

ORDER PO-2302

Appeal PA-030289-1

Criminal Injuries Compensation Board

NATURE OF THE APPEAL:

The Criminal Injuries Compensation Board (CICB) is a quasi-judicial tribunal that provides compensation to victims of violent crime in Ontario under the *Victims of Crime Act*.

On behalf of an individual client (now the appellant), a lawyer made a request to the Criminal Injuries Compensation Board (CICB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all documents relating to a specific file for an ongoing proceeding before the CICB, to which the appellant is a party. The lawyer indicated that the following documents, in particular, should be included

- application for compensation filed by the complainant (the affected party) in the proceeding
- statement dated September 27, 1993
- all of the complainant's materials submitted to the CICB
- all of the materials disclosed to the complainant by the CICB

The CICB found 127 pages of records. The CICB gave the appellant all of pages 77 to 127. It denied access to the rest of the records on the basis of section 21 (personal privacy) of the *Act*. It specifically applied sections 21(1), 21(2)(f), 21(3)(a), 21(3)(d) and 21(3)(f).

The appellant appealed the decision claiming that the CICB is obligated to disclose the records to him given the provisions of section 21(2)(d) of the *Act*.

The appeal moved to the mediation stage. During mediation, several matters were discussed:

- The CICB gave the appellant an Index of Records that the appellant asserted was unsatisfactory because it lacked sufficient detail about the records. The CICB then provided a revised index. The appellant claims that the revised index is still insufficient, therefore this issue is outstanding. A copy of this revised index forms part of the mediator's report prepared in this appeal.
- The mediator asked the CICB to consider the application of section 49(b) (discretion to refuse an individual's own personal information). The CICB applied the exemption to pages 17, 18, 54, 71, 74 and 75 of the records.
- The appellant confirmed that pages 64-66, 67-68 and 69-70 are duplicates of pages 4-6, 2-3 and 15-16, respectively, and are therefore not at issue in the appeal.

Mediation resolved no other matters so the appeal moved to the adjudication stage.

Initially, I sought and received representations from the CICB and the affected party.

The CICB indicated that its representations could be shared in their entirety with the appellant and so they were. In addition, the CICB altered its position with respect to the disclosure of some of the records. It now submits that the following pages of the records may be disclosed

- in full: pages 9-12, 15-16, 19, 22-23
- with severances: pages 14, 20-21

The affected party, on the other hand, indicated a preference that her representations remain confidential. Rather than share her representations, then, I indicated that her desire was that her personal information not be disclosed in any manner to the appellant. Because of the affected party's objection to any further disclosure, it will be necessary for me to determine whether the records the CICB has offered to disclose are exempt under section 21(1) or 49(b), as applicable.

I then sought and received representations from the appellant. I provided those representations to the CICB and the affected party, both of whom provided reply representations.

ANALYSIS:

PERSONAL INFORMATION

To determine whether the records are exempt from disclosure under sections 21 and 49(b) of the *Act*, I must first decide whether the records contain "personal information" as defined in the *Act* because these sections only apply to information that qualifies as "personal information".

"Personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] 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 [paragraph (h)].

I have considered the representations before me and examined all of the records at issue. I find that the following pages contain the personal information of the appellant and another individual, the affected party: pages 2-3, 4-7, 14, 15-16, 17-18, 20-21, 54, 57 and 63. The personal information in these records consists of information identified in sections (b), (c), (d), (e), (g) and (h) of the definition of personal information.

I find that all of the remaining pages contain only the personal information of other individuals, including the affected party. These pages do not contain the personal information of the appellant. The personal information of others contained in these records includes that information identified in sections (b), (c), (d), (e), (g) and (h) of the definition of personal information.

RECORDS:

The following records are at issue in this appeal. I have indicated which exemptions have been considered for each record as dictated by my findings about personal information, above.

Sections 49 and 21(1)

Records 2-3, 4-7, 14, 15-16, 17-18, 20, 21, 54, 57, 63

Section 21(1)

1, 8, 9, 10, 11-12, 13, 19, 22-23, 24-25, 26, 27-34, 35-36, 37-40, 41, 42-44, 45-47, 48-49, 50-53, 55, 56, 58, 59-60, 61, 62, 71, 72, 73, 74-75, 76.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Introduction

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester and another individual, and disclosure of the information would constitute and “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester. I will review the CICB’s exercise of discretion under section 49(b) later in this order, after I have decided whether the exemption applies.

Where the record only contains the personal information of other individuals, section 21(1) prohibits an institution from disclosing personal information to any person other than the individual to whom the information relates unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

In both of these cases, sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 21(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. [See Order PO-1764]

If none of the presumptions in section 21(3) applies, section 21(2) requires me to consider all relevant circumstances, including the factors listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy.

Appellant's representations

The appellant attempted to obtain full disclosure within the proceedings before the CICB. In advance of the hearing, the CICB disclosed only portions of the application for compensation, a statement and a police questionnaire. The CICB refused further production on the basis of its policy to maintain confidential all personal information of complainants.

The appellant's main argument is that the *Act* requires the balancing of the affected party's privacy interests against the appellant's right to natural justice.

The effect of Sections 21(1)(f), 21(2)(d) and 21(3) of the *Act* is to establish a process whereby the likely harm that would result from the disclosure of confidential information is weighed against factors favouring disclosure.

The predominant factor favouring disclosure in this case is set out in Section 21(2)(d): "the personal information is relevant to a fair determination of rights affecting the person who made the request." The *Act* recognizes and incorporates the duty of disclosure mandated by the rules of natural justice. The duty is necessary because a party requires disclosure to effectively participate in an adjudicative process. As elaborated below, the duty of disclosure requires that a tribunal disclose to both parties all of the information before it, subject only to a weighing of the likely harm that would result from disclosure of confidential information against the harm resulting from non-disclosure.

The CICB in its Representations recognizes the necessity of balancing the interests of one party's right to confidentiality with the other party's right to natural justice. It is submitted that the CICB's policy of a blanket refusal to disclose any personal information of the Applicant violates this balancing requirement of natural justice, and violates the *Act*.

The appellant goes on to submit that the CICB has a duty to make disclosure because it is a quasi-judicial body whose decisions are significant to the individual's affected. In this case the appellant's interests and reputation could suffer with a finding by the CICB that he is an offender. The appellant also makes broader arguments about a tribunal's obligations respecting disclosure of the evidence before it.

CICB's representations

In general, the CICB argues that victims of crime such as the affected party have an expectation of privacy when filing applications with the CICB.

Although victims are made aware that offenders may be made parties to the proceeding and that disclosure may be required when they apply for compensation, they do not expect that their medical/therapy records or personal identification information will be disclosed without regard to privacy rights.

More particularly, it submits that in this case, pursuant to the provisions of sections 12 and 13 of the *Victims of Crime Act*, the CICB will make orders in connection with the proceeding to hold the hearing in camera and prevent public disclosure of the evidence.

Furthermore, it submits:

The relationship between the victims and the CICB must be sedulously fostered because the community has an interest in ensuring that victims of sexual assault crimes bring their complaints to the attention of the justice system. Lastly, if the CICB is required to routinely disclose medical records or other records containing personal information of victims of sexual assaults to alleged offenders, the relationship between the victims and the CICB would be seriously injured and victims of sexual assaults would be discouraged from seeking recourse and compensation.

It is submitted that the injury to the relation between the CICB and the victim by reason of the disclosure of confidential information outweighs any administrative law obligations which may require disclosure in the circumstances of CICB hearings where the CICB is neither mandated to make a final determination on who committed a criminal act nor given authority to punish an alleged offender.

The CICB then goes on to provide specific representations about each individual record and the exemptions claimed.

Analysis

As I have indicated, some of the records contain the personal information of the appellant and of other individuals. The rest of the records contain only the personal information of others. The CICB applied sections 21(3)(a), (d) and (f) to some of the information in the records and the factors listed at sections 21(2)(f) and (h) to the remainder of the information in the records. The appellant, in turn, has referred to the provisions in section 21(2)(d).

In my analysis following, I will first examine the applicability of sections 21(3) and (2) to all of the records and then I will examine the CICB's exercise of discretion under section 49(b) in respect of those records containing the personal information of the appellant.

Sections 21(3)(a) and (d)

The CICB relies on sections 21(3)(a) and (d) which state:

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
- (d) relates to employment or educational history

On my review of the records, I find that the presumption at section 21(3)(a) applies to pages 24-25, 27-34, 37-40 and 45-47 because all of these pages comprise medical reports and set out information related to the medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation of the affected person. In addition, page 41 is a written consent from the affected person related to her medical history and therefore also qualifies for this presumption. The disclosure of all of this information, then, would constitute an unjustified invasion of personal privacy. These pages are therefore exempt from disclosure under section 21. Furthermore, I find that no exceptions under section 21(4) apply and that there is no compelling public interest in their disclosure under section 23.

I find also that section 21(3)(d) applies to pages 35-36, 42-44 and 48-49. Pages 35-36 and 42-44 comprise the curriculum vitae of two individuals and contain information relating to their employment and educational history. Information contained in resumes [Orders M-7, M-319, M-1084] and work histories [Order M-1087] falls within the scope of section 21(3)(d) [Order MO-1257] therefore its disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(d) of the *Act*. These pages are therefore exempt from disclosure under section 21. Furthermore, I find that no exceptions under section 21(4) apply and that there is no compelling public interest in their disclosure under section 23.

Section 21(2)

The balance of the information that has been withheld consists of identifying information about the appellant and the affected party, other personal information related to the affected party and connected to the proceeding at the CICB, and information about the incident that gave rise to the proceeding. None of the presumptions in section 21(3) appears to apply to this information.

Section 21(2)(f)

As I have indicated, one of the CICB's main arguments is that the information contained in these records is highly sensitive because it relates to the affected party's allegations of sexual misconduct. For information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the

subject individual. [See Orders M-1053, P-1681 and PO-1736] The affected party's own representations indicate that disclosure of her personal information to the appellant would cause her considerable personal distress considering her particular circumstances. Furthermore, this office has found in previous orders that allegations of sexual misconduct are "by definition highly sensitive" within the meaning of the *Act*: see, for example Orders PO-1815 and PO-1868. I am satisfied that the information contained in the records generally is of a highly sensitive nature. The application of section 21(2)(f), therefore, weighs against the disclosure of this information.

Section 21(2)(h)

The CICB has also claimed the application of section 21(2)(h) arguing that the affected party and other individuals provided their personal information to the CICB with the expectation that the information would remain confidential.

In Order PO-1868, the adjudicator, dealing with similar arguments relating to records of a similar nature at the CICB, adopted the reasoning of the Assistant Commissioner in Order PO-1815, where, referring to the CICB, he stated:

I also accept that applicants before the [CICB] 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 [CICB] 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.

I find that there is a reasonable expectation of confidentiality with respect to the information in these records, and that section 21(2)(h) is a relevant factor weighing against disclosure of the records.

Section 21(2)(d)

I repeat the appellant's arguments in this regard.

The predominant factor favouring disclosure in this case is set out in Section 21(2)(d): "the personal information is relevant to a fair determination of rights affecting the person who made the request." The *Act* recognizes and incorporates the duty of disclosure mandated by the rules of natural justice. The duty is necessary because a party requires disclosure to effectively participate in an adjudicative process. As elaborated below, the duty of disclosure requires that a tribunal disclose to both parties all of the information before it, subject only to a weighing of the likely harm that would result from disclosure of confidential information against the harm resulting from non-disclosure.

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 PO-1815, 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)

I find that the appellant has established the relevance of the factor in section 21(2)(d), with respect to some of the information in the records. There is an impending hearing in which he has a right to participate. The information about the incident is significant to the matters to be determined in that hearing and is required in order for the appellant to prepare for the hearing. Accordingly, I am satisfied that section 21(2)(d) is a relevant factor in a determination of whether disclosure of that information would constitute an unjustified invasion of personal privacy. I also find, however, that section 21(2)(d) is not relevant to the identifying information about the affected party or the other personal information related to the affected party and connected to the proceeding at the CICB, as I am not satisfied that this information is required by the appellant in order for him to prepare for the hearing.

In sum, the factors in sections 21(2)(f) and (h) weigh against disclosure of the remaining information in the records, and the factor in section 21(2)(d) weighs in favour of disclosure of some, but not all of this remaining information.

I must also assess the relative strength to be accorded to these factors by determining the appropriate balance to be struck between the personal privacy rights of the affected party, and the rights of the appellant as a participant in a legal hearing. In my view, the weight to be accorded all of the relevant factors in section 21(2) is affected by the fact that the CICB has already provided the appellant with disclosure of the nature of the allegations against him. This fact is particularly relevant to my assessment of the weight to be given to the factor in section 21(2)(d), because the appellant is already in possession of information that allows him to prepare for the proceedings at the CICB.

On balance, I find that the disclosure of the personal identifying information of the affected party and other personal information related to the affected party and connected to the proceeding at the CICB would constitute an unjustified invasion of personal privacy. The factors in sections 21(2)(f) and (h) weigh moderately against disclosure, and the factor in section 21(2)(d) does not apply to this information.

I also find that disclosure of the details of the incident contained in the records would constitute an unjustified invasion of the personal privacy of the affected party. The factors in sections 21(2)(f) and (h) weigh moderately against disclosure, and the factor in section 21(2)(d) is of relatively low weight given the prior disclosure to the appellant by the CICB.

With respect in particular to pages 9-12, 14, 15-16, 19, 20-21 and 22-23, the records that the CICB is prepared to disclose either in whole or in part, I find that portions of these pages can be disclosed as disclosure of them would not constitute an unjustified invasion of the personal privacy of the affected party, so long as her personal information is severed there from. While factor 21(2)(f) has been applied to these pages, it does not weigh against disclosure given the very nature of the records and their contents, which, from my review, do not appear to be sensitive.

Pages 9-12 relate to a summons to witness to a named detective constable. The affected party's personal information can be found on pages 9 and 11 and should not be disclosed. Page 19 is a note indicating the names of police officers. Again, the affected party's personal information appears on that page and should not be disclosed. Pages 15-16 comprise the completed report to the Chief of Investigations of the CICB. The CICB's representations indicate that the appellant has already received a severed copy of this record. The portion severed was the *appellant's* own personal information, so disclosure of that information to the appellant is not inappropriate. Finally, pages 22-23 are a blank copy of this same report. There is no personal information contained in that record, so disclosure of it would not constitute an unjustified invasion of personal privacy.

With respect to pages 14, and 20-21, the CICB is prepared to disclose 14 and 20-21 so long as the personal information of the affected party is severed. Pages 14 and 20-21 are requests to the Chief of Police to forward information to CICB. Disclosure of the information that does not constitute the affected party's personal information would not be an unjustified invasion of personal privacy.

Conclusions Regarding Application of sections 21(1) and 49(b)

On this basis, I find that disclosure of the records at issue, with the exception of portions of the records the CICB has indicated it is prepared to disclose, would constitute an unjustified invasion of personal privacy. Records containing the personal information of the appellant and other individual(s) are therefore exempt under section 49(b), and those containing only the personal information of others are exempt under section 21(1).

Exercise of discretion under section 49

Section 49(b) applies to pages 2-3, 4-7, 14, 15-16, 17-18, 20-21, 54, 57 and 63 of the records because only these pages contain the personal information of the appellant along with the personal information of other individuals.

The section 49 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. When an institution decides that this exemption is available to deny access, it must exercise its discretion. The exercise of discretion under this section involves a balancing principle. The institution must weigh the requester's right of access to his or her own personal information against the other individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

The Commissioner may find that the institution erred in exercising its discretion where, for example

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573].

In this case, the CICB bore in mind the following considerations

- the purposes of the *Act*, including the principles that individuals should have a right of access to their own personal information, that exemptions from the right of access should be limited and specific, and that the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester had a compelling need to receive the information
- the relationship between the requester and any affected person
- the nature of the information and the extent to which it is significant and/or sensitive to the CICB, the requester or any affected person
- the historic practice of the CICB with respect to similar information

It is clear to me, from the representations of the CICB, that it properly exercised its discretion in the circumstances. I am satisfied that the CICB considered the relevant circumstances and did not take into account irrelevant considerations.

The CICB's willingness to re-examine the records and disclose more information to the appellant during the course of this adjudication further supports my conclusion that it appropriately exercised its discretion.

ORDER:

1. I order the CICB to disclose those portions of pages 9, 11, 14, 19, 20 and 21 that are not highlighted in the copies I have attached to the CICB's copy of this order. To be clear, the CICB shall not disclose the highlighted portions of these pages.
2. I order the CICB to disclose all of pages 10, 12, 15-16 and 22-23.
3. The CICB shall disclose these records to the appellant no later than **August 25, 2004** but not before **August 20, 2004**.
4. I uphold the CICB's decision not to disclose the remainder of the information in the records.
5. In order to verify compliance with provisions 1 and 2 of this order, I reserved the right to require the CICB to provide me with a copy of the records it discloses to the appellant.

Original signed by: _____
Rosemary Muzzi
Adjudicator

July 21, 2004 _____