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

ORDER PO-1657

Appeal PA-980199-1

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The requester was charged with but not convicted of a sexual assault. Arising from this matter, the requester's alleged victim (the affected person) applied to the Criminal Injuries Compensation Board (the Board) under section 5 of the Compensation for Victims of Crime Act (CVCA) seeking compensation for injuries she claimed she had suffered. Although the affected person's application to the Board was made outside the limitation period prescribed by section 6 of the CVCA, the affected person sought, and the Board granted, a time extension to permit the application under section 6. The Board then held a hearing into the merits of the application, to which the requester and the affected person were parties. The requester did not attend the hearing, but his counsel did so on his behalf. After the hearing, the requester made a request to the Board under the Freedom of Information and Protection of Privacy Act (the Act) for access to the following information:

- copy of the original application for compensation;
- copy of any letter of time extension for the application;
- names and titles of the panel members who sat on the Board during the hearing; and
- names and titles of all in attendance at the hearing.

The Board located seven pages of records responsive to the request and granted access in full to pages 3 and 6, and partial access to the remaining five pages. The Board withheld information from pages 1, 2, 4 and 5 based on the exemption at section 21 (personal privacy) of the Act. In addition, the Board advised the requester that the "bottom portion" of page 7 was not responsive to his request. Further, the Board advised the requester that it was waiving any applicable fees for providing access under the Act. The Board did not notify the affected person of the appeal under section 28 of the Act at any time prior or subsequent to granting partial access to the records.

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

Later, the Board identified additional records responsive to the request, consisting of a letter granting a time extension (page 8) and a victim impact assessment which had been attached to the affected person's application for compensation (pages 9-15). The Board advised the appellant that it was denying access to these records based on the exemptions at sections 21 and 49(b) of the Act. In particular, the Board cited the factor at section 21(1)(f) ("the personal information is highly sensitive") as a basis for its supplementary decision. The appellant also seeks a review of the Board's supplementary decision.

I provided a Notice of Inquiry setting out the issues in the appeal to the appellant, the Board and the affected person. I received representations from the appellant and the Board only. In the Board's representations, it indicates that subsequent to the appeal it received a separate request from the appellant for a copy of the Board's order with respect to the hearing it held into the affected person's application. The Board granted the request and provided the appellant with a copy of this document. The Board indicated that normally, as a party to the proceedings, the appellant would have been provided with a copy of the order, but this was not done due to an administrative oversight. The appellant's counsel confirmed

receipt of this document. Since page 7 is the first page of the Board order, I will consider this page as no longer being at issue in this appeal.

ISSUES:

PERSONAL INFORMATION

The first issue which must be decided is whether or not the records contain personal information and, if so, to whom the personal information relates. 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 [paragraphs (c), (h)].

All of the records at issue in this appeal contain the personal information of both the appellant and the affected person. Disclosure of these records would reveal information about both of these individuals, including their names, addresses and telephone numbers, and information about the alleged incident in which they were both allegedly involved, and information about subsequent events involving both parties, including the Board proceedings.

The appellant states that "the above information [referring to the requested records] or in the alternative, parts thereof does not constitute 'personal information' as defined in section 2(1) of the Act." For the reasons stated above, I do not accept the appellant's submission on this point.

DISCRETION TO REFUSE ACCESS TO ONE'S OWN PERSONAL INFORMATION

Introduction

Section 47(1) of the Act provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. Section 49 provides a number of exceptions to this general right of access. However, this right of access under section 47(1) is not absolute; section 49 provides a number of exceptions to this general right of access to personal information by the individual to whom it relates. In particular, under section 49(b), a head may refuse to disclose to the individual to whom the information relates personal information where the disclosure "would constitute an unjustified invasion of another individual's personal privacy".

Section 21 provides guidance in determining whether or not disclosure would constitute an unjustified invasion of another individual's personal privacy.

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, personal information can be disclosed only if it falls under section 21(4) or if the section 23 "public interest override" applies to it [Order M-1154; John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)].

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

Representations

The Board relies on various provisions under sections 21(2) and (3) in support of its decision. With regard to section 21(3), the Board submits that the presumption at paragraph (a) is applicable to certain portions of the record. Section 21(3)(a) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

In particular, the Board claims this presumption applies to: (i) the withheld information on page 2, a portion of the application for compensation, which contains the affected person's detailed description of the injuries she claimed she suffered; and (ii) all of the information contained in the affected person's victim impact assessment at pages 9-15.

With respect to the remaining withheld information, the Board relies generally on the factor weighing against disclosure at section 21(2)(f) which applies to "highly sensitive" personal information. The Ministry states:

> . . . Obviously, the fact that the Board's proceedings related to allegations of sexual assault and breach of trust against [the appellant] qualifies the information in the records as "highly sensitive".

In addition, the Ministry states that it took into account the "previous history" between the appellant and the affected person in reaching its decision. The Ministry states:

> As a result of a complaint made by the [the affected person], the police had laid criminal charges against [the appellant] which were disposed of by a court of law. In this criminal process, [the appellant] would have been entitled to receive certain information about [the affected person's] complaints, previous statements and her anticipated testimony. The head also had regard to the fact that [the appellant] had been a party to the proceedings and had sent a representative to the Board hearing. As a result, the release of certain information in the file to [the appellant] was not considered to constitute an unjustified invasion of [the affected person's] personal privacy.
>
> At the same time, the head was mindful of the fact that [the Board] process is separate and distinct from the system of criminal law. Applicants before the Board do have a reasonable

> expectation of privacy when they submit information about their experiences as victims of crimes and violence. The Board is particularly careful when considering whether any information should be released regarding an applicant's medical or psychological history. In most cases, the (alleged) offender is not provided with information about an applicant's injuries as he or she would not be able to assist the Board in its adjudication of this issue.
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> With respect to [the affected person's] application for an extension, it was significant for the head that this process is not intended to involve (alleged) offenders. The decision regarding an extension is to be made by the Board with respect to a particular applicant. An (alleged) offender is not considered to be a party at this stage of the Board's proceedings. Any rights of an (alleged) offender to participate in the Board's process only arise later, at the time of the hearing.

In support of disclosure of the withheld personal information, the appellant firstly submits that none of the presumptions at paragraphs (a) through (h) of section 21(3) applies. In addition, the appellant submits that the factor at section 21(2)(a) applies. That section reads:

> 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,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

The appellant explains that in his view the hearing conducted by the Board on the merits of the affected person's application was unfair. The appellant provides detailed information about the conduct of the hearing in support of his view. The appellant also provides background information about the affected person and her interactions with him, and questions the veracity of the affected person's testimony at the hearing. Further, the appellant calls into question the validity of the Board's ultimate order of compensation, and characterizes it as an "abuse of the system" by the affected person, particularly in light of the appellant's acquittal by a jury in the earlier criminal trial. The appellant submits that as a result of the Board's decision, he has concerns that people will now be encouraged to make "false allegations and charges . . . in order to get money from [the Board]." The appellant concludes that his concerns about the lack of fairness in the Board's process "outweigh any claim to privacy or the unjustified invasion of privacy, which [I] deny exists in these circumstances. [I] therefore need all records in order to assist [me] to properly scrutinize [the Board's] decision and the criminal injuries compensation process. It is therefore submitted that it is in the public interest to disclose the above records [to me]."

The appellant's submissions raise the possible application of the factor weighing in favour of disclosure at section 21(2)(d) which reads:

> 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,
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> > the personal information is relevant to a fair determination of rights affecting the person who made the request;

Analysis

Section 21(3)(a) - medical information - pages 2, 9-15

As stated above, the Board claims that the section 21(3)(a) presumption applies to: (i) the withheld information on page 2, a portion of the application for compensation, which contains the affected person's detailed description of the injuries she claimed she suffered; and (ii) all of the information contained in the affected person's victim impact assessment at pages 9-15.

With respect to this information the Board submits:

> In this space, [the affected person] describes the mental and physical injuries she suffered as a result of the criminal acts allegedly committed against her [page 2].
>
> . . . . .
>
> [] The information contained in the assessment is particularly sensitive because it describes in great detail the traumatic reactions she experienced as a result of the incident involving [the appellant]. It also describes affects on her health, details of medical treatment sought and behavioural changes [].

In my view, the withheld information in pages 2 and 9-15 clearly constitutes one or more of the affected person's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. In addition, none of the factors at section 21(4) applies to this information. Therefore, disclosure of the withheld information on page 2 and all of the information contained in pages 9-15 would constitute an unjustified invasion of the affected person's personal privacy within the meaning of section 49(b).

Section 21(2) - other information - pages 1, 4, 5, 8

Having reviewed the records in detail and considered the representations of the Board and the appellant, and taking into account the circumstances, I find that most of the withheld information in pages 1, 4, 5 and 8 can be considered "highly sensitive" within the meaning of section 21(2)(f). Information falling within this category includes the affected person's mailing address, telephone number, date of birth, social insurance number and details in support of her application for a time extension. While much of this information would not be considered highly sensitive in other circumstances, the subject matter of the records and nature of the relationship between the parties gives the information its highly sensitive character. The section 21(1)(f) factor weighs against disclosure of this information.

The only remaining withheld information in pages 1, 4, 5 and 8 to which section 21(2)(f) does not apply is the majority of information on page 8, a letter to the affected person from the Board granting the time extension. With the exception of the affected person's address, this page does not contain information which in the circumstances could be considered highly sensitive. Much of this information would have been provided to the appellant either during the course of the Board proceedings or as a result of his request under the Act. Further, I find that no additional factors, either listed or unlisted, weigh against disclosure of this record (except for the address). Therefore, I find that disclosure of page 8, with the exception of the address, would not constitute an unjustified invasion of personal privacy within the meaning of section 49(b).

With respect to the information to which I found the factor at section 21(2)(f) to apply, I must now consider any factors weighing in favour of disclosure.

The appellant submits that section 21(2)(a) ("public scrutiny") applies to the requested information. In my view, the appellant has failed to make a connection between the withheld information and the desirability of any public scrutiny of the Board or of the Ontario government at large which might result from disclosure. While I accept that the appellant holds the view that the Board's proceedings in the main hearing were unfair and that it reached an unjust result, the appellant does not make a detailed and logical argument as to why information pertaining to the affected person's request for a time extension, which preceded and was distinct from the hearing on the merits, would achieve the ends set out in section 21(2)(a). Moreover, this connection is not apparent on the face of the relevant information. Accordingly, I do not find this to be a relevant factor in favour of disclosure of the withheld information.

The appellant further submits that section 21(2)(d) ("fair determination of rights") applies to the withheld information.

Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order 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.)]:

> In my view, 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.

Although the Board hearing has been completed, it is possible that further related proceedings could take place, including appeal proceedings before the Ontario Court (General Division) Divisional Court under section 10(1) of the CVCA. However, the appellant has not provided me with any information respecting existing or possible proceedings. Moreover, the appellant has not provided me with sufficient representations in support of the application of parts (3) and (4) of the test for the applicability of the section 21(2)(d) factor. Therefore, I find that section 21(2)(d) is not a relevant consideration.

I further find that no unlisted factors weigh in favour of disclosure of the withheld information in pages 1, 4 and 5, and the address on page 8.

Since I found that all of the withheld information in pages 1, 4 and 5, and the address on page 8 is "highly sensitive", and since I found no factors weighing in favour of disclosure apply to this information, I find that disclosure of this information would constitute an unjustified invasion of the affected person's personal privacy within the meaning of section 49(a) of the Act.

PUBLIC INTEREST IN DISCLOSURE

Section 23 reads:

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

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (January 27, 1999), Docs. C29916, C29917 (Ont. C.A.), reversing (1998), 107 O.A.C. 341 (Div. Ct.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

Neither party has made representations explicitly relating to section 23, although the appellant's representations concerning the section 21(2)(a) "public scrutiny" factor could be relevant to the application of section 23. In the circumstances, and in part based on the reasons set out above for which I found that section 21(2)(a) did not apply, I find that there does not exist a compelling public interest in disclosure of the withheld information. Accordingly, I find that section 23 does not apply.

NOTICE TO AFFECTED PERSON

In this case, the Board did not notify the affected person of the appellant's request. Further, the Board disclosed portions of the requested records in the absence of notice to the affected person. Sections 28(1)(b) and 28(2), (5), (7), (8) and (9) of the Act provide:

> (1) Before a head grants a request for access to a record,
>
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purpose of clause 21(1)(f),
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> The head shall give written notice in accordance with subsection (2) to the person to whom the information relates.
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> (2) The notice shall contain,
>
> > (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;
> >
> > (b) a description of the contents of the record or part thereof that relate to the person; and
> >
> > (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.
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> (5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed.
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> (7) The head shall, within thirty days after the notice under subsection (1) is given, but not before the earlier of,
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> > (a) the day the response to the notice from the person to whom the information relates is received; or

(b) twenty-one days after the notice is given,

decide whether or not to disclose the record or the part thereof and give written notice of the decision to the person to whom the information relates and the person who made the request.

(8) Where a head decides to disclose a record or part thereof under subsection (7), the head shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and

(b) the person who made the request will be given access to the record or to a part thereof, unless an appeal of the decision is commenced within thirty days after the notice is given.

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

In my view, the purpose of these provisions of section 28 is to ensure that procedural fairness is accorded to individuals whose privacy interests may be at stake. Adherence to these provisions permits the subject individual to make representations as to whether or not the information should be disclosed and, if the head decides to disclose information, to appeal the matter to the Commissioner before disclosure actually takes place.

In Investigation Report I98-018P, Commissioner Ann Cavoukian made the following comments with respect to disclosure of personal information pursuant to section 21(1)(e) and the notice requirements under section 28(1)(b):

> The Ministry maintains that it was not required to give notice under section 28(1)(b) of the Act because it was not relying on the exception provided by section 21(1)(f), and had no reason to believe that disclosure of the personal information might constitute an unjustified invasion of privacy. The Ministry attempts to distinguish the present case from Investigation Report I95-024M, where I found that a municipal institution had breached section 32 of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 42 in the provincial Act), because it had not notified the complainant prior to disclosing his personal information in response to an access request.

In I95-024M, the institution had disclosed personal information pursuant to section 14(1)(f) of the municipal Act (section 21(1)(f) of the provincial Act). In that case, I found that disclosure in the absence of notice was not proper, and that the institution should have provided the complainant with the opportunity to provide representations on whether any of the presumptions or factors listed in sections 14(2) and (3) of the municipal Act were present before determining whether disclosure would be an unjustified invasion of privacy.

However, the Ministry submitted that the notice requirement referred to in I95-024M was confined to circumstances where section 21(1)(f)/14(1)(f) were being relied upon by an institution as the basis of permitting disclosure. I disagree.

Although section 14(1)(f) was the only exception relied upon in I95-024M, I did not conclude in that case that notice is required **only** where section 21(1)(f)/14(1)(f) is relied upon by an institution. The notice requirements of section 28(1)(b) are engaged whenever an institution has reason to believe that the disclosure of personal information **may** constitute an unjustified invasion of personal privacy. If an institution is relying on one of the exceptions listed in sections 21(1)(a) through (e), and there is a reasonable doubt as to whether the requirements of these exceptions have been established, the institution may well have reason to believe that disclosure **may** constitute an unjustified invasion of personal privacy for the purposes of section 21(1)(f), in which case notice under section 28(1)(b) would be required.

In my view, the Ministry's arguments concerning its obligation to provide section 28(1)(b) notice to affected persons, and the related right of an affected person to appeal the head's decision prior to disclosure, are premised on the assumption that an institution will always be correct in applying the section 21(1)(a) through (e) exceptions. If in fact the institution is not correct and the requirements of any of sections 21(1)(a) through (e) being relied upon are not present, then the obligation to give section 28(1)(b) notice would clearly arise.

In the present case, if any of the requirements of section 21(1)(e) are not present, this exception to the mandatory section 21 exemption is not available, and disclosure of personal information is prohibited unless another exception, such as section 21(1)(f), applies. In these circumstances, failure to provide section 28(1)(b) notice prior to disclosure of this personal information would amount to non-compliance with the requirements of section 42(a). The Ministry's obligation to provide proper notice cannot be removed simply because it mistakenly thought it could rely on section 21(1)(e). Nor can the absence of notice deprive an affected person of the right to appeal to this office where section 28(1)(b) notice should have been given prior to disclosure, but was not.

I should also note that institutions are not the only bodies with a statutory obligation to provide notice to affected persons. Section 50(3) of the Act also imposes an obligation on

> the Commissioner to provide notice during the course of an appeal. In Ontario (Attorney General) v. Fineberg, [1996] O.J. No. 67, the Divisional Court interpreted this obligation. The Court quashed Order P-676 for breach of natural justice because this office had not provided an affected person with notice on the basis that the record at issue had not contained his personal information. The Court found that the affected person should have been given the opportunity to make submissions on the threshold question of whether the record contained his personal information and, if so, whether the disclosure would constitute an unjustified invasion of personal privacy.
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> The Court's judgment suggests that notice is required under section 50(3) where the outcome of a threshold decision may result in disclosure of a record containing personal information. In my view, similar considerations of fairness should apply where information qualifies as personal information and a reasonable doubt exists as to whether disclosure would fall within one of the exceptions at sections 21(1)(a) through (e).
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> In my view, where an institution relies on an exception at sections 21(1)(a) to (e) and fails to give section 28(1)(b) notice, it does so at its own risk. The disclosure of personal information may never come to the attention of the affected person. However, if it does, as in the present case, and that person claims that none of the exceptions in sections 21(1)(a) through (e) are available, that individual is entitled to complain to this office that section 42(a) has not been complied with; this will then necessarily require an independent determination of the proper application of the various provisions of section 21 and the notice requirements of section 28(1)(b) of the Act.

Here, it may be the case that the personal information disclosed by the Board would not constitute an unjustified invasion of the affected person's personal privacy within the meaning of sections 21(1)(f) and 49(b). Since the information has already been disclosed, I see no useful purpose in making a determination on this issue. However, the requested records clearly contained the personal information of both the appellant and the affected person and, as acknowledged by the Board, the matter giving rise to the records was highly sensitive. In these circumstances, there was a "reasonable doubt" as to whether disclosure would constitute an unjustified invasion of the affected person's personal privacy, and thus the Board had ample reason to believe that disclosure "might" constitute an unjustified invasion within the meaning of section 28(1)(b). Therefore, the Board ought not to have deprived the affected person of notice under this provision, and should have given her an opportunity to make representations on the issues prior to disclosure.

The Board relies on Orders P-706 and P-738 in support of its decision not to notify the affected person before disclosing portions of the records. In each of these cases, former Inquiry Officer John Higgins reviewed the institution's decision not to notify under section 28(1)(b), in light of the particular circumstances of the case, and found no reason to conclude that the notice requirements had not been met. These two cases were decided on their own unique facts and are not determinative of the notice issue here.

ORDER:

1. I order the Board to disclose to the appellant all of the information in page 8 with the exception of the affected person's address on or before **March 22, 1999** but not earlier than **March 17, 1999**.

2. I uphold the balance of the Board's decision.

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 which is disclosed to the appellant pursuant to Provision 1.

Original signed by: February 15, 1999
David Goodis
Senior Adjudicator