



Report of Findings: 22/23-AP-067
Department of Health
September 15, 2023

Citation: New Brunswick (Health) (Re), 2023 NBOMBUD 5

Summary: The Applicant, who was one of the individuals identified as part of a cluster with a potential neurological syndrome of unknown cause investigated by Public Health, made an access request to the Department of Health for their own personal information. The Applicant was seeking the names of the oversight committee members who examined their medical files and other information related to the oversight committee's review. The Department provided the Applicant with a response and explained that the names of the neurologists on the oversight committee had been previously provided. When the matter escalated for formal review, the only outstanding issue was the question of the Applicant's access rights to the names of the two neurologists who examined their medical file and whether they were protected under paragraphs 21(2)(c), 21(2)(e), 28(1)(a), and/or 28(1)(c) of the *Right to Information and Protection of Privacy Act*.

The Ombud found that the Department did not meet its burden of proof and recommended that it disclose the names.

Statutes Considered: [Right to Information and Protection of Privacy Act](#), SNB 2009, c. R-10.6, paragraphs 21(2)(c), 21(2)(e), 28(1)(a), and/or 28(1)(c).

INTRODUCTION

[1] The Applicant, who was one of the individuals identified as part of a cluster involving a potential neurological syndrome of unknown cause investigated by Public Health, made an access request under the *Right to Information and Protection of Privacy Act* (“the Act”) to the Department of Health for their own personal information. The Applicant was seeking the names of the oversight committee members who examined their medical files and other information related to the oversight committee’s review.

[2] The Department responded to each point of the Applicant’s request. As to the Applicant’s request for the names of the committee members who reviewed their own medical files, the Department explained that this had already been provided in response to a previous access request.

[3] The Applicant was not satisfied with the Department’s response and filed a complaint with this office. The Applicant noted that the Department’s previous response provided the names of all committee members, but not the names of the two individuals who examined their own medical files.

[4] Efforts to informally resolve this complaint resulted in most issues being resolved, except for the question of the Applicant’s access rights to the names of the committee members who examined their medical files, which led me to conduct a formal investigation under subsection 68(3) of the Act.

CONTEXT

[5] The backdrop to this complaint involves a public health investigation led by Public Health New Brunswick into a cluster of patients with a potential neurological syndrome of unknown cause.

[6] Public Health New Brunswick announced the creation of an oversight committee to assist with the investigation in June 2021. The oversight committee consisted of nine individuals. The committee was co-chaired by two senior officials from Horizon Health Network and Vitalité Health Network, and the remaining members were six neurologists and one member from Public Health. The oversight committee published a report in February 2022¹ in which the names and credentials of all oversight committee members were made public.

¹ Public Health New Brunswick, *Investigation into a Potential Neurological Syndrome of Unknown Cause: Final Report* (February 24, 2022), at p. 10 <https://www2.gnb.ca/content/dam/gnb/Departments/h-s/neuro/final-report.pdf>

[7] The oversight committee's mandate and review of patient files is described in Public Health's *Investigation into a Potential Neurological Syndrome of Unknown Cause: Final Report* as follows:

On June 2, 2021, PHNB announced the creation of an independent oversight committee, which was tasked with providing peer review and expert oversight of the identified cases, ensuring due diligence and helping to determine if there were potential alternative diagnoses or if more investigation is indicated. This work involved, but was not limited to, a comprehensive review of clinical and diagnostic records and information.

...

Between August 2021 and February 2022, the Oversight Committee conducted full case reviews, including chart reviews and secondary reviews, for the 48 individuals identified as members of the cluster as of April 30, 2021. Individuals were identified based on clinical presentation as determined by the main referring neurologist. During the in-depth clinical reviews, cases were randomly allocated to pairs of neurologists, who reviewed independently and then presented and discussed their findings with the full committee consisting of six neurologists, co-chairs from HHN and VHN, and a Medical Officer of Health acting as a liaison with PHNB. Once the reviews were completed, the Oversight Committee sent letters to the individuals' primary care physicians with its conclusions around whether an individual should be included or excluded from the cluster and to provide recommendations for follow-up testing.²

[8] At the conclusion of its work, the oversight committee sent letters to the individual patients in addition to the patients' primary care physicians. As will be explained further below, the letters sent by the oversight committee were signed by the two co-chairs and did not identify which neurologists reviewed each individual patient's medical files.

[9] The oversight committee also presented its findings to the Department, unanimously finding that none of the patient cases fulfilled the full criteria of the case definition.³

ISSUES

[10] The only outstanding issue is whether the Department properly refused access to the names of the two members of the oversight committee who reviewed the Applicant's medical files.

[11] While the Department's initial response to the Applicant did not cite any exceptions to disclosure to refuse access, as the names of the oversight committee members are publicly known, during the course of this investigation, the Department maintained that the names of the committee members who reviewed individual medical

² *Ibid*

³ *Ibid*, at p. 11.

files were protected from disclosure under paragraphs 21(2)(c) and 21(2)(e) (unreasonable invasion of third party privacy) and paragraphs 28(1)(a) and (c) (disclosure harmful to an individual or to public safety).

APPLICANT'S REPRESENTATIONS

[12] The Applicant's position is that they have a lawful right of access to the names of the neurologists who reviewed their own medical files. The Applicant also submitted that the neurologists wrote reports and suggested alternative findings and recommendations and that the Applicant has questions about these conclusions that they would like to address to the neurologists.

DEPARTMENT'S REPRESENTATIONS

[13] In summary, the Department's position is that the Applicant has no right of access to the reviewing neurologists' names as they are protected under paragraphs 21(2)(c) and 21(2)(e) (unreasonable invasion of third party privacy), as well as paragraphs 28(1)(a), and 28(1)(c) (disclosure harmful to an individual or to public safety). While the Department did not cite these exceptions in its initial response, it raised them in its subsequent submissions during the investigation process. Details of the Department's representations will be set out in further detail below.

DISCUSSION

Section 21: Unreasonable invasion of third-party privacy

[14] The relevant portions of section 21 are:

21(1) The head of a public body shall refuse to disclose information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy.

21(2) A disclosure of personal information shall be deemed to be an unreasonable invasion of the third party's privacy if

...

(c) disclosure could reasonably be expected to reveal the identity of a third party who has provided information in confidence to a public body for the purposes of law enforcement or the administration of an Act of the Legislature or an Act of the Parliament of Canada,

...

(e) the personal information relates to the third party's employment, occupational or educational history,

[15] This is a mandatory exception to disclosure, which means that public bodies are prohibited from disclosing information where doing so would unreasonably invade a

third party's privacy. Subsection 21(2) of the *Act* sets out certain circumstances where disclosure is deemed to be an unreasonable invasion of privacy. Subsection 21(3) also must be considered, as it deems the disclosure of certain kinds of personal information to not be an unreasonable invasion of privacy, in which case the personal information in question cannot be protected on the grounds of privacy.

[16] To meet the requirements of this exception, a public body must demonstrate that the information in question is personal information about a third party and that disclosure would be an unreasonable invasion of their privacy.

Department's submissions

[17] The Department is of the view that the neurologists' names in this context constitutes their personal information and that the neurologists agreed to review individual patient files on an understanding that their names would remain confidential. The Department submitted that disclosing their names would reveal their identity as individuals who provided information in confidence to the Department as part an investigation conducted for the purpose of the administration of the *Public Health Act*.

[18] In support of its position, while the Department acknowledged that there was no express confidentiality agreement with the neurologists, it provided an excerpt of the oversight committee's meeting minutes documenting its decision that the letters containing its findings that would be sent to patients and their primary care physicians would be sent under the signature of the two co-chairs. The Department submitted that this implies that the individual neurologists who reviewed the patient medical files would not be named and that it was the neurologists' understanding that their identities in conducting the patient medical file reviews would be kept confidential and not disclosed to the patients.

[19] The Department also submitted that disclosure of the neurologists' names would disclose personal information relating to their employment and education history.

Analysis and findings

[20] I have considered the parties' representations and the exceptions to disclosure claimed by the Department. As I will explain in more detail below, I do not find that the Department has met the burden of proof to demonstrate that it properly relied on paragraphs 21(2)(c) or (e) of the *Act* to refuse access to the neurologists' name.

[21] In the present circumstances, the names of the six neurologists who sat on the oversight committee are already publicly known; however, the Applicant wants to know which two of these six neurologists reviewed their medical files as part of the Public Health investigation.

[22] The Department submitted that the names of the two neurologists in this context is their personal information as defined in section 1 of the *Act*, which means “recorded information about an identifiable individual” and includes an individual’s name.

[23] At first glance, it may not appear that the disclosure of the neurologists’ names in this context would reveal anything about the neurologists in their personal capacity, given that the names of all six committee members are already publicly known and the neurologists were engaged in their professional capacity to assist with a public health investigation. That being said, I agree that their names do constitute personal information and thus the question of disclosure is governed by whether doing so would be an unreasonable invasion of their privacy.

[24] I have considered the Department’s reliance on paragraph 21(2)(c), and while I understand why it looked to this exception, I do not agree that the Department has met the test set out in this paragraph. I agree that the neurologists in this case are third parties, as they were engaged to be independent experts on the oversight committee, and that their work in this capacity included the sharing of their findings and recommendations with the Department for the purposes of the administration of the *Public Health Act*.

[25] That being said, I do not find that the Department has presented sufficient evidence to establish that the neurologists provided information to the Department on an understanding that their identities would be kept confidential. The fact that the names of the six neurologists on the oversight committee are a matter of public record suggests otherwise. Moreover, we were not provided with any documentation indicating that confidentiality provisions were established from the outset of the oversight committee’s work.

[26] As proof of the neurologists’ expectation of confidentiality with respect to their identities, the Department relied on meeting minutes dated in November 2021 that document the committee’s decision to issue letters with the results of its findings to patients and their primary care physicians. The excerpt of the minutes in question state that it had a “high level discussion around letters to families and to physicians” as well as a discussion “on who would sign off on letters”. The documented actions taken indicate that the decision was made that “letters would be sent under the signature of the co-chairs of the committee.”

[27] The information recorded in the meeting minutes do not provide a detailed account of the oversight committee’s full discussion or what considerations the oversight committee may have discussed in arriving at the decision to have the co-chairs sign off on the letters. I cannot find that the minutes constitute clear evidence that the neurologists were advised that their identity was to be kept confidential and their names would not be disclosed to patients.

[28] The Department also submitted that the letter sent to the Applicant by the oversight committee advising them of the outcome of its review was consistent with the decision to keep the reviewing neurologists' names confidential. While the letter provided to the Applicant was consistent with the oversight committee's decision to have the co-chairs sign on behalf of the whole committee, I cannot conclude that this is clear evidence to support the assertion of confidentiality.

[29] As this is the case, I do not find that the Department can rely on paragraph 21(2)(c) to refuse access to the names.

[30] As for the Department's position that the names are protected under paragraph 21(2)(e), I cannot find that this exception applies. It is publicly known that all six neurologists were engaged to assist with the Public Health investigation based on their professional credentials. I do not find that disclosing their names to the Applicant would reveal information about their employment or educational history that is not already publicly known.

[31] For all the above reasons, I do not find that the Department has presented sufficient evidence to demonstrate that the names merit protection from disclosure under paragraphs 21(2)(c) or (e) of the *Act*.

[32] Finally, even if I were to find that the test under paragraph 21(2) was met, I would have to turn my attention to paragraph 21(3) of the Act to determine if any of the factors therein would nonetheless permit the disclosure of the neurologists' personal information (i.e. their names). Though I will not fully examine this analysis here as it is moot, on the face of the information before me, it appears likely that some of the circumstances identified in paragraph 21(3)(b) could be considered and may have warranted disclosure in the present case.

Section 28: Disclosure harmful to an individual or to public safety

[33] The relevant portions of section 28 are:

28(1) The head of a public body may refuse to disclose to an applicant information, including personal information about that person, if disclosure could reasonably be expected to

(a) threaten or harm the mental or physical health or safety of another person,

...

(c) threaten public safety.

[34] This is a discretionary exception to disclosure, which means that a public body must show that the information in question falls within its scope and that it exercised its discretion in deciding to refuse access.

[35] To establish that information falls within the scope of this exception, the public body must demonstrate a reasonable expectation of probable harm. To establish this, a public body must provide evidence well beyond or considerably above a mere possibility of harm. The public body must also show a direct link between the disclosure of the information and the contemplated harm.

[36] In addition to demonstrating that the exception applies, a public body must also show that it exercised its discretion in arriving at the decision to refuse access by considering relevant factors.

Department's submissions

[37] The Department raised concerns about the potential impact on the neurologists if their names were to be disclosed to the Applicant. The Department submitted that the disclosure of the names of the neurologists who reviewed specific patient files could reasonably be expected to harm their mental or physical health. The Department is concerned that releasing their names could potentially lead to them becoming the targets of harassment.

[38] The Department also submitted that if it were to disclose the neurologists' names in this context, health care professionals would be extremely hesitant to work with public health initiatives in the future if they felt collaboration would expose them to potential harassment. The Department stated that it would be impossible to find health care professionals to review public health issues in the future, which would impact the health and safety of New Brunswick residents and threaten public safety.

[39] For these reasons, the Department is of the view that the names are protected under paragraphs 28(1)(a) and (c) of the *Act*.

Analysis and findings

[40] I have carefully considered the Department's position and concerns with disclosure in these circumstances.

[41] I am aware that the oversight committee's findings garnered much media attention, as well as activity on social media sites, some of which was negative towards the investigation and those involved. I am also aware of the alarming trend of some individuals verbally harassing or attacking public officials in person and online when they disagree with government decisions. This is unacceptable behaviour which, quite unfortunately, is becoming more common place for many in the public eye.

[42] With this in mind, I considered the evidence provided by the Department in support of its position. In this particular case, I cannot find that it has been sufficiently demonstrated that disclosure to the Applicant could reasonably be expected to threaten or harm the physical health or safety of the neurologists, or to threaten public safety by

undermining the Department's ability to recruit health care professionals to assist in public health investigations.

[43] While there may be a concern that some of the patients who were part of the Public Health investigation or individuals close to them might be expected to engage in such behaviours, this analysis must be done on a case-by-case consideration.

[44] In the present case, the Applicant has expressed a desire to know the names of the neurologists as they have questions about the conclusions made on their own medical file. However, the Department did not present any evidence to demonstrate specific concerns related to this particular Applicant's actions.

[45] While I appreciate and understand the Department's concerns, I can only make a decision based on the evidence before me, and under the circumstances, I do not find that it has been demonstrated that disclosure of the names to the Applicant in this case could reasonably be expected to give rise to the harms contemplated by paragraphs 28(1)(a) and (c). A determination under this provision must be based on more than a mere possibility of harm. The public body must also show a direct link between the disclosure of the information and the contemplated harm.

[46] In arriving at this finding, I note that my decision on this point is specific to the facts and evidence presented in this particular case. If more detailed or specific facts or evidence were available to better support a concern of harm that could arise from disclosure to a particular individual, my findings may have been different.

RECOMMENDATION

[47] Based on the above findings, I recommend under section 73(1)(a)(i)(A) of the *Act* that the Department disclose the names of the two neurologists that reviewed the Applicant's medical files to the Applicant.

[48] As set out in section 74 of the *Act*, the Department must give written notice of its decision with respect to these recommendations to the Applicant and this office within 20 business days of receipt of this Report of Findings.

This Report issued in Fredericton, New Brunswick this 15th day of September, 2023.

Marie-France Pelletier
Ombud for New Brunswick