



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-919

Appeals P-9400746 and P-9400758

Criminal Injuries Compensation Board



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NATURE OF THE APPEALS:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The Criminal Injuries Compensation Board (the Board) received a request for copies of the applications filed under the Compensation for Victims of Crime Act (the CVCA), by six named individuals (the claimants). The claims arose out of the death of a named individual (the deceased) on June 16, 1991 and was made by members of the deceased's family (the family). The requesters in this appeal are two defendants in a civil action brought by the family for damages arising from the death of the deceased.

The request was subsequently clarified to include a copy of the claims filed and the disposition of the Board regarding the matter. The Board located three records responsive to the request. Record 1 is a three page Interim Order issued by the Board. Records 2 and 3 are copies of a four page application which had been filed individually by two of the named family members. The Board denied access to these three records on the basis of section 21(1) of the Act (invasion of privacy).

The requesters appealed the Board's decision. Appeal Number P-9400746 was opened with respect to Record 3 and P-9400758 was opened with respect to Records 1 and 2.

During mediation, the Board agreed to release the amount awarded to the claimants in its interim order. The Board continues to exempt Record 1, however, pursuant to section 21(1). Because all three records arise from the same incident and both appeals arise from the same access request, I will dispose of the issues relating to both appeals in this order.

A Notice of Inquiry was provided to the Board and the appellants. The two claimants and two other individuals referred to in the records were notified as affected parties. Representations were received from the Board, the appellants and the two claimants.

Because it appeared that the records at issue could contain the personal information of one of the appellants, the Commissioner's office also raised the possible application of section 49(b) (invasion of privacy).

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual. I have reviewed the records and I find that the Interim Order (Record 1) contains the personal information of one of the claimants and of the deceased.

Records 2 and 3 are the two applications for compensation. Both records consist of an eleven-part form that is filled out by the claimants and contains particulars about the claimants, the deceased, the circumstances of death and the police report, which includes identification of the offender(s). Claimants are asked to include on the form, particulars of expenses arising from the death, loss of income and support and any benefits received or to be received as a result of the death. I find that Records 2 and 3 contain primarily the personal information of the claimants and the deceased. Both of these records also contain a reference to one of the appellants. Accordingly, Records 2 and 3 contain the personal information of each claimant respectively, the deceased, and one appellant. Records 2 and 3 do not contain the personal information of the other appellant.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Board determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Board has the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits an institution from releasing this information.

In both these situations, sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the Board must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the Board states that the following presumptions apply to the records or parts of the records:

- medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation - section 21(3)(a) (Record 3, in part)
- describes an individual's finances - 21(3)(f) (Records 1, 2 and 3)
- indicates the individual's racial or ethnic origin - section 21(3)(h) (Records 2 and 3, in part).

The Board further states that there are several factors under section 21(2) which favour non-disclosure of the personal information in the records:

- the information is highly sensitive - section 21(2)(f) (Records 1, 2 and 3)
- the information is unlikely to be accurate or reliable - section 21(2)(g) (Records 2 and 3, in part)
- disclosure may unfairly damage the reputation of individuals referred to in the records - section 21(2)(i) (Records 2 and 3, in part).

The appellants claim the applicability of section 21(2)(d) as a factor weighing in favour of disclosure of the records. They indicate that the claimants (who are the plaintiffs in the action against them) have applied to the court for an extension of the limitation period under the Family Law Act, citing the proceeding before the Board as one circumstance excusing delay. They submit that by making the Board proceedings relevant to the lawsuit, the family has waived any claim to privacy under the Act. They argue further that any compensation paid to the family is relevant to an assessment of damages in the civil action. Finally, they state that the Board documents are admissible in court and may be compelled.

The appellants rely on an article written by a legal advisor with Management Board Secretariat, Freedom of information and Privacy Branch, Ministry of the Attorney General, entitled "The impact of access and privacy legislation on the civil litigation process", in support of their position. In my view, this article simply provides some guidance to lawyers in the field and cannot support the appellants' arguments in the particulars of this appeal in any way.

The two claimants, who submitted Records 2 and 3 to the Board, submit that disclosure of the records would constitute an unjustified invasion of their personal privacy as the records contain sensitive information pertaining to financial and medical matters. They indicate that Records 2 and 3 also contain their home address and phone number, social insurance number and other identifying information personal to them. The claimants also acknowledge that some of the information in the records could be obtained through the civil litigation discovery process in accordance with the safeguards that are built into that process, but which are not available under this Act.

I am unable to accept the appellants' position that by making the Board proceedings relevant to the lawsuit, the family has waived any claim to privacy. One of the primary purposes of the Act is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)). In my view, the principles of the Act are not compatible with the concept of waiver with respect to its privacy protection provisions. Rather, the Act states, in section 21(1)(a) that:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

In this case, the claimants have expressly objected to the disclosure of their personal information in the context of this access request.

Section 21(2) of the Act identifies some factors that may be relevant in determining whether the disclosure of information would constitute an unjustified invasion of personal privacy, however, the list found in 21(2) is not exhaustive. In my view, the appellants' argument may more properly be considered as an unlisted factor in this determination. Previous orders of the Commissioner's office have recognized that, in some circumstances there exists, what might be referred to as, a diminished expectation of privacy with respect to personal information (Orders M-50 and M-129).

There may be an occasion where, by the actions of an individual or by the situation, an expectation of privacy cannot reasonably be held. The appellants have not, however, established that, in the circumstances of this appeal, the claimants had or should have had a diminished expectation of personal privacy. Accordingly, I find that this unlisted factor has no application.

With respect to the remaining issues, I have carefully considered the representations of the parties and have reviewed the records at issue, and I make the following findings:

- (1) Records 2 and 3 contain a reference to the claimants' racial and/or ethnic origin. I find that disclosure of this information would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(h).
- (2) Records 2 and 3 also contain references to the claimants' financial situation and I find that disclosure of this information would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(f).
- (3) The Board indicates that certain provisions of the CVCA set out the circumstances in which an Interim Order will be issued. The Board argues that these circumstances, combined with the fact that an interim award was made would reveal financial information of the claimant. Keeping in mind that the Board has already disclosed to the appellants the amount of the award, I find that the above argument is not sufficient to trigger the application of section 21(3)(f) with respect to the remaining information in the record. Accordingly, I find that this section does not apply to Record 1.
- (4) Record 3 contains a reference to an individual's medical, psychiatric or psychological condition. Disclosure of this information would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(a).
- (5) In previous orders of the Commissioner's office it has been determined that in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Orders P-312, P-375 and P-387]

Records 2 and 3 contain extensive personal information pertaining to the claimants and the deceased and only peripherally contain personal information of one of the appellants. The information pertains to proceedings before the Board. The appellants have presented no evidence to support their claim that the personal information in these two records is necessary to ensure a fair determination of their rights with respect to the matter before the Board. Nor is there sufficient evidence to support their argument that disclosure of the personal information in Records 2 and 3 is necessary to ensure a fair determination of their rights with respect to the civil action. I therefore find that section 21(2)(d) does not apply to the personal information in Records 2 and 3.

With respect to Record 1, however, the appellants have argued that compensation paid to the claimants under the CVCA is relevant to the assessment of damages in the civil action. They argue further that the Board is subrogated to the rights of the claimants for any monies paid. There is no evidence presented that the Board has taken any action against the appellants to reclaim any monies paid, or that this is foreseeable. I find, however, notwithstanding that the appellants have been provided with the interim amount, the information contained in Record 1 in its totality does have direct bearing on the civil action as between the parties. I find, therefore, that section 21(2)(d) is a factor which weighs in favour of disclosure of Record 1.

- (6) The personal information of the claimants and other affected persons referred to in the records is highly sensitive in nature within the meaning of section 21(2)(f) of the Act. This factor weighs in favour of non-disclosure of the personal information.
- (7) I am not satisfied that the information contained in Records 2 or 3 is unlikely to be inaccurate or reliable. Nor am I satisfied that disclosure of the information would unfairly damage the reputation of the individuals referred to in the records. Accordingly, sections 21(2)(g) and (i) do not apply.

- (8) Section 21(4) does not pertain to any of the information in the records. Nor is there a compelling public interest in disclosure which outweighs the purpose of the section 21 exemption. Therefore, section 23 does not apply in the circumstances of this appeal.
- (9) The personal information contained in Records 2 and 3 pertaining to one of the appellants is intertwined with that of other individuals referred to in the records such that disclosure of it would reveal personal information of the other individuals.

To summarize, I find that the presumptions in sections 21(3)(a), (f) and (h) apply to portions of Records 2 and 3. I further find that the information contained in Records 2 and 3 is highly sensitive pursuant to section 21(2)(f). I have found that no factors favouring disclosure of these two records have been established. Accordingly, disclosure of Records 2 and 3 would result in an unjustified invasion of personal privacy and sections 21(1) and 49(b) of the Act apply, respectively, to exempt these records from disclosure.

With respect to Record 1, I find that there are no factors which weigh in favour of privacy protection and that section 21(2)(d), which weighs in favour of disclosure, applies. Accordingly, this record should be disclosed to the appellants.

ORDER:

- 1. I uphold the Board's decision to exempt Records 2 and 3 from disclosure.
- 2. I order the Board to disclose Record 1 to the appellants within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
- 3. In order to verify compliance with Provision 2, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellants in accordance with that provision.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ April 27, 1995