



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1136

Appeal P-9500483

Ministry of the Attorney General



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NATURE OF THE APPEAL:

A request was made to the Ministry of the Attorney General (the Ministry) for access under the Freedom of Information and Protection of Privacy Act (the Act) to the Criminal Injuries Compensation Board's file relating to allegations against the requester. The Ministry denied access to the approximately 150 pages found to be responsive to the request. The requester appealed the denial of access.

During mediation, the requester (now the appellant), represented by counsel, narrowed the scope of his request to the following pages of the record: pages 5, 7, 8, 22-29, 41-45, 56-58, 63-67, 79-86, 88-96, 101-107, 110-116, 118-123, 125-132 and 134-148. These pages are listed and described in the index provided by the Ministry to the appellant.

The record relates to an application for compensation to the Criminal Injuries Compensation Board (the Board) by the affected person for alleged sexual abuse. The affected person alleges that this sexual assault was perpetrated on her from early childhood by her father, the appellant in this appeal. Counsel for the appellant indicates that the appellant was not notified by the Board and was not a party to the Board's proceedings. Counsel further states that his client is now facing a civil suit instituted by the affected person.

The Ministry denies access to the record on the basis that disclosure would constitute an unjustified invasion of another individual's personal privacy under sections 21(1) and 49(b) of the Act.

A Notice of Inquiry was sent by the Commissioner's office to the appellant, the affected person and the Ministry. Representations were received from all parties.

The Criminal Injuries Compensation Board (the Board) is listed as a separate institution under the Act, whose head is the Attorney General. The Ministry has confirmed that it acted on the Board's behalf in the processing of the request and the appeal and in making submissions to the Commissioner's office.

The Ministry has pointed out that pages 79-86 are duplicates of pages 89-96. I have reviewed the relevant pages and I agree. I will, therefore, not consider pages 79-86 as part of the record.

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 information relating to the medical, psychiatric or psychological history of 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 carefully reviewed the information in the record and I find that all the information in the record relates to the affected person, the appellant and other identifiable individuals. I find, therefore, that the record contains the personal information of these individuals.

Section 47(1) gives individuals a general right of access to their own personal information held by a government body. Section 49 lists 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 Ministry decides that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the appellant access to that information.

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 institution 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.

The Ministry submits that the presumptions contained in sections 21(3)(a), (b) and (f) apply to parts of the record. The Ministry states that parts of the record are also highly sensitive (section 21(2)(f)). The Ministry has provided detailed representation on the application of each of the presumptions and section 21(2)(f) to the various parts of the record.

The appellant submits that access to the information in the record is necessary for him to defend himself in the civil action (fair determination of rights - section 21(2)(d)). The appellant submits that the Ministry has improperly exercised its discretion in refusing access to the appellant's own personal information on that basis that the affected person has made her allegations a matter of public record by commencing legal proceedings.

The affected person has raised the application of sections 21(2)(f) and (h) of the Act to deny access to the record.

Sections 21(2)(d), (f) and (h) and sections 21(3)(a), (b) and (f) of the Act read as follows:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (f) the personal information is highly sensitive;

- (h) the personal information has been supplied by the individual to whom the information relates in confidence;
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
 - (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
 - (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
 - (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The Ministry states that some of the information on pages 5, 7 and 8 (which comprise part of the Board's order) indicate the amount of compensation received by the affected person and, therefore, these pages describe her financial history or activities (section 21(3)(f)). I do not agree. Pages 5 and 8 show the amounts awarded to the affected person. In my view, the compensation received by the affected person does not qualify as "financial history or activities" for the purposes of section 21(3)(f) of the Act.

The Ministry submits that the information on pages 5, 7, 8, 22-29, 41, 56-58, 63-67, 88-96, 101-107, 110-116, 134-143 and 144-148 contain personal information which relates to the affected person's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. These pages form part of medical reports, therapy invoices and statements by the affected person and other individuals. I have reviewed the information on the pages and I find that, with the exception of the dollar amounts on pages 5 and 8, the remaining information falls within the presumption in section 21(3)(a).

Pages 118-120 constitute a letter from the police to the Board; pages 121-123 contain a letter to the police and a questionnaire which has been completed by the police; pages 125-132 consist of a statement to the police. My review of these pages indicate that the information on these pages was provided by the police to the Board. The Ministry submits that the pages contain information that was compiled and is identifiable as part of an investigation into a possible violation of law (section 21(3)(b)). I accept that these pages contain information that was compiled by the police as part of an investigation into a possible violation of the Criminal Code and, therefore, falls within the presumption in section 21(3)(b) of the Act.

I find that none of the information on the pages that I have found to be exempt under sections 21(3)(a) and (b) falls under section 21(4) and the appellant has not raised the possible application of section 23 of the Act. As I have indicated previously, the relevance of a factor or a combination of factors under section 21(2) cannot be used to rebut the finding of a presumption under section 21(3) of the Act (Order M-170). Therefore, I find that disclosure of the personal information on pages 5, 7, 8, 22-29, 41, 56-58, 63-67, 88-96, 101-107, 110-116, 134-143 and

144-148 would constitute a presumed unjustified invasion of personal privacy and these pages are exempt from disclosure under section 49(b) of the Act. I have highlighted the portions of pages 5 and 8 which I have found do not qualify for exemption under the presumptions and I will consider them in my review below.

I will now consider the relevance of the factors raised by the parties to pages 42-45 and the highlighted portions of pages 5 and 8. Pages 42-45 consist of a statement by an identifiable individual and contain the personal information of the author and other identifiable individuals, including the affected person and the appellant.

The appellant states that disclosure is necessary for a fair determination of his rights (section 21(2)(d)). The appellant states that he was not notified of the affected person's application by the Board and was not a party in the Board's proceedings. The appellant states that the information is required to prepare a defence in the civil suit launched against him by the affected person. In this regard, the affected person points out that a civil action has been commenced and under the Rules of Civil Procedure, the appellant will be entitled to all relevant documentation in that process.

I find that section 21(2)(d) which weighs in favour of disclosure of pages 42-45 and the highlighted portions of pages 5 and 8, is relevant in the circumstances of this appeal.

With respect to section 21(2)(f), the Ministry states that the personal information in these pages is highly sensitive. The Ministry points out that the personal information relates to sexual abuse. This factor is also raised by the affected person who states that the information contains highly sensitive details of traumatic events which should not be disclosed. I find that the dollar amounts of the award on pages 5 and 8 are not highly sensitive. Given the nature of the record, I find that the remaining information can be properly characterized as "highly sensitive" and I find that section 21(2)(f) which weighs in favour of protection of privacy is a relevant consideration.

The affected person has also raised the possible application of section 21(2)(h) of the Act. The affected person states that the information sought was tendered to the Board in a private process and at a time when the alleged perpetrator was not notified of the hearing. The affected person points out that she made her application on the understanding that the information she provided would be protected. The affected person states that section 21(2)(h) is relevant as the circumstances in which the information was supplied to the Board and received by it gave rise to a reasonable expectation of confidence.

This position is reiterated by the Ministry which explains that at the time of the hearing it was the Board's policy not to notify (alleged) offenders, in the interests of protecting the safety and security of the applicants before the Board. This policy was amended in March 1995 and all alleged offenders are notified, where practicable. The Ministry also states that the Board's order was made under section 13(1) of the Compensation for Victims of Crime Act, which prohibits publication of any report of the evidence presented during the Board hearing and that the Board makes such an order where it considers it necessary.

The highlighted portions of pages 5 and 8 constitute the monetary award by the Board to the affected person and cannot be said to be "supplied" by the affected person to the Board for the

purposes of section 21(2)(h). However, I am satisfied based on the evidence before me that the remaining personal information was supplied in confidence and section 21(2)(h), which favours privacy, is relevant in the circumstances of this appeal.

The appellant also claims that he should not be denied access to the personal information when the affected person has made her allegations a matter of public record through the civil action. The appellant is implicitly submitting that the affected person's expectation of privacy is diminished by her actions vis a vis the civil suit. Previous orders of the Commissioner's office have considered a diminished expectation of privacy with respect to personal information as an unlisted factor under section 21(2) of the Act (Orders M-129 and P-919). These orders found that there may be an occasion where, by the action of an individual or by a situation, an expectation of privacy cannot reasonably be held. I agree with these findings and adopt them for the purposes of this appeal. However, in the circumstances of this appeal, the affected person has expressly objected to disclosure of the personal information and the appellant has not established that the affected person had or should have had a diminished expectation of personal privacy. Therefore, I find that this unlisted factor has no application.

I have reviewed the representations of the parties and considered the factors listed in section 21(2) of the Act together with all the relevant circumstances of this appeal. With respect to the highlighted portions of pages 5 and 8, I find that disclosure of this information is relevant to the fair determination of the appellant's rights and, therefore, section 21(2)(d) applies. Therefore, this information is not exempt from disclosure under section 49(b) of the Act and should be disclosed.

With respect to pages 42-45, I have found one factor in favour of disclosure and two factors which weigh in favour of protection of privacy. I have also considered all the relevant circumstances of this appeal and in doing so, I find that while section 21(2)(d) is relevant to the fair determination of rights of the appellant, on balance it does not outweigh the privacy interests of the victim and the other individuals identified in the pages under sections 21(2)(f) and (h). I find, therefore, that disclosure of the information would constitute an unjustified invasion of personal privacy and pages 42-45 are exempt under section 49(b) of the Act.

The appellant has stated that the Board has exercised improper use of discretion in denying access to his personal information when the affected person has filed a civil suit. I have reviewed the manner in which discretion was exercised by the head and I find nothing improper in this exercise.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of pages 5 and 8 which I have highlighted on the copy provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose the information to the appellant by April 5, 1996 but not earlier than April 1, 1996.

3. I uphold the Ministry's decision to deny access to the remaining information in the record.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the pages disclosed to the appellant pursuant to Provision 1.

Original signed by: _____ February 28, 1996
Mumtaz Jiwan
Inquiry Officer