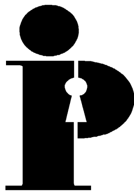

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1868

Appeal PA-000136-1

Criminal Injuries Compensation Board

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NATURE OF THE APPEAL:

This is an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a decision of the Criminal Injuries Compensation Board (the Board).

The requester (now the appellant) sought access under the *Act* to an Application for Compensation and Police Questionnaire from the Board, both of which relate to a file in which he is named as the (alleged) offender. In its decision, the Board denied access to the information in its entirety, relying on the mandatory exemption in section 21 of the *Act* (unjustified invasion of personal privacy), and the provisions of section 49(b) (discretion to deny requester's personal information).

In addition to the exemptions relied on by the Board, there is also an issue, raised by the appellant, as to whether the head of the Board is in a conflict of interest in making the decision refusing disclosure to the appellant. Further, the appellant also objects to having to pay an appeal fee, on the basis that it is contrary to principles of disclosure that he is required to disburse funds in order to appeal the refusal of disclosure materials.

I sent a Notice of Inquiry to the Board, initially, inviting submissions on the issues raised by the appeal. These submissions were shared with the appellant, who was invited to submit representations in response, and has. I then decided to invite the submissions of the Board and of two affected parties in reply to those of the appellant, all of whom have responded. The affected parties object to the release of the records.

RECORDS:

The first record at issue is titled "Police Questionnaire", and consists of a two-page standard form document which has been completed in handwriting and signed by a police officer and the officer's supervisor. Among the information contained in the form are the names of the victim and alleged offender, details as to charges laid and disposition, and details as to the incident giving rise to the charge.

The second record is titled "Application for Compensation", and consists of a four-page standard form document which has also been completed in handwriting. Not every portion of the form has been completed, but some of the information contained in the form includes the name, address, date of birth, and health card number of the victim (one of the affected parties), the time, place and details of the alleged incident, details of the injury allegedly sustained, and name and identifying details about a person making an application on behalf of the victim (the other affected party).

CONCLUSION:

I order disclosure of certain non-personal information in the records, and certain personal information relating to the appellant only, but uphold the Board's decision to exempt other information in the records. I also find that the Chair of the Board was not in a conflict of interest in making the decision on the appellant's access request. Finally, I uphold the appeal fee.

DISCUSSION:
PERSONAL INFORMATION

In determining whether the records are exempt from disclosure under sections 21 and 49 of the *Act*, I must first decide whether the records contain "personal information", since section 21 applies only to information which qualifies as “personal information”. APersonal information" is defined in section 2(1), in part, to mean 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)].

On my review of the records, I am satisfied that the Police Questionnaire contains the personal information of the appellant, and of an affected party, identified as the victim. It also contains information of a non-personal nature, such as the names of the investigating officers, their badge numbers, supervisor and occurrence number. In past orders, it has been found that, except where identifying information about police officers appears in a context of complaints of professional misconduct against them, such information is normally considered to be information about the officers in their professional capacities, and not personal information: see, for instance, MO-1288.

Other information of a non-personal nature includes the time, date and location of the alleged incident, and the date of the application.

The Application for Compensation contains personal information of the appellant and of the victim. In addition, there is personal information about a person completing the application on behalf of the victim. Further, the Application contains information of a non-personal nature, similar to that found in the Police Questionnaire.

UNJUSTIFIED INVASION OF PERSONAL PRIVACY

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. Section 49(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b), where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. The institution may also decide to grant access despite this invasion of privacy.

Section 49(b) introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against other individuals' rights to the protection of their personal privacy. If the institution determines that release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

I have found that both of the records contain information of a non-personal nature, such as the names and badge numbers of the investigating officers, time, date and location of the alleged incident, and date of the application. Since this information would not qualify for exemption under section 21, section 49 also has no application and I will order it to be disclosed.

Further, some of the information withheld from the records consists of the personal information of the appellant only, such as identifying information, and information about charges laid against him and disposition. As such, its disclosure would not constitute an unjustified invasion of the personal privacy of another individual, and section 49(b) does not apply. Accordingly, the appellant is also entitled to these portions of the records.

In considering the application of section 49(b) to the remaining personal information in the records, sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

With respect to section 21(3), 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 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

In its representations, the Board has relied on the factors in sections 21(2)(f) and (h) and the presumption in section 21(3)(a), in claiming that disclosure of the records would constitute an unjustified invasion of the personal privacy of individuals other than the appellant. The appellant has in turn referred to the provisions of section 21(2)(d). These sections provide:

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

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

Section 21(3)(a)

I will first consider the application of section 21(3)(a). On my review of the records, certain information about the victim on pages 1 and 2 of the Police Questionnaire, and on pages 1 and 2 of the Application for Compensation relates to the type of matters set out in section 21(3)(a). On the Police Questionnaire, this information consists of a comment on page 1 revealing whether there was any physical injury and, on page 2, the answer to the form question: “In your opinion, did the injuries result, to any extent, from the victim’s own conduct?”

On the Application for Compensation, information falling under the presumption in section 21(3)(a) includes the answer to the form question on page 1: “Did the victim receive any treatment for his/her injuries?”. As well, information provided in answer to the form question on page 2 (“Details of injury sustained”) falls under this presumption.

The disclosure of the above personal information must therefore be presumed to constitute an unjustified invasion of personal privacy.

Section 21(2)

The balance of the personal information which has been withheld consists essentially of identifying information about the victim and about the person making the application on the victim’s behalf (such as date of birth, address, social insurance number), and information about the incident alleged to constitute sexual assault. None of the presumptions in section 21(3) appear to apply to this information. Accordingly, I will assess whether its disclosure would constitute an unjustified invasion of personal privacy having regard to the criteria enumerated in section 21(2) and any other relevant consideration.

As I have indicated, the Board submits that the information in the records is highly sensitive within the meaning of section 21(2)(f), as it relates to allegations of sexual misconduct. The appellant disputes the suggestion that the proceedings before the Board relate to allegations of sexual misconduct, as no charge of sexual assault has been laid against the appellant and no other proceedings based on conduct of a sexual nature have been instituted by the applicant for compensation.
Previous orders have found that allegations of sexual misconduct are "by definition highly sensitive" within the meaning of the *Act*: see, for instance, Order PO-1815. I accept this finding, and adopt it here. I also observe that the fact that no other proceedings have been instituted in relation to the allegations does not

detract from their sensitive nature. The application of section 21(2)(f), therefore, weighs against the disclosure of this information.

With respect to the application of section 21(2)(h), the appellant has submitted that the very fact of making an application for compensation suggests either a waiver of confidentiality, or a reduced expectation of confidentiality. In Order PO-1815, Assistant Commissioner Tom Mitchinson stated, referring to the Board:

> 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.

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

Turning to factors which support disclosure of the records, the appellant states that he requires the information so that he can be properly represented at the compensation hearing. In previous correspondence, he has stated that it is "contrary to the established principles of disclosure that material relating directly to the issue to be determined at the hearing is being denied to one of the parties to the hearing". Related to this, he has also submitted that at the hearing, the applicant for compensation will be obliged to disclose the facts which are the subject of this appeal in any event. If those facts are only made available at the hearing, and not prior, an adjournment of the hearing might be necessitated so that the appellant can prepare to meet those facts. Accordingly, denial of the requested disclosure at this point will result in the prolongation of the hearing and extra costs to all parties concerned.

The Board has submitted, in response, that the appellant was notified by way of a Board disclosure package, that the Board proceedings related to an allegation of sexual misconduct which took place at a specific place during a specific time period. Specific details of the alleged misconduct were provided. The Board states that the appellant has thus been provided with reasonable information on the allegations against him, and can properly prepare for the hearing. The Board states that information relating to the personal information of the victim will not assist the appellant in his submissions before the Board.

Further, the Board submits that at the hearing, the appellant would only be provided with particulars that relate to the allegations against him and at no time before, during or after the hearing, will he be entitled to obtain the personal information of the victim. He will not be entitled at the hearing to personal identification information such as social insurance number and date of birth, or to other sensitive information that does not relate to the actual incidents alleged to have occurred.

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 to which he will be given notice and a right to participate. The information about the incident alleged to constitute sexual assault 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 find, however, that it is not relevant to the personal identifying information about the two affected parties contained in the records, since it is not clear 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 personal 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.

In assessing the relative strength to be accorded to these factors, I must determine, in essence, the appropriate balance to be struck between the personal privacy rights of the affected parties, and the "process rights" of the appellant as a participant in a legal hearing. In my view, a significant consideration which affects the weight to be given all of the relevant factors in section 21(2) is the fact that the appellant has already been provided with disclosure of the nature of the allegations against him. In a sense, this diminishes the significance of the factors in section 21(2)(f) and (h), at least with respect to the information about the allegations, since the appellant is already aware of some of that information. But it is even more relevant to my assessment of the weight to be given the factor in section 21(2)(d), insofar as the appellant is in possession of information which allows him to prepare for the hearing.

It should be noted that the appellant appears to be particularly interested in obtaining details of any injury alleged by the victim. In his submissions, he states that information withheld in reliance on the presumption in section 21(3)(a) of the *Act* (medical, psychiatric or psychological history etc.) is "seminal information" in terms of his ability to reply to the claim. Since I have already determined that this information was properly withheld due to the application of the section 21(3)(a) presumption, the factors in section 21(2) do not

apply. As I have indicated above, once the applicability of a presumption in section 21(3) is established, the factors in section 21(2) cannot be resorted to in favour of disclosure.

On balance, I find that the disclosure of the personal identifying information of the affected parties contained in the records would constitute an unjustified invasion of their personal privacy. The factors in sections 21(2)(f) and (h) weigh moderately against their 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 one of the affected parties. The factors in sections 21(2)(f) and (h) weigh moderately against their disclosure, and the factor in section 21(2)(d) is of relatively low weight given the prior disclosure to the appellant by the Board.

I note that the appellant has expressed a concern about statements made in the Board's representations to the effect that information was received in the form of Acorrespondence from other persons". To the extent that there may be a concern about other undisclosed material from an undisclosed source, it appears that the Board is simply stating that the personal information of the appellant found in the two forms in question was obtained *other* than through the appellant.

Conclusion

In sum, I conclude that the personal information of the affected parties in the records qualifies for exemption under section 21(1). Further, I am satisfied that the Board has exercised its decision appropriately under section 49(b) in deciding against the disclosure of this information.

PUBLIC INTEREST

The appellant asserts that section 23 of the *Act* supports his request for disclosure of the information in the records. Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 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].

In the case before me, the appellant has submitted:

> If the public interest exemption under section 23 cannot prevail in the present and analogous cases, persons responding to applications for compensation will be unable to fully participate in the compensation hearing due to a lack of disclosure regarding fundamental facts at issue in the hearing. One of the fundamental principles of procedural fairness and fundamental justice is that both parties to a proceeding be fully informed of the facts at issue, in order that each party can represent its interests as extensively as it considers appropriate. If respondents to applications for compensation are frustrated by a lack of information in the conduct of their cases, the decisions of the Board will not be the result of full hearings, and may accordingly be regarded with less respect by the public.

The threshold for establishing a compelling public interest is high. In other cases, it has been concluded that a request for information which would assist an appellant in participating in a legal process is more in the nature of a personal, rather than public, interest. Further, to the extent that general issues as to the administration of justice are raised, it has been said that section 23 (or its municipal equivalent) does not apply where there is an alternative disclosure mechanism: see, for instance, Orders M-249 and PO-1815.

I adopt the reasoning in the above cases. I am satisfied that section 23 does not apply, insofar as there is an alternative disclosure mechanism providing for access to information enabling the appellant to participate in the hearing in which he has an interest and, in any event, the concerns expressed are rooted in a private rather than public interest.

CONFLICT OF INTEREST

The appellant has alleged that the Chair of the Board is in a conflict of interest in making a decision about access to the information at issue, while presiding over the tribunal which will render a decision about the application for compensation. He submits, among other things:

> ...if the withheld information is not disclosed, or if the Board directs that the information not be disclosed during the hearing, the anomalous situation will arise where the Board will have information (in the application for compensation) that the requester lacks. A decision could be made on evidence not available to the respondent in the compensation hearing. Such a situation would be contrary to the rules of natural justice, which require that tribunals only make decisions on the basis of evidence available to the parties. I would suggest that a reasonably informed person who was told that an administrative tribunal could on its own motion withhold information on which it might make its decision from a party to the proceeding would perceive a conflict on the part of the tribunal, as the tribunal could not be expected in such circumstances to hold an impartial hearing and render an impartial decision....The Board is indivisible as a tribunal, and if one member makes a decision withholding information from one party to a proceeding, a reasonably informed person would be concerned about the impartiality of those members hearing the application. Although the Chair does not have a personal interest in the records in question, the Board has an institutional interest in recovering compensation paid from the respondent.

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example, Orders MO-1285 and MO-1283).

The question of conflict of interest encompasses both real conflicts, based on a personal or special interest, and reasonably perceived conflicts. The concern which underlies the issue of conflict of interest is that a person making a decision on access to records should be free of extraneous influences which may prevent an impartial decision.

In this case, the appellant suggests that the Chair and, indeed, the Board in its entirety, has a conflict of interest. He states that the Board has an "institutional interest in recovering compensation paid" from the appellant. Although it is not entirely apparent, I assume that the appellant is suggesting that the Board will find itself in an adversarial relationship to the appellant in the future and thus ought not to make decisions under the *Act* on the appellant's request for disclosure of records. I am not convinced, even assuming the

existence of an “institutional interest”, that this interest would affect the ability of the Chair or of the Board to make an impartial decision on the appellant’s access request. Such an interest is, at this time, hypothetical at most since no decision on compensation has yet been granted. Still more hypothetical is the possibility that, if compensation were granted, the Board would decide to seek indemnity against the appellant, *and* that its decision at this point under this *Act* would benefit the Board's interests and prejudice the appellant's interests, in any future proceedings. In my view, such an eventuality is sufficiently remote that it does not give rise to a conflict of interest on the part of the Chair or of the Board in deciding on the appellant’s access request.

Further, the appellant also suggests that the Board’s very position as decision-maker in relation to the compensation application places it in a conflict of interest with respect to its role as decision-maker on the access request. After considering the applicant’s submissions, I cannot conclude that a decision to grant or deny access to information under the *Act* would have an effect on the Board’s ability to make an impartial decision under the *Compensation for Victims of Crime Act (CVCA)*, or the reverse. The issues to be decided in each role are entirely distinct, and I am unable to discern how a decision in respect of one statute might prejudice a decision under the other statute. In short, I am satisfied that the existence of these two roles does not, by itself, place the Board in a conflict of interest.

I conclude that the Chair of the Board was neither in an actual nor reasonably perceived conflict of interest, in deciding on the appellant's access request.

APPEAL FEE

Finally, the appellant has submitted that it ought not to be required to pay the fee for appealing an access decision under the *Act*. In support of this, he refers to the right to disclosure granted under the *Statutory Powers Procedure Act* (*SPPA*) and states that the imposition of a fee inhibits the right to disclosure. Whatever the appellant's rights and remedies may be under the *SPPA*, the processing of this appeal is governed by the provisions of this *Act*. Section 50(1.1) of the *Act* provides that a person who appeals an access decision "shall" pay a prescribed fee. I have been provided with no legal authority establishing a basis upon which I might waive this provision. Accordingly, I uphold the requirement to pay an appeal fee.

ORDER:

1. I order disclosure of the portions of the records which contain information of a non-personal nature, and which contain personal information of the appellant only. For greater certainty, I have provided a copy of the records for the Board highlighting those portions which shall be **withheld**.

2. I uphold the Board’s decision to deny access to the remaining information in the records.

3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Board to provide me with a copy of the records which it provided to the appellant.

4. I order disclosure to be made by sending the appellant a copy of the records, excluding the exempted portions, by no later than **March 23, 2001**, but not before **March 19, 2001.**

Original signed by: __________________________ ____________ February 16, 2001
Sherry Liang
Adjudicator