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

ORDER PO-2472

Appeals PA-050108-1 and PA-050162-1

Criminal Injuries Compensation Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND

The Criminal Injuries Compensation Board (the CICB) is a quasi-judicial tribunal which provides compensation to victims of violent crime occurring in Ontario. The CICB administers compensation under the *Compensation for Victims of Crime Act*, and as a tribunal it follows the rules and procedures set out in the *Statutory Powers Procedure Act*.

NATURE OF THE APPEAL:

The CICB received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records in respect of any applications for compensation made by any or all of twenty-one (21) named individuals. The request, specifically sought access to:

1. Any and all records, where situate, whether in paper or electronic format, in respect of any application for compensation made by 21 named individuals, all women, in connection with each or any of their allegations against the requester.

2. Any and all records, wherever situate, whether in paper or electronic format, in respect of any decision(s) made by the CICB in respect of any application for compensation made by 21 named individuals, all women, in connection with each or any of their allegations against the requester.

3. Without limiting the generality of the foregoing, information respecting whether each of any of the 21 named individuals, all women, have applied for compensation with each or any of their allegations against the requester.

The CICB is an institution for the purpose of the *Act* whose head is the Attorney General of Ontario. The Ministry of the Attorney General (the Ministry) has acted on the CICB's behalf in the processing of the request and the response to the subsequent appeals.

As the request was for records relating to twenty-one individuals and the requester only submitted $5.00, the fee required for processing one request, the Ministry began its search for records relating to the first individual listed in the request and advised the requester that additional fees were due in order for it to process the request relating to the remaining twenty individuals.

In response to the request for records relating to the first individual, the Ministry issued a decision letter advising that the existence of responsive records cannot be confirmed or denied in accordance with subsection 21(5) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision with respect to the first request. That first appeal was assigned Appeal Number PA-050108-1.

Subsequently, the appellant submitted the fees required for processing requests relating to the remaining twenty individuals detailed in his original request letter. As a result, the Ministry opened twenty more files and issued a single decision letter for those files. The Ministry's

decision letter with respect to information relating to the remaining twenty individuals, advised that the existence of responsive records cannot be confirmed or denied in accordance with subsection 21(5) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision with respect to the remaining twenty requests. Appeal Number PA-050162-1 relates to those twenty requests.

During the mediation process of both files, the mediator contacted both the appellant and the Ministry. No issues were resolved. Accordingly, both appeals were transferred to the adjudication stage of the appeal process.

As both appeals deal with the request for the same type of information as it relates to twenty-one individuals and as the Ministry has refused to confirm or deny the existence of records for all twenty-one requests, this order will address both Appeal Number PA-050108-1 and Appeal Number PA-050162-1.

I began my inquiry by sending a Notice of Inquiry to the Ministry and received representations in return. I then sent the Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations. As the appellant raised the possible application of section 23 (public interest override) in his representations, I provided the Ministry with a copy of his submissions and it responded with reply representations with respect to the possible application of section 23 to the records.

DISCUSSION:

REFUSAL TO CONFIRM OF DENY THE EXISTENCE OF A RECORD / INVASION OF PRIVACY

Section 21(5) provides as follows:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339, P-808 upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)].

Before an institution may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5), stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
>
> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal dismissed (May 19, 2005), S.C.C. 30802.]

Part one: Disclosure of the records (if they exist)

Definition of personal information

An unjustified invasion of privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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)].

The Ministry takes the position that any responsive records, if they exist, would contain personal information, within the meaning of section 2(1) of the *Act*, belonging to the individuals named in the appellant's request. It submits:

> It is usual for victims … to provide lengthy written statements with their applications for compensation that set out information that qualifies as personal information under the various subparagraphs of section 2(1) and other personal information that does not neatly fit into the categories captured by the subparagraphs.

The appellant states that he takes "no position on this issue" and that the onus is on the Ministry to establish that the information contained in any records, if they exist, is personal information as defined by section 2(1) of the *Act*.

In my view, any records responsive to the appellant's request would contain information that pertains to the individuals named by the appellant who might have applied for compensation from the CICB. Accordingly, I find that any such responsive records, if they exist, would be

"about" those named individuals in a personal sense, and would contain information about them that would fall within the scope of the definition of "personal information".

In my view, it is also possible that some or all of any responsive records, if they exist, might contain the name of the appellant and perhaps other information that might qualify as his personal information. Accordingly, I find that any such responsive records might also contain information "about" the appellant that would qualify under section 2(1) of the *Act* as the appellant's "personal information". For the purposes of my analysis below, and given the nature of the request, I will assume that responsive records, if they exist, would contain the appellant's personal information, together with the information of the named individuals.

Unjustified invasion of personal privacy

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. However, this right of access under section 47(1) is not absolute; section 49 provides a number of exceptions to this right. 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 as outlined in section 21(1).

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some criteria for the Ministry to consider in making this determination; section 21(3) identifies certain types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; section (4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Sections 21(2) and (3)

The Ministry takes the position that if applications for compensation have been submitted by any of the twenty-one individuals named in the appellant's request, the presumptions at sections 21(3)(a), (b) and/or (h) would apply to any records relating to such an application, if they exist. These sections provide:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> …
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Ministry submits:

> Under section 21(3) of the *Act*, the disclosure of certain kinds of personal information is presumed to constitute an unjustified invasion of privacy. Applicants for compensation are required to complete forms in which, among other things, they are requested to provide information about physical and psychological injuries and treatments, and to detail the incident or incidents in which a crime of violence took place, to obtain police questionnaires which often include police reports of active criminal investigations. Given that an applicant has flexibility to provide as much information as possible, application forms can also indicate an applicant's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

In the alternative, the Ministry submits:

> In the alternative, even if none of the presumptions apply, the personal information contained in applications made by victims of crime […] would, if disclosed constitute an unjustified invasion of privacy based on a consideration of the factors contained in section 21(2) of the *Act*. Applicants would be exposed unfairly to harm, the personal information is highly sensitive, the personal information has been supplied by the person to whom it relates in confidence, and the disclosure may unfairly damage the reputation of any person, including the victim, referred to in the record.

The appellant disagrees with the Ministry that the presumptions in sections 21(3)(a), (b) or (h) would apply to personal information in the responsive records, if they exist. The appellant takes the position that none of the presumptions listed in section 21(3) apply in the circumstances of this appeal. The appellant submits that the following factors listed in section 21(2) that favour the disclosure of personal information apply. He submits that the following factors apply:

> (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;

(e) the individual to whom the information relates will [not] be exposed unfairly to pecuniary or other harm;

(f) the personal information is [not] highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has [not] been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may [not] unfairly damage the reputation of any person referred to in the record.

In support of his contention that section 21(2)(d) applies, the appellant submits that disclosure of the information is relevant and necessary to his ability to "make full answer and defence to very serious criminal and professional discipline allegations".

The appellant also submits that once these factors are balanced, and in particular taking into account the factor at section 21(2)(d), the considerations weigh in favour of disclosure.

Having taken into account the circumstances of this appeal and all of the representations submitted by the parties, in my view, any responsive records, if they exist, would clearly contain personal information, pertaining to the named individuals that would relate to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation as contemplated by the presumption at section 21(3)(a). In my view, it is also very likely that records responsive to a request of this nature, if they exist, would contain information that falls within the presumption at section 21(3)(b) (investigation into a possible violation of law) and quite possibly information that falls within the presumption at section 21(3)(h) (indicates an individuals' racial or ethnic origin, sexual orientation or religious or political beliefs or associations).

Given the nature of the records that would be responsive to the request, the type of personal information that would appear in such records, and the nature of CICB's work, I find that the very fact that such records are in its custody and control strongly support the conclusion that any responsive records, if they exist, would be subject to one if not all of the presumptions listed at sections 21(3)(a), (b) and/or (h). Therefore, I find that the presumptions at sections 21(3)(a), (b), and/or (h) of the *Act* apply to the personal information contained in any responsive records, if they exist.

Accordingly, I find that disclosure of the records, if they exist, that contain the personal information of the individuals named in the request but do not contain the personal information of the appellant would result in a presumed unjustified invasion of the personal privacy of those individuals and, subject to my discussion of section 23 below, would qualify for exemption under section 21(1).

For those records which contain the personal information of the appellant as well as that of the individuals named in the request, I find that disclosure of the personal information in the records, if they exist, would also constitute a presumed unjustified invasion of the personal privacy of the named individuals whose personal information would be contained therein and, subject to my discussion of section 23 below, would qualify for exemption under section 49(b).

As noted above, given that a presumption against disclosure under section 21(3) has been established and a presumption cannot be rebutted by either one or a combination of the factors set out in section 21(2), it is not necessary for me to consider those factors.

Section 21(4) has no application in the circumstances of this appeal and therefore, does not rebut the presumptions established in sections 21(3)(a), (b) and/or (h). However, as the application of the "public interest override" at section 23 has been raised I must determine whether the presumptions at section 21(3) can be overcome by a compelling public interest that outweighs the purpose of the exemptions at sections 21(1) and 49(b).

Public interest override

The appellant has raised the application of the section 23 "public interest override" as a basis for requiring disclosure of the records, if they exist, even if disclosure is found to constitute an unjustified invasion of personal privacy pursuant to sections 21(1) and 49(b).

Section 23 provides:

> 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.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In considering whether there is a "public interest" in the disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in

some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, and P-1439]. Where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist [Order MO-1564].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant argues in his appeal letter (which, for the purposes of the public interest argument he relies on in his representations) that the compelling public interest in the disclosure of the information arises from the fact that it is necessary to enable him to make full answer and defence to very serious criminal and professional discipline allegations. He submits:

> Release of the information will assist the parties, the court and the Discipline Committee of the College of Physicians and Surgeons in assessing the credibility of [the] complaints. Disclosure will ensure that all relevant information is available to be placed before the court and the Discipline Committee.
>
> …
>
> [The appellant] submits that the public interest of ensuring fair and efficient adjudication of criminal and professional discipline complaints outweighs the privacy rights of an individual who may make an application to the CICB following the making of criminal and professional discipline complaints arising from the same circumstances.

The appellant also submits:

> [I]n the context of a likely conspiracy among the complainants in this matter (evidence of which was adduced in the course of the criminal proceedings) there is a compelling public interest in disclosure of the mere fact of whether an application for compensation has or has not been made by any of the named individuals. In the context of this case, it would be highly relevant if any of the named individuals were denied. Without knowing what, if indeed any, information or records exist in relation to any application for compensation by any of the named individuals, we cannot determine whether disclosure of the same would or would not constitute an unjustified invasion of privacy. As such, and at the very least, the CICB ought to be compelled to disclose to [the appellant] whether any application for compensation has been made by any of the named individuals.

In its representations, the Ministry addressed the possible application of the public interest override at section 23 as follows:

> It is submitted that there is no compelling public interest in disclosure in this appeal. Notwithstanding that the appellant is facing criminal charges and disciplinary proceedings, this does not entitle him to obtain disclosure of records and evidence that, without confirming or denying their existence, may be filed with the CICB. The criminal process has its own requirements for disclosure of documents and evidence in the possession of Crown prosecutors. Therefore there is no compelling reason for the CICB to disclose any records or evidence that may

> be in its possession since the rights of the appellant to make full answer and defence in the criminal proceedings are not jeopardized.
>
> …
>
> The College of Physicians and Surgeons also has its own rules and procedures for disciplining the appellant, and like any other tribunal, it will be required to adhere to principles of natural justice and fairness in its proceedings. Given the serious sanction that the College can impose on the appellant, records and evidence that will be used by the College in relation to its investigation and prosecution will likely be fully disclosed since the highest penalty that can be imposed by the College will impair the appellant's future career. The appellant will not suffer any prejudice in defending the disciplinary proceedings if he is unable to obtain disclosure of record and evidence in the possession of the CICB.
>
> If the procedures of the College do no permit disclosure of complaints and records in which allegations […] are made, the appellant should not be entitled to use the *Act* to circumvent the procedures of the College by attempting to obtain what may amount to be similar records in the possession of other third party institutions where expectations of privacy and confidentiality are sought.

Taking into consideration the representations of the parties, and the type of information contained in any responsive records, if they exist, I cannot agree that there exists any compelling public interest in the disclosure of such records. In my view, the records, if they exist, are being sought by the appellant to pursue his purely private interest in defending himself in the face of criminal and professional discipline allegations and this interest cannot be said to be public in nature. As noted above, previous orders have found that a compelling public interest does not exist where a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]. Previous orders have also found that a compelling public interest does not exist where another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]. In the circumstances of this appeal, such alternative disclosure mechanisms (as governed by the courts) and public processes or forums (as governed by the Ontario College of Physicians and Surgeons) exist to protect the appellant's right to provide full answer and defence to both the criminal and professional discipline allegations

Accordingly, in my view, there does not exist any public interest, compelling or otherwise, in the disclosure of the responsive records, if they exist. As a result, I find that section 23 has no application in the present appeal and the responsive records, if they exist, are exempt from disclosure under sections 21(1) and 49(b).

Part two: Disclosure of the fact that the records exist (or do not exist)

Under part two of the section 21(5) test, the Ministry must demonstrate that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the

nature of the information conveyed is such that disclosure would constitute an unjustified invasion of privacy.

On this point, the Ministry relies upon Order PO-2326 which addressed a request for access to a complaint from a named individual to the Ontario Provincial Police (the OPP). The Ministry claimed the application of section 21(5). In Order PO-2326, Adjudicator Frank DeVries found that not only would the record contain personal information that qualified for exemption under one of the presumptions in section 21(3), but also that the disclosure of the existence or non-existence of the records responsive to the request would reveal personal information about a named individual, specifically whether or not the named individual had submitted a complaint to the OPP. Relying on the finding in that order, the Ministry submits:

> The public policy goal of encouraging victims […] to come forward can only be met it the privacy rights of these victims are safeguarded…The administrative process of moving a complaint from the application stage to the hearing stage takes time as applicants are requested to obtain medical information and police information. In many instances, complaints are abandoned or administratively closed because of non-replies from victims after applications have been filed. In order to protect the integrity of the complaint process and to protect individuals from revealing how they may be dealing with alleged acts of criminal violence, a response that would *either* confirm or deny the existence of records before the CICB would in itself disclose personal information about an named individual.

The appellant submits that the Ministry has not discharged its burden of proving that disclosure of the mere existence of a record would be an unjustified invasion of privacy as it has not provided detailed and convincing evidence that disclosure of the existence of responsive records would convey information to the appellant and that disclosure of this information would constitute an unjustified invasion of personal privacy.

In the circumstances of this appeal, particularly in light of the nature and wording of the request and the subject matter and content of any responsive records, if they exist, I have concluded that part two of the test for section 21(5) has been met. In my view, disclosure of the very existence or non-existence of records responsive to this request would in and of itself convey information to the appellant and the nature of that information is such that disclosure would constitute an unjustified invasion of privacy under sections 21(1) and 49(b).

In the circumstances of this appeal, disclosure of the existence or non-existence of the records, if they exist, would reveal personal information about the named individuals, specifically whether or not those individuals have applied for compensation from the CICB which in turn reveals whether or not the applicant might be (or consider herself to be) a victim of a violent crime. Given the nature of the information in the records that would be responsive to the request, if they exist, in my view, the very knowledge that responsive records exist would reveal personal information about the named individuals that is highly sensitive (section 21(2)(f)) and personal information that I accept has been supplied to the CICB in confidence (section 21(2)(h)).

In my view, these factors weighing against disclosure are not outweighed by the possible application of the factor weighing in favour of disclosure at section 21(2)(d) (that disclosure of the personal information is relevant to a fair determination of rights affecting the person who made the request). In light of the fact that other avenues are available to the requester to obtain the information required to defend himself either in criminal court or before his professional disciplinary board I find that this consideration cannot be given significant weight. In addition, the disclosure of the very fact that an application for compensation was or was not filed might also trigger the presumption at section 21(3)(b) because information that was compiled and is identifiable as part of an investigation into a possible violation of law would likely be included in such a record.

In my view, I have been provided with sufficient evidence to satisfy me that this is a situation in which the very nature of the request permits the Ministry to rely on the application of section 21(5), as disclosure of the very existence or non-existence of responsive records would result in an unjustified invasion of the personal privacy of the individuals named in the appellant's request.

Conclusion

As both parts of the test for the application of section 21(5) have been met, I find that the Ministry properly exercised its discretion to refuse to confirm or deny the existence of responsive records, if they exist, and that section 21(5) applies in these appeals.

ORDER:

I uphold the Ministry's decision.

Original Signed By
Catherine Corban
Adjudicator

May 25, 2006