted in a satisfactory settlement for both parties…" The news release goes on to quote the Minister of Health and Community Services as saying "…[c]learly, both the government and the NLMA share the same goals for our provincial health care system and these successful negotiations have cemented the cooperative partnership that exists between the parties".* [para. 62]

[77] The settlement referred to in the quotation above is just one of a series of periodic negotiations between the government and the NLMA over the years. The previous contract to the one described above resulted from an arbitration award, dated April 15, 2003, which in turn was part of a settlement of a 17-day strike by physicians in October 2002. That award reads, in part:

> *Background*
>
> *The Newfoundland and Labrador Medical Association and the Government of Newfoundland and Labrador agreed to submit several outstanding issues to the Arbitration Board. The parties agreed to arbitration as part of a settlement to end a withdrawal of services by physicians in the province of Newfoundland and Labrador from October 1 to October 17, 2002. The parties agreed to arbitration pursuant to Terms of Reference dated October 17, 2002, which state, in part, as follows:*
>
> *TERMS OF REFERENCE*
>
> *The Newfoundland and Labrador Medical Association (the NLMA) and the Government of Newfoundland and Labrador (the Government) have agreed to submit outstanding issues to binding arbitration under the following terms:*
>
> *. . .*
>
> *11. The decision of the Arbitration Board is final and binding upon the parties*

[78] The current Memorandum of Agreement was negotiated and ratified by the members of the NLMA in the fall of 2015. However, it has not yet been executed by the parties. As such, the 'current' Memorandum of Agreement is the 2009-2013 version, which continues to be in force until a new agreement is signed.

[79] It is clear that this Memorandum of Agreement, within the statutory framework, constitutes a contract between physicians and the government. It is, for all practical purposes, identical to a collective agreement governing the terms and conditions of employment of other government employees. Although the NLMA is not a certified

bargaining agent under labour legislation, it has the same function. The Association is recognized as the sole and exclusive negotiator on behalf of physicians licensed by the College of Physicians and Surgeons of Newfoundland and Labrador to practice in this Province, for matters which fall within the scope of the Agreement. Like members of other trade unions, physicians are required to become members of the NLMA, and are required to abide by the terms and conditions of employment set out in the Memorandum of Agreement, the *Medical Act* and the *Medical Care Insurance Act*.

[80] In its submissions to this Office prior to the issuance of Report 2006-001, the same conclusion was apparently reached by the Department at that time, as outlined in the following passages from Report 2006-001:

> *[35] … The Department argues that the MOA signed between the NLMA, on behalf of physicians, and the Provincial Government is a contract between physicians and government, as contemplated by section 30(2)(g). This MOA, available through the NLMA website …*
>
> *[36] With respect to the supply of goods or services, the Department referenced Article 10.01 of the MOA: Physicians commit to provide, in accordance with the negotiated payment schedule/salary rate, the insured services which have been traditionally funded through MCP and which the public might reasonably expect to be available, subject to resources and skill limitations.*
>
> *[37] With respect to the use of the word "financial" in section 30(2)(g), the Department contends that the billing data being requested reflects the contractual relationship between the physicians who bill for services and the Department who pays for those services. As such, the Department believes that the MOA is a contract and the billing data is considered the financial details of that contract.*

While this argument was advanced in the context of interpreting what is now paragraph 40(2)(g), it is equally applicable to the interpretation of paragraph 40(2)(f). It stands in contrast with the submission of the Department in 2016, that the FFS physicians are not retained under a contract to perform a service for the public body.

[81] The importance of the contract can be seen in the way in which the relationship between an individual physician and MCP is initiated, defined and regulated by the *Medical Care Insurance Act*. The physician applies for registration with MCP, agreeing to abide by the *Act,*

the regulations and all of the terms and conditions of the Medical Care Plan. This application, in my view, constitutes an offer by the physician to practice medicine in conformity with the terms of the Plan. At the bottom of the application form, above the signature, it states:

> *I hereby declare and affirm that I understand the content of all forms signed pursuant to this registration as a provider of service under the Newfoundland Medical Care Insurance Act, and that all information provided by me to MCP for purposes of this registration is accurate and true. I acknowledge having reviewed and understand all pertinent information in relation to this registration with MCP, and I agree to abide by all terms and conditions therein contained, which terms and conditions shall form part of this application. I agree to abide by the Newfoundland Medical Care Insurance Act and Regulations as they apply to the Medical Care Program or Dental Health Program.*

[82] The MCP office processes and evaluates the application, and once all of the required information is complete and in order, issues the physician with a provider number, permitting the physician to submit billings to MCP. This issuing of the provider number signifies the acceptance of the physician's offer. The form states:

> *When all information is received and processed, a copy of this form along with a six (6) digit Provider Number will be forwarded to you. This Provider Number must be identified on all claims submitted to MCP.*

[83] From that point on, the physician records all medical services provided in the course of his or her practice, on forms provided by MCP, and submits them within 90 days for payment. Ordinarily, those payments are made to the physician by MCP. However, the minister, through MCP, has the right under the *Medical Care Insurance Act* to challenge the account, to conduct audits and to withhold payment. There is a review process culminating in an appeal by the physician to Trial Division.

[84] I conclude that a physician's application to MCP for registration, once accepted, constitutes a contract between the physician and the Department of Health and Community Services, which brings the physician within the legal framework represented by the Memorandum of Agreement and the encompassing legislation.

[85] The Department has argued that there is no contract between FFS physicians and the government. I have dealt with that argument above. The Department also argues, in the

alternative, that FFS physicians are independent contractors. This could possibly be the case if physicians in Newfoundland and Labrador were free to sell their services to other buyers in the same market, but that is not the case. Unlike jurisdictions such as the USA, where there may be a large number of public and private hospitals and other organizations that can constitute a competitive market place in which doctors are free sell their services, there is only one MCP.

[86] Physicians may opt out of MCP and bill their patients directly. However, they must still charge patients no more than the MCP scale for each medical service performed, and must still abide by all of the same rules, standards and best practices, so they are not, even in that sense, independent. It is therefore not surprising that, in the period covered by the present access request, there were no physicians practicing in the province who had opted out of MCP.

[87] In this respect, FFS physicians more closely resemble dependent contractors in labour relations. This category of employee is defined in the *Labour Relations Act*, subsection 2(1):

> *(k) "dependent contractor" means an individual, whether or not he or she is employed by a contract of employment or provides his or her own tools, vehicles, equipment, machinery, material or other thing, who performs work or services for another person for compensation or reward on those terms and conditions that he or she is in a position of economic dependence upon and under an obligation to perform duties for that person more closely resembling the relationship of an employee than that of an independent contractor;*

FFS physicians, while providing their own offices, tools and equipment, are clearly in a position of economic dependence on the government, similar to the individuals in the description above. The *Labour Relations Act* provides, in the definition of employee, that it includes a dependent contractor.

[88] There is one remaining term that forms part of the provision in paragraph 40(2)(f). That provision permits disclosure of an employee's "remuneration." That term is defined in subsection 2(z), as follows:

> *(z) "remuneration" includes salary, wages, overtime pay, bonuses, allowances, honorariums, severance pay, and the aggregate of the*

> *contributions of a public body to pension, insurance, health and other benefit plans;*

[89] Again, this is an inclusive, or illustrative, rather than an exhaustive definition. It has been expanded from the definition in previous versions of the *Act,* and the inclusion of all of the listed forms of compensation clearly is intended to encompass the broadest possible scope. Whether the billings of FFS physicians are regarded as business income, or personal income, they are clearly remuneration for professional services performed.

[90] If there is any remaining doubt about the applicability of this term, it should be dispelled by the fact that "remuneration" is the term used to refer to compensation for FFS physicians in the Memorandum of Agreement.

[91] Given the legal framework represented by the legislation, the Memorandum of Agreement, the way in which a physician enters into participation in the arrangement, the way in which remuneration flows from the government to the physician, and the absence of any contract between physician and patient, it is an inescapable conclusion that, while physicians provide medical services to their patients, they provide those services for the government.

[92] This was also the conclusion reached by my predecessor in Report A-2009-008. After discussing, and distinguishing, the Doctors Nova Scotia cases, the Report focuses on the distinction between services supplied to a public body in the terminology of paragraph 40(2)(g) and services performed for a public body in paragraph 40(2)(f):

> *[35] The physicians provide insured services to patients. That is, it is the patient who is affected by the services. However, the physicians commit to provide these services for Western Health and, in turn, the Government of Newfoundland and Labrador. The services are being performed in a set manner with regard to and as a result of the aforementioned MOA. The services are being performed "in accordance with the negotiated payment schedule/salary rate." Physicians, even fee for service physicians who are also covered by the MOA, perform their services in favour of, on the behalf of and to the benefit of Western Health and the Government of Newfoundland and Labrador in exchange for payment. Put simply, physicians perform their services for Western Health and the Government of Newfoundland and Labrador.*

> *[36] As a result, the definition of "employee" as provided in section 2(e) clearly contemplates both salaried and fee for service employees. While I appreciate that this may be a more expansive definition than is provided in other legislation – contractors are often surprised to learn that they are employees for the purpose of ATIPPA – this is the definition which I must apply in dealing with ATIPPA. In summary, the physicians, whether salaried or fee for service, are defined under the ATIPPA as employees of Western Health and, therefore, the Government of Newfoundland and Labrador. Their names and titles constitute information regarding their positions or functions as employees of Western Health or the Government of Newfoundland and Labrador in accordance with section 30(2)(f) and must be disclosed.*

[93] My conclusion, therefore, under this alternative argument, is that for the purposes of the *ATIPPA, 2015*, FFS physicians fall into the category of persons "retained under a contract to perform services for the public body." Therefore they are included in the definition of "employee" in subsection 2(i). Therefore they fall into the category of those individuals whose remuneration may be disclosed under paragraph 40(2)(f). The requested information is deemed not to be an unreasonable invasion of privacy by the operation of subsection 40(2). Therefore it must be disclosed.

Issue 3 – Whether Disclosure Would Be An Unreasonable Invasion of Privacy

[94] There is a third alternative to be considered. Even if the requested information were held to constitute personal information, but not to fall under the deemed disclosure provisions in subsection 40(2), it must then be assessed under subsection 40(5). For the purpose of this section I have carried out that assessment as if subsection 40(2) does not apply. After conducting that assessment I conclude that its disclosure would not be an unreasonable invasion of privacy.

[95] First, the invasion of privacy that is prohibited by subsection 40(1) of the *ATIPPA, 2015* is an "unreasonable" one. The legislation recognizes that some encroachments on an individual's privacy will be justified.

[96] Second, subsection 40(2), by deeming certain specific encroachments on privacy not to be unreasonable invasions, provides a guide to what might be justified. Some are essentially logical: for example, it would be absurd if the *Act* were to prohibit disclosure even with consent, or if a disclosure were authorized by other legislation. But it is in keeping with the

core purposes of the *ATIPPA, 2015* that many of the exceptions in subsection 40(2) have to do with public finance and expenditures, for example:

> *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*
>
> *(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;*
>
> *...*
>
> *(i) public access to the information is provided under the Financial Administration Act;*
>
> *(j) the information is about expenses incurred by a third party while travelling at the expense of a public body;*

[97] Third, subsection 40(5) states that in making the determination whether a disclosure is an unreasonable invasion of privacy, "all relevant circumstances" must be considered. The determination must be fact-based. There must be evidence to support an argument that harm will result, and while a party does not have to provide proof that harm will in fact result from disclosure, the evidence must go beyond what is merely possible or speculative.

[98] The subsection goes on to list a number of such circumstances, of which two, in particular would appear to be most relevant in the present case:

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;*
>
> *...*
>
> *(e) the third party will be exposed unfairly to financial or other harm;*

[99] The NLMA has made an argument, summarized above in the discussion of its submissions, that "de-identified" information would be just as useful. First, however, it must be understood that de-identified information is, by definition, not personal information. If the Applicant's request were for de-identified information, then section 40 would not be applicable at all. However, the Applicant has specifically asked for the names, and has argued, in his submissions, that releasing a list without names (or without specialities) does not allow accountability, because it is impossible to get further details about whether billings are legitimate or not.

[100] I find the Applicant's argument, summarized earlier, to be compelling. As the *ATIPPA* Review Committee stated at page 191 of its Report:

> *The privacy of public employees needs to be balanced against the public's right to know how their tax dollars are spent. Contemporary values of transparency and accountability for public funds tip the balance in favour of disclosure.*

[101] In the earlier Reports from this Office on what has been called the "sunshine list" it has been noted that the Government of Newfoundland and Labrador accepted all of the recommendations of the Review Committee. In addition, the Review Committee proposed a draft *ATIPPA, 2015* which after speeches in support of the bill by all three parties, was passed virtually without amendment. This is significant, because the legislature can be deemed to have understood and agreed with all of the recommendations made by the Committee, and with their underlying rationale.

[102] There is no principled reason why physicians' billings should not be subject to the same transparency as payments to employees, businesses, consultants and other parties receiving funding from government.

[103] The essence of access to information under the *ATIPPA 2015* is that it is a right, subject only to limited exceptions. The "default position" is disclosure of requested information, and it is fundamental that it is not the responsibility of the Applicant either to justify the request, or to prove why something less is not sufficient. On the contrary, the burden of proof lies with the objecting party to show why the information should be withheld.

[104] In the present case, it is clear that, in the words of the *ATIPPA, 2015*, the disclosure would be "desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny." There can be no doubt that transparency, in this and other aspects of the cost of health care, which is the largest single category of provincial government expenditure, can assist with public scrutiny. The issue remaining in the subsection 40(5) analysis, is whether there is sufficient evidence of likely harm to third parties (the physicians) to outweigh the factors in favour of disclosure.

[105] In the first section of this Report I referred to the argument made by the NLMA and many of the physicians, that the gross billings of physicians should not be disclosed because they are misleading and not an accurate representation of personal incomes, since they do not take into account the expenses involved in operating a medical practice.

[106] In *Merck Frosst* v. *Canada (Health)* 2012 SCC 3, at paragraph 224, the Supreme Court of Canada commented on the "misleading" argument, and noted that it defeats the purpose of the *Act:*

> *The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party:* [citations omitted] *If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.*

[107] In addition to the "misleading" argument, there were numerous other arguments made by the NLMA, or by FFS physicians themselves, that other sorts of harm could occur as a result of disclosure of the billing information. Some of the common ones were:

- release of of physicians' billings would lead to disparities in physician specialties. Publishing the large gap of incomes between family medicine and specialists will drive physician graduates away from family medicine;

- release of FFS billings would harm the ability of physicians to negotiate salaries with their clinic employees, or could create a bad working environment;

- release would be detrimental to potential physicians who are considering Newfoundland and Labrador as a place to relocate;

- the third party has a therapeutic relationship with clients and revealing income could interfere with that relationship;

- the third party lives in a small community and if the amount of billings were known there would be a risk of being the target of theft, vandalism and physical harm;

- release of the requested information would provide opportunity for public misunderstanding, or may damage the third party's reputation with the general public;

- release would put the third party and their family in danger when travelling back to their home country.

[108] While I have no doubt that the concerns raised by these individuals are sincerely felt, the problem is that there was little or no evidence provided to support the arguments that were made. The *ATIPPA, 2015* places the burden of proving that an exception applies on the party relying on it, and neither the Department, the NMLA nor the individual physicians have succeeded in meeting the test. In the absence of clear and convincing evidence, it is impossible to conclude, simply on the basis of expressed concerns, that there is a risk of harm sufficient to outweigh the factors in favour of disclosure.

[109] There was, in addition, an argument that each of the different elements of the information in the requested record is, separately, personal information to which section 40 applies. I do not agree.

[110] Physicians' names along with their specialties cannot be considered to be private information. The provision of professional services in the practice of medicine is a public activity in Canada. It would be impossible for all sorts of reasons, including accountability, for a physician to practice medicine anonymously. In practice, every physician's name, specialty, certifications and so on are an essential part of their professional persona, as well as being published in the register of physicians maintained by the College of Physicians and Surgeons. The disclosure of a list of names plus specialties could not constitute an unreasonable invasion of privacy.

[111] A physician's provider number is a unique identifier, but it is of no actual use to anyone else. Its only function is as an internal MCP code, to assign payments to the right account. If necessary, like an MCP number or a credit card number, it can be changed. Disclosure of a physician's provider number could not constitute an unreasonable invasion of privacy.

[112] The NLMA has argued that even if disclosure were permitted by paragraph 40(2)(f), paragraph 40(4)(g) must simultaneously be complied with, to prohibit disclosure of the billing information along with the physician's name. That provision reads:

> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where*
>
> *. . .*
>
> *(g) the personal information consists of the third party's name where*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party;*
>
> *. . .*

[113] The short answer is that in the step by step analysis required by section 40, once the information in question has been deemed not to be an unreasonable invasion of privacy under subsection 40(2) that is the end of the process. The analysis simply does not get to the consideration of subsection 40(4).

[114] If, however, the information does not fall into subsection 40(2), it is then necessary to investigate whether the information falls into subsection 40(4). If it does, the next step is to conduct the balancing of factors under subsection 40(5) in order to evaluate whether the presumption in subsection 40(4) has been rebutted.

[115] In the present case, however, I have concluded, above, that the other information appearing in the record along with the individuals' names is not personal information. Therefore the presumption in paragraph 40(4)(g) has no application, and it is not necessary to conduct the subsection 40(5) analysis.

[116] Finally, the issue of whether harm is likely to result from the disclosure is best evaluated in the context of the evidence from actual experience. In both British Columbia and Manitoba, physicians' billings (and in several other provinces, salaried physicians' incomes) have been disclosed for many years. In Manitoba, physician billing information is disclosed in compliance with the *Public Sector Compensation Disclosure Act*, which has been in force since 1996, rather than through their access to information statute. Similarly, in British Columbia, physician billing is disclosed in compliance with the *Financial Information Act*, in force since 1996.

[117] "Doctors BC", the British Columbia equivalent of the NLMA, has gone on record on its website as supporting the disclosure of physicians' billings, with the caution that that people must be aware what the raw numbers mean. In Manitoba, a cursory search of online newspaper articles over a period of years leads to the conclusion that, while the annual disclosures are viewed with interest, most people do in fact understand the difference between aggregate billings and income after expenses. It would appear that these annual disclosures take place without any evidence of the sort of harm predicted by the submissions from the FFS physicians and the NMLA. This further undermines all of the harm arguments in relation to the disclosure of names and billings.

[118] Taking all of these considerations into account, and after a review of all of the submissions made by both the NLMA and individual physicians, I have concluded that none of the parties has provided sufficient evidence of a reasonable likelihood of harm. Therefore, under the analysis required by subsection 40(5), the requested information should be disclosed.

VI CONCLUSIONS

[119] In summary, with respect to Issue 1, I have concluded that the fee-for-service physicians' billing information does not constitute personal information, and therefore cannot be withheld under section 40.

[120] With respect to Issue 2, I have concluded, in the alternative, that even if the information in the requested records is considered to be personal information, the fee for service physicians are included in the definition of "employee" in subsection 2(i). The requested information is therefore deemed not to be an unreasonable invasion of privacy by the operation of subsection 40(2) and must be disclosed.

[121] With respect to issue 3, I have concluded, in the further alternative that since none of the parties has provided sufficient evidence of the reasonable likelihood of harm under the analysis required by subsection 40(5), the requested information should be disclosed.

VII RECOMMENDATIONS

[122] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Health and Community Services disclose the requested records to the Applicant.

[123] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Health and Community Services must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[124] Please note that within 10 business days of receiving the decision of the Department of Health and Community Services under section 49, the Applicant or any Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA, 2015*.**

[125] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of September, 2016.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador