Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1815

Appeal PA-990456-1

Criminal Injuries Compensation Board

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NATURE OF THE APPEAL:

The Criminal Injuries Compensation Board (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "a copy of the application and all other contents" of a file relating to a claim for compensation made to the Board by a named individual (the victim). The requester is alleged to have caused injury to the victim, and may be liable to reimburse the Board for any award of compensation made to the victim by the Board.

The Board provided partial access to portions of five pages of records. In so doing, the Board stated that it was satisfying the statutory requirements of disclosure pursuant to the Statutory Powers Procedure Act (the SPPA) and the Compensation for Victims of Crime Act (the CVCA), but made no reference to the decision-making requirements under the Act. The requester wrote to the Board asking it to reconsider the decision and provide him with full access to the records. The Ministry of the Attorney General responded on behalf of the Board, advising the requester that access to the five pages of records was denied, based on the exemptions found in sections 21 and 49(b) (invasion of privacy).

The requester, now the appellant, appealed the Board's decision.

During mediation of the appeal, the Board identified 122 additional pages of responsive records and issued a second decision, granting access to four pages in their entirety, and partial access to a fifth page. The remaining records were withheld in their entirety under the exemptions in sections 13(1) (advice and recommendations), 21(1) and 49(b) of the Act.

I sent a Notice of Inquiry initially to the Board and received representations in response. In its representations the Board withdrew the section 13(1) exemption claim, and also attached a copy of a third decision letter sent to the appellant, disclosing additional records. I then provided the appellant with a copy of the Notice of Inquiry, together with the Board's non-confidential representations, and received representations from him in response.

Pages 17, 26, 27, 28, 29, 30, 37, 49, 50 and 114-116 are duplicates of pages 10, 18, 19, 9, 10, 11, 36, 4, 4 and 78-80 respectively. Consequently, there is no need for me to deal with this first group of pages, and I have removed them from the scope of this inquiry.

Pages 8, 12, 13, 15, 16, 43, 44 and 127, and parts of pages 33, 35, 38, 39 and 40 have been disclosed to the appellant and are no longer at issue in this appeal.

RECORDS:

The records remaining at issue consist of:

- correspondence between the Board and the victim or persons acting on her behalf, and documentation submitted in support of the application (pages 1- 4, 14, 31, 45-48, 51-62, 70-80, 87-91, 113, 119-122 and 124-126);

- correspondence between the Board and alleged offenders other than the appellant, or their representatives (pages 5-7, 9-11, 18, 41 and 42);

- Power of Attorney relating to another alleged offender (pages 19-24);

- the birth certificate of an individual other than the appellant (page 25);

- the application documents (pages 32, 34 and 36, and portions of pages 33, 35 and 38);

- an incident report (portions of pages 39-40);

- an internal Board memorandum (page 63);

- records relating to the accounting of costs for compensation (pages 64-69, 81-86, 92-103, 109-112, 117 and 118);

- information provided by and correspondence sent to the Sault Ste. Marie Police Services Board (pages 104-108 and 123).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the various pages of records and make the following findings:

(1) Pages 1-7, 9-11, 18-25, 31-36, 41, 42, 52-77, 81-87, 92-104, 107-113, 117-122 and 124-126 contain the personal information only of individuals other than the appellant. These pages contain the victim's personal information, as well as personal information of other alleged offenders including addresses, references to them and to incidents in which they are involved, and correspondence, application records, supporting documentation, records relating to accounting of costs for compensation, and other documentation relating to the victim's application for compensation.

(2) Pages 14, 38-40, 45-48, 51, 78-80, 88-91, 105, 106 and 123 contain the personal information of the appellant and other identifiable individuals, including the victim and other alleged offenders. These pages include references to the appellant, addresses and specifics concerning alleged incidents involving the appellant and other individuals.

(3) None of the pages contain the personal information of the appellant only.

Section 21(1)(d)

The appellant submits that section 21(1)(d) applies in the circumstances of this appeal. This section provides an exception to the general prohibition against the disclosure of personal information to any person other than the individual to whom it relates. It states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure;

The appellant argues that sections 6 and 8 of the SPPA expressly authorize the disclosure of the records. His position is that the notice requirements provided by these sections must be reasonable, in order to provide him with enough information to know the case he must meet.

Section 6 sets out the various notice requirements under the SPPA, and section 8 states:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

In Order M-292, former Adjudicator Anita Fineberg determined that the phrase "expressly authorizes" found in section 21(1)(d) should be interpreted in a manner consistent with the way the phrase has been interpreted in the context of section 38(2) of the Act. She relied on the comments made in Investigation Report I90-29P, which stated:

> The phrase "expressly authorized by statute" in subsection 38(2) of the Act requires either that specific types of personal information be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute i.e in a form or in the text of the regulation.

I agree with the above interpretation and adopt it for the purposes of this appeal.

Sections 6 and 8 of the SPPA identify the notification requirements for tribunals covered by that statute. Section 6 identifies the general notice requirements and lists a number of items that the notice must include. These items include the time, place, purpose of the hearing, and various other information. There is no reference in section 6 to the nature of the information that must be provided to the parties, nor is there an express authorization for the disclosure of any particular records or personal information in the possession of the tribunal. Similarly, although section 8 of the SPPA does stipulate that parties are entitled to reasonable information of particular types of allegations, it does not expressly authorize the disclosure of specific records or types of records containing personal information. Accordingly, applying the interpretation from

Investigation Report I90-29P and Order M-292, I find that section 21(1)(d) has no application in the circumstances of this appeal.

INVASION OF PRIVACY

Section 21(1)(f)

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 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 discretion to deny the appellant access to that information.

Where, however, the record only contains the personal information of individuals other than the appellant, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. Having dealt with section 21(1)(d), the only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy."

Therefore, for the pages that contain the appellant's personal information, I will decide whether section 49(b) applies; and for all other records, I will decide whether section 21(1)(f) applies.

In both these situations, sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions 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 if 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 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 circumstances that are relevant to the appeal.

The Board submits that the presumption in section 21(3)(a) applies to some of the records, on the basis that these documents contain information pertaining to the victim's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. I have reviewed the records and find that pages 3, 32, 34, 53-56, 59-61, 63-87, 92-103, 109-113, 117-122, 126 and the severed portions of pages 33 and 40 contain information which falls within the scope of the section 21(3)(a) presumption. These pages include detailed physician reports, references to the physical and emotional health of the victim, and references to the dates and costs for various medical, psychiatric or psychological treatments. Accordingly, I find that the disclosure of the personal information contained in these records is presumed to constitute an unjustified invasion of the victim's personal privacy. None of the personal information contained in these records falls within the scope of section 21(4) of the Act.

I will now review the various factors listed in section 21(2) as they apply to the remaining records. The Board identifies sections 21(2)(f) and (h), claiming that the personal information is highly sensitive and was supplied by the individuals to whom it relates in confidence. In order for personal information to be considered highly sensitive, disclosure must reasonably be expected to cause the individual excessive personal distress (Orders M-1053, P-1681 and PO-1736). In order for section 21(2)(h) to apply, the person who supplied the information must have had a reasonably held expectation that the information would be treated in a confidential manner (Order PO-1767).

I accept the Board's position that the factors in sections 21(2)(f) and (h) are both relevant in the circumstances of this appeal, and I find that both factors should be given significant weight.

The personal information provided by the victim relates to allegations of sexual misconduct, which is by definition highly sensitive. I also accept that applicants before the Board have a reasonable expectation of privacy when they submit information about their experience as victims of crimes of violence, as do others who provide evidence during the course of an investigation undertaken by the Board in this context. This expectation of confidentiality is not absolute, as evidenced by the notice provisions of the SPPA and the access rights under the Act, but the section 21(2)(h) factor is nonetheless relevant.

The appellant submits that section 21(2)(d) applies, because the information contained in the records is relevant to a fair determination of his rights, and that disclosure is necessary for him to know the allegations made against him by the victim and to properly prepare himself for the Board hearing.

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.

(See Orders P-312 [upheld on judicial review in Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764)

In arguing the relevance of section 21(2)(d), the appellant makes reference to his rights under the SPPA. He identifies that the statute applies to the Board, and points out that section 5 of the SPPA combined with

section 9(2) of the CVCA, makes the appellant a "party" to a proceeding before the Board. As a party, the appellant refers to the notice he is entitled to receive under sections 6 and 8 of the SPPA.

The appellant (through his counsel) submits:

> While the "notice" [issued by the Board] indicates that the appellant is entitled to take part in the hearing, give evidence and file written materials with the Board, he has absolutely no idea what will be alleged at the hearing so that effectively he has no opportunity whatsoever to take part in the hearing in any way.
> ...
>
> For the reasons and based on the documentation provided to the appellant by the Board as set out above, the appellant has absolutely no idea of the case to be met and, accordingly, unless the disclosure requested is granted, the appellant will have been denied his rights under the SPPA.
>
> ... If the appellant is not furnished with the application and all other contents of the Board's file, it is respectfully submitted that he will have been denied his right under section 8 of the SPPA to be provided with reasonable information of the allegations with respect to his good character and propriety of conduct.

Section 52(2) of the Act states that the SPPA does not apply to an inquiry to review a head's decision to deny access to requested records. Accordingly, I am not bound by the disclosure provisions of the SPPA in this inquiry. It is also not my role to review or comment on the disclosure mechanisms which may exist at the Board and are tied to its mandate to administer its own process. My role in this inquiry is restricted to determining whether the exemptions claimed by the Board apply to the records responsive to the appellant's request.

Although the appellant has been provided with relatively few records, the information that has been disclosed identifies the nature of the allegations made against him by the victim. I am also aware that the appellant was interviewed by the police in relation to these allegations, although no charges were laid. I accept that section 21(2)(d) is a relevant factor favouring disclosure, but the fact that the appellant has been provided with certain key pieces of information concerning the allegations and has participated in discussions about them with the police, reduces the weight accorded to this factor in the circumstances.

In weighing the two factors favouring privacy protection against the one factor favouring disclosure, I make the following findings:

(1) Pages 5-7, 9-11, 18-25, 41 and 42 contain personal information about other alleged offenders, including correspondence and documentation relating to allegations, as well as other personal information of these individuals. I find that the disclosure of this information could reasonably be expected to cause excessive personal distress to these individuals, and that it was provided with a reasonably-held expectation of confidentiality. None of this information relates to the appellant

directly, thereby minimizing the significance of any considerations under section 21(2)(d). Accordingly, I find that disclosure of the information on these pages would constitute an unjustified invasion of the personal privacy of the victim and other alleged offenders.

(2) Pages 2, 36, 45-48, 51, 57, 58, 88-91, 105-108, 123, 125 and the severed portions of pages 35, 38 and 39 contain the personal information of the victim, and include information about offences against her. I find that this information is highly sensitive, and was provided to the Board in confidence. Although some of these pages include the personal information of the appellant as well as the victim and others, I find that the factors favouring privacy protection are stronger in the circumstances, and that disclosure would constitute an unjustified invasion of the privacy of the victim.

(3) Pages 1, 4, 31, 52, 62, 104 and 124 contain the personal information of the victim, and relate to her compensation application. Although this information is arguably less sensitive than information contained on other pages, none of the appellant's personal information is contained on these pages, and their content has no direct bearing on any rights associated with the appellant. Consequently, on balance, I find that disclosure of this information would constitute an unjustified invasion of the victim's privacy.

(4) I find that page 14 contains the victim's name and address. If this information is severed and withheld, I find that disclosure of the rest of the page, which includes the appellant's personal information and no highly sensitive or confidential information of any other individual, would not constitute an justified invasion of any individual's privacy, and should be disclosed to the appellant.

The Board refers to various factors it considered when exercising discretion under section 49(b) for those pages which include the appellant's personal information. These factors include the sensitivity of the records at issue and the confidential nature of the correspondence relating to the victim's application. I am satisfied that the Board properly exercised its discretion in making its decision under section 49(b) not to disclose these records to the appellant.

For the first time in his representations in response to the Notice of Inquiry, the appellant raises the possible application of section 23 of the Act, the so-called Apublic interest override".

This section states as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

The appellant's arguments relate to the public interest in ensuring individuals who are the subject of allegations under the programs administered by the Board are given full particulars of the allegations and know exactly the case that is to be met. The appellant also refers to the concern that compensation paid to victims under the CVCA are paid from public monies. He states that if unfounded or untruthful allegations

are made against an individual which only that individual can respond to, the individual should get complete access to the records to allow him to fully and fairly defend against the allegations, and properly safeguard the public against the wrongful dissipation of public funds.

I do not accept the position put forward by the appellant. In my view, any public interest that does exist is adequately addressed by the compensation scheme established by the Board and regulated by the disclosure provisions of the SPPA. In addition, even if I were to find that a compelling public interest is present, in my view, it would not be sufficient to clearly outweigh the mandatory personal information exemption claim in these circumstances. I find that the concerns the appellant raises about the process of the hearing under the CVCA, though couched in terms of concern for the public interest, are essentially private concerns about accessing more of the information at issue in this appeal. As set out above, some disclosure was given to the appellant under the provisions of the SPPA, and I have been provided with no information indicating any broad public concern about the nature of hearings under the CVCA.

Accordingly, I find that there is no compelling public interest in disclosure of the affected person's personal information so as to clearly outweigh the purpose of the exemption, and section 23 of the Act is not applicable.

ORDER:

1. I order the Board to disclose the information which is **not** highlighted on the copy of page 14 of the record which I have provided to the Board's Freedom of Information and Privacy Co-ordinator, by sending the appellant a copy by **September 14, 2000**.

2. I uphold the Board's decision to deny access to the remaining records at issue in this appeal.

3. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: August 30, 2000
Tom Mitchinson
Assistant Commissioner