



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

ORDER P-1156

Appeal P-9500556

Criminal Injuries Compensation Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 records relating to a claim for compensation by a named individual. The Board denied access to the 34 pages that it found responsive to the request. The requester appealed the denial of access.

The appellant is the alleged perpetrator of an assault against the named individual (the affected person) and is liable to reimburse the Board for any award made to the affected person by the Board under the subrogation provisions of section 26(2) of the Compensation for Victims of Crime Act.

The record at issue consists of the application and supporting documents including reports, correspondence and photographs, which I will describe as follows:

- Pages 1-4: Application for Compensation
- Page 5: Statement of Claim and Losses Claimed
- Page 6: Board Questionnaire
- Page 7: Request for Extension of Limitation Period
- Pages 8-11: Letter from the Board to Records and Registration Branch of the OPP with completed questionnaire
- Pages 12-14: Investigator's notes
- Pages 15-19: Medical reports
- Pages 20-29: Board correspondence with counsel for affected person
- Pages 30-32: Photocopies of photographs

The Board denied access to the record under sections 21(1) and 49(b) of the Act. During mediation, the appellant indicated that he was also seeking access to information about the extension of the limitation period for application granted by the Board to the affected person. The Board confirmed that this information is included in the record at issue in this appeal.

A Notice of Inquiry was provided by this office to the Board, the appellant and the affected person. The appellant raised the application of section 23, the public interest override, to the records. A supplementary notice was then sent to the parties, inviting their submission on this issue. Representations were received from all parties.

The Board has indicated that page 23 is a duplicate of page 11 and that pages 33 and 34 are duplicates of pages 13 and 14. I have reviewed the pages and I agree. Consequently, I shall not consider pages 23, 33 and 34 separately and my findings on pages 11, 13 and 14 will apply equally to pages 23, 33 and 34.

PRELIMINARY ISSUES:

THE RAISING OF ADDITIONAL DISCRETIONARY EXEMPTIONS LATE IN THE APPEALS PROCESS

Upon receipt of the appeal, this office provided the Board with a Confirmation of Appeal notice. This notice indicated that the Board had 35 days from the date of this notice (i.e. October 30, 1995) to raise additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations received on February 20, 1996, the Board raised the application of the discretionary exemption provided by section 13(1) of the Act to page 12. The deadline for raising additional discretionary exemptions expired on October 30, 1995.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

The Board acknowledges that the time for raising additional discretionary exemptions has elapsed. It submits that while the Board has considered page 12 to be part of the incident report (pages 13 and 14), withheld on the basis of section 21(3)(b), it can also be considered as a separate record and on that basis, the Board has now raised the application of section 13 to this page.

In Order P-685, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

While the Board has provided its reasons for the delay in raising the additional discretionary exemption at this stage of the appeals process, I am not persuaded that a departure from the 35-day time frame is justified in the circumstances of this appeal. Accordingly, I will not consider the application of section 13 to page 12.

APPLICATION OF SECTION 8 OF THE STATUTORY POWERS PROCEDURE ACT

The appellant submits that section 8 of the Statutory Powers Procedure Act (the SPPA) requires the Board to disclose the allegations made against him for the purpose of enabling him to respond. The appellant points out that under section 26(2) of the Victims of Crime Act, he is liable for any compensation awarded to the affected person and this makes the issue of disclosure to the appellant even more critical. The appellant states that he was acquitted of all charges in a court hearing in September, 1991. He claims that he has not been provided with particulars of the claim for compensation filed by the affected person, some 4½ years after the alleged offence.

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. I am not, accordingly, bound by the disclosure provisions of the SPPA in this inquiry.

Further, I do not have the jurisdiction 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. The sole issue which I am empowered to determine in this inquiry is whether the exemptions claimed by the Board apply to the records at issue in this appeal. I am, therefore, unable to make a finding on the sufficiency of the disclosure of records made by the Board beyond the context of the provisions of the Act.

DISCUSSION:

PERSONAL INFORMATION

The appellant indicates that he is not seeking access to the address, telephone number and age of the affected person nor any medical history which is not related to the claim for compensation before the Board. Therefore, this information is not part of the record at issue in this appeal. I have highlighted this information on the pages of the record and it should not be disclosed to the appellant.

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 record at issue and make the following findings:

- (1) Pages 6, 15-19, 20-29 and 30-32 contain the personal information only of the affected person;
- (2) Pages 2-4, 7, 8-11 and 12-14 contain the personal information of the appellant, the affected person and other identifiable individuals;
- (3) I find that Page 5 (the Board's form of Statement of Claim) is blank and contains no personal information. In addition, after removal of the name and personal identifiers of the affected person from page 1, I find that there is no personal information left. No other exemptions have been claimed for pages 1 and 5 and they should be disclosed to the appellant.

INVASION OF PRIVACY

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 the discretion to deny the appellant access to that information.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. 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 records which contain the appellant's personal information, I will decide whether section 49(b) applies. For the other records, I will decide whether section 21(1) 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 pages 2, 3, 6, 7, 15-19, 26 and 30-32 as these documents contain information pertaining to the affected person's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

The Board claims that the presumption in section 21(3)(b) applies to pages 8-11 and 12-14 on the basis that they contain information that was compiled and is identifiable as part of an investigation into a possible violation of law.

The Board submits that pages 20-29 contain information that describes the affected person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness and therefore are exempt under the presumption in section 21(3)(f).

In addition, the Board relies on sections 21(2)(e) and (f) for the remaining information on the basis that the information is highly sensitive and that disclosure could expose the affected person unfairly to pecuniary or other harm.

The appellant has raised sections 21(2)(a), (d), (e), (f), (g), (h) and (i). The appellant states that disclosure of the information is necessary for the purpose of subjecting the Board to public scrutiny as it dispenses public funds; that disclosure is necessary for the appellant to know the allegations made against him and to prepare himself for the Board hearing; that the information is unlikely to be accurate, could not have been supplied in confidence and that the appellant needs to know the allegations against him in order to protect his reputation.

The affected person submits that the information includes personal, medical, psychological, financial, employment information together with educational history and therefore the

presumptions in sections 21(3)(a), (d) and (e) apply. The affected person argues that the factors in sections 21(2)(f) and (h) also are relevant to the protection of the personal privacy of the affected person.

I have reviewed the information in the pages at issue and I make the following findings:

1. I find that parts of pages 2, 3, 7, 13, 14 and all of pages 6, 15-19 and 30-32 contain information relating to the medical, psychiatric or psychological history, diagnosis, condition treatment or evaluation of the affected person and fall within the presumption in section 21(3)(a).
2. I find that parts of pages 8, 10, 11 and 12 contain information that was compiled and is identifiable as part of an investigation into a possible violation of law (the Criminal Code) and therefore falls within the presumption in section 21(3)(b) of the Act.
3. I find that none of the information in the record falls within the presumption in section 21(3)(f).
4. I find that section 21(4) does not apply to the information that I have found to be subject to the presumptions in sections 21(3)(a) and (b). Therefore, I find that the information subject to the presumptions in pages 6, 15-19 and 30-32 is exempt under section 21(1). I find that the information subject to the presumptions in pages 2, 3, 7, 8, 10-12, 13 and 14 is exempt under section 49(b) of the Act. I will address the application of section 23 of the Act in my discussion below.
5. With respect to the remaining information, I find that the factors raised by the affected person, sections 21(2)(e) and (f), weigh in favour of protection of privacy and are relevant in the circumstances of this appeal.
6. The appellant has raised sections 21(2)(e), (f), (g), (h) and (i). In my view, these factors weigh in favour of privacy protection and against disclosure. In addition, there is no evidence before me to show why disclosure of the information in these particular records is desirable for the purpose of subjecting the activities of the Board to public scrutiny and I find that section 21(2)(a) is not relevant.
7. I agree, however, that the withheld information is relevant to the fair determination of rights of the appellant in the circumstances of this appeal. For this reason, I find that the factor favouring disclosure in section 21(2)(d) is a relevant consideration. I am cognizant that the appellant was acquitted of the criminal charges laid as a result of a complaint by the affected person and therefore, the appellant is aware of the nature of the allegations made against him. However, I am also mindful that some two to three years have elapsed since the matter was resolved before the court and in my view, the appellant has the right to know the allegations in this new proceeding.
8. In weighing the affected person's right to privacy against the appellant's right to know the case against him, I find that disclosure of some of the information on pages 13 and 14 and all of pages 20-22 and 24-29 would constitute an unjustified invasion of the personal

privacy of the affected person and is therefore exempt under sections 21(1) and 49(b) of the Act. I have highlighted the pages and the parts thereof that I have found to be exempt under sections 21(2) and (3) of the Act and which should not be disclosed. I find that disclosure of the remaining information to the appellant would not result in an unjustified invasion of privacy and therefore this information is not exempt and should be disclosed.

In summary, I have found that all of pages 6, 15-19, 20-22, 24-29, 30-32 together with parts of pages 2, 3, 7, 8, 10-12, 13 and 14 are exempt from disclosure (highlighted). I have found that all of pages 1, 4, 5 and 9 and the remaining parts of pages 2, 3, 7, 8, 10-12, 13 and 14 are not exempt (non-highlighted).

I will now address the application of section 23 of the Act to the records.

PUBLIC INTEREST IN DISCLOSURE

The appellant has raised the application of section 23, the public interest override, to the information contained in the records.

Section 23 of the Act 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)

In Order P-948, Inquiry Officer Holly Big Canoe examined the component parts of section 23 and found:

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant submits that the record relates to a public hearing process and therefore, no privacy interest exists. The appellant argues that the record relates to an application before a public agency whose function it is to determine the legitimacy of the claim and to dispense public funds. The appellant states that there is thus a public interest in disclosure of the records to the appellant to ensure his ability to speak to the allegations. The appellant contends that even information containing the affected person's medical information remains personal only until he makes them the subject matter of a public hearing.

In my view, the fact that the record relates to a proceeding before the Board where an applicant can request an oral hearing does not, in any way, diminish the expectations or the rights of an applicant to protection of personal privacy under the Act. I find no compelling public interest in

the disclosure of the records. I find that the interest that exists in disclosure is a private interest and section 23 has no application in the circumstances of this appeal.

ORDER:

1. I uphold the Board's decision to deny access to pages 6, 15-19, 20-22, 24-29 and 30-32 in their entirety and to the highlighted portions of pages 1, 2, 3, 7, 8, 10, 11, 12, 13 and 14 as shown on the copy of the record provided to the Board's Freedom of Information and Privacy Co-ordinator with this order.
2. I order the Board to disclose to the appellant pages 4, 5, 9 and the **non-highlighted** portions of pages 1, 2, 3, 7, 8, 10, 11, 12, 13 and 14 by sending a copy by **May 2, 1996** but not earlier than **April 27, 1996**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2.
4. If the Board is unable to comply with Provision 2 of this order due to the current OPSEU strike, I order the Board to contact me through the Registrar of Appeals by **April 22, 1996**, so that I may then consider any required adjustment to the compliance date(s) and respond accordingly with notice to all parties.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ March 28, 1996