



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2022-009

June 24, 2022

Department of Health and Community Services

Summary:

The Complainant made an access to information request to the Department of Health and Community Services pursuant to the *Access to Information and Protection of Privacy Act, 2015* for records relating to the Premier's billings as a fee-for-service physician. The Department declined to provide the records, relying on its yearly proactive disclosure of all fee-for-service physician billings. The Complainant disagreed with this decision and made a complaint to this Office. The Commissioner determined that section 22 (Published material) did not apply, and recommended the release of the records.

Statutes Cited:

[*Access to Information and Protection of Privacy Act, 2015*](#), SNL 2015, c. A-1.2, sections 2, 20, and 22.

I BACKGROUND

- [1] On March 9, 2022 the Complainant made an access to information request to the Department of Health and Community Services (the “Department”) for the following records:

An updated version of HCS-401-2021, covering August 19, 2020 to present

- [2] In HCS-401-2021 the requester sought:

A copy of all billings made by Dr. Andrew Furey to MCP from August 19, 2020 to present. This includes the date, the billing code used and the common name, and the amount that was paid

- [3] HCS-401-2021 was also the subject of a complaint to this Office and was eventually resolved informally when the Department agreed to provide the records.
- [4] In response to the Complainant’s March 9, 2022 request, the Department refused to provide the information, citing the Department’s yearly proactive disclosure of fee-for-service physician billings and referencing section 20(5) of *ATIPPA, 2015*.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [6] The Department submits that it is not required to provide the requested records to the Complainant because the Department, on an annual basis, proactively publishes the information.
- [7] It also claims that in order to provide the Complainant with the requested information, records would have to be created, as currently the information only exists as “raw data”. It also argues that creation of such records would unreasonably interfere with the operations of the Department under section 20(5) of the Act.

[8] The Department also submits that the records in its custody or control may not be complete as fee-for-service physicians have 90 days from the date of the service to submit their billings.

III COMPLAINANT'S POSITION

[9] The Complainant submits that they made a request for records in the custody or control of the Department, that the Department has previously provided similar records, and that the information published by the Department is insufficient to respond to their request.

IV ISSUES

[10] The several issues to be addressed in this Report are:

- a. Is there a difference between “raw data” and records with respect to the application of *ATIPPA, 2015*?
- b. Can section 20 be used to deny access to records, or is it limited to the format in which records are released? Accordingly, is this an appropriate use of the section in this circumstance?
- c. Can the Department refuse to release records that are subject to an annual proactive disclosure?

V DECISION

[11] The Department has argued that the requested records only exist as “raw data”, that they are contained in a number of electronic databases, and that this does not constitute a record. The Act defines a record as:

(y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

[12] The definition is very broad and includes information in “any form” that includes “raw data”. While providing the requested information organized in a table or some other readily

accessible format (as was done by the Department in response to the previous request) might be ideal, it is not required. A potential solution would be to provide screen shots of the raw data, and this would be sufficient to fulfill the Department's duties under the Act.

[13] The Act also includes a definition of "data set" which is:

- (g) *"dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection*
- (i) *has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,*
 - (ii) *is factual information*
 - (A) *which is not the product of analysis or interpretation other than calculation, and*
 - (B) *to which section 13 of the Statistics Agency Act does not apply, and*
 - (iii) *remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;*

[14] The Act specifically notes that datasets are records and there is no specific exclusion for them.

[15] This leads into the Department's argument under section 20. It argues that section 20 allows for a refusal to provide records on the basis that it would unreasonably interfere with Departmental operations. Section 20 states:

Provision of information

20. (1) *Where the head of a public body informs an applicant under section 17 that access to a record or part of a record is granted, he or she shall*
- (a) *give the applicant a copy of the record or part of it, where the applicant requested a copy and the record can reasonably be reproduced; or*
 - (b) *permit the applicant to examine the record or part of it, where the applicant requested to examine a record or where the record cannot be reasonably reproduced.*

- (2) *Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where*
- (a) *it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
 - (b) *producing it would not interfere unreasonably with the operations of the public body.*
- (3) *Where the requested information is information in electronic form that is, or forms part of, a dataset in the custody or under the control of a public body, the head of the public body shall produce the information for the applicant in an electronic form that is capable of re-use where*
- (a) *it can be produced using the normal computer hardware and software and technical expertise of the public body;*
 - (b) *producing it would not interfere unreasonably with the operations of the public body; and*
 - (c) *it is reasonably practicable to do so.*
- (4) *Where information that is, or forms part of, a dataset is produced, the head of the public body shall make it available for re-use in accordance with the terms of a licence that may be applicable to the dataset.*
- (5) *Where a record exists, but not in the form requested by the applicant, the head of the public body may, in consultation with the applicant, create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.*

[16] The Department's assertion that section 20 can be used to refuse to provide access to a record is a misinterpretation of the section. Section 20 specifically deals with the format in which the records are to be provided, and is not an exception to access. Subsection 20(3)(b) speaks about information that exists electronically and forms part of a data set. It does not exclude that information from release, rather it allows for the production of records in an alternate format, when providing access to the record in electronic form for reuse would be simpler or less costly to the public body. Additionally, subsection 20(5) allows for the creation of records in alternative formats when required, it does not allow a public body to withhold records because of their format.

[17] If the Department was of the view that disclosing the requested information would unreasonably interfere with its operations, it had the option to apply to the Commissioner for approval to disregard the request, in accordance with section 21(1)(a). The Department did not provide evidence of having considered or made such an application.

[18] The Department has also argued that the information may not be complete, as fee-for-service physicians have 90 days from the date the service was provided to submit their billings. Additionally, they note that billings can be submitted in batches that may span fiscal years. These arguments do not provide justification for the Department's refusal to provide the requested records to the Complainant. Any billings that fall outside the date range specified by the Complainant are not responsive and any billings not yet provided are simply not in the Department's custody or control. The Department is obliged to provide all responsive records in its custody and control, even if there is a possibility that the information is incomplete. Furthermore, the Department is not prevented from providing an explanation along with the records, outlining any potential limitations on the accuracy of the records.

[19] Finally, the Department has argued that it is not required to release information that is already published. While sections 22(1) and (2) of *ATIPPA, 2015* allow a public body to refuse to provide published material or soon to be published material, it is tempered by section 22(3) which says that if material is not published within 30 business days after the request, then it cannot be withheld under the section.

[20] The information currently published online covers April 1, 2020 to March 31, 2021. The complainant is seeking information from December 16, 2021 to March 9, 2022 in the present request. Presently, the Department has still not yet published the requested information, and it has been more than 30 days since the request was made. Therefore, the Department is not entitled to rely on section 22 to refuse to provide the information.

[21] As well, the published records are an aggregate of all billings for each fiscal year, while the Complainant is seeking information for a specific time-period. Therefore, even if the April 1, 2021 to March 31, 2022 information were available, the Complainant's request for billings from December 16, 2021 to March 9, 2022 is for something entirely different and they would

be entitled to request – and the Department would be obligated to provide – such information notwithstanding that data for the full fiscal year is already available.

VI RECOMMENDATIONS

[22] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Health and Community Services release the requested information within 10 business days of receipt of this Report.

[23] As set out in section 49(1)(b) of *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.

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of June 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador