Privacy Commissioner of Canada

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File: 7100-03809

OCT 15 2008

Ms. Philippa Lawson
Director
Canadian Internet Policy & Public Interest Clinic
University of Ottawa
57 Louis Pasteur, Rm 506
Ottawa ON K1N 6N5

Dear Ms. Lawson:

Please find attached the report of findings prepared by my Office with regard to the complaint you filed against Service Canada (SC) under the *Privacy Act*, and received by us on August 1, 2007.

Following the investigation into your complaint, I have concluded that the matter is well-founded. For details on the investigation and the rationale for my conclusion, please see the attached report of findings.

This concludes our Office's investigation of your complaint. If you have any questions about this letter, please do not hesitate to contact Jocelyne Rodrigue, the privacy investigator of record, at 1-800-282-1376.

Sincerely,

Jennifer Stoddart

Jennifer Stoddart
Privacy Commissioner of Canada

Attachment

Report of Findings

File: 7100-03809

Complaint under the *Privacy Act* (the *Act*)

1. The individual complained about the disclosure of personal information by the Pension Appeals Board (PAB) in Appeals Board decisions posted on its website.

Summary of Investigation

2. The investigation confirmed that the PAB publishes on its website its decisions rendered on appeals for *Canada Pension Plan (CPP)* disability and Old Age benefits based on PAB hearings. These written decisions contain the approval or dismissal of the appeal, as well as personal information of the appellants, including date of birth of appellant and family members, family, education and employment history, detailed health information and medical reports, financial information, etc.

3. Section 44(1) of the *CPP* affords those individuals who are contributors to the *CPP* the right to request *CPP* disability and old age benefits. Sections 81 to 86 of the *CPP* set out the mechanism for reconsideration and appeal in those instances where benefits are denied. Applicants dissatisfied with a decision regarding their application for *CPP* disability and old age benefits have three opportunities to appeal that decision: 1) a departmental Adjudicator not involved in the initial decision; 2) a Review Tribunal of three members chosen from a national panel of several hundred members appointed by the Governor-in-Council; and 3) the PAB which is a tribunal composed of three judges or former judges, of the Federal Court or a superior court of a province, appointed by the Governor in Council. They are not considered employees of the Pension Appeals Board. Applicants must request leave to appeal to the PAB.

4. The PAB is considered the authority of last resort when it comes to interpretation of the *CPP* and its provisions. Subject to judicial review under the *Federal Courts Act*, decisions of the Pension Appeals Board are final and binding for all purposes under the *CPP*. The *Pension Appeals Board*

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Rules of Procedure section 18 states that "*a hearing of an appeal shall be public unless the Board in special circumstances orders the case to be heard in camera*". Section 20(1) stipulates that "*[t]he reasons for a decision of the Board on an appeal shall be in writing and shall be deposited with the Registrar who shall draw up and enter the decision and shall forthwith send by registered mail a copy of the decision and the reasons therefore to the parties to the appeal*". Section 20(2) specifies that "*[t]he Registrar may arrange for the publication of the decisions of the Board, or a digest thereof, in such form and manner as the Board deems proper*".

5. Most of the decisions of the Board from 1968 onward are available to the public from the Commerce Clearing House (CCH) Canadian Employment Benefits and Pension Guide Reports. CCH also publishes the annotated case tables on certain themes. The PAB explained that this limited access to case law has been of concern to claimants and their representatives who frequently want access to the same cases which are automatically available to the other party, namely the Minister of Human Resources and Social Development. Access to decisions is also of interest to other levels of decision-making involving *CPP* as well as other tribunals. The decisions of the first two levels of appeals are not made public.

6. In order to better facilitate access to the PAB decisions, the Chairman of the Board decided to publish all written decisions on its website in 2004. The decisions are posted as written by the members of the Board and include the names of parties to the appeal. Currently, the PAB is in the process of adding the decisions prior to 2000. The PAB has taken the position that its appeal process is quasi-judicial, its hearings are public and it will continue to publish its decisions on the PAB's website.

7. The complainant is of the view that the PAB is authorized to publish only decisions that are of public interest. She states that section 20(2) of the PAB Rules of Procedure authorizes the PAB to publish its decisions when public interest clearly outweighs any invasion of privacy or that it would clearly benefit the person concerned.

8. While section 20(2) of the Pension Appeals Board Rules of Procedure (Benefits) confers discretion on the PAB to publish its decisions or a digest thereof, subsection 104.01(1) of the *Canada Pension Plan* provides that personal information will not be disclosed, except in accordance with the express provisions of that Act.

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9. While section 83(11) of the *Canada Pension Plan* requires that the Appeal Tribunal "notify in writing the parties to the appeal of its decision and of its reasons therefore", there is no provision in the *Canada Pension Plan* which would empower the Board to publish the reasons for its decisions more broadly.

10. Section 89(1)(c) of the *Canada Pension Plan* does authorize the Governor in Council to make regulations "regulating the procedure to be followed on appeals to...the Pension Appeals Board". The Rules of Procedure in question are regulations made under this authority. However, publication of a decision on the Internet following an appeal is not obviously a "procedure to be followed on appeals to...the Pension Appeals Board".

11. The PAB was advised of these observations in my letter of August 17, 2007. The PAB did not take issue with these views and has not argued that subsection 20(2) of the Rules of Procedure constitutes a regulation authorizing the disclosure for the purposes of section 8(2)(b) of the *Privacy Act*. In the circumstances, this office declined to interpret subsection 20(2) as such a provision.

12. In the course of the investigation, the open court principle was also considered as a possible justification for the disclosure of personal information in Appeals Board decisions on the Internet. The open court principle manifests as a presumption in favor of public and media access to judicial and quasi-judicial proceedings.

13. In a letter dated August 17, 2007, the PAB was advised that it was the view of this office that the open court principle does not require or justify the electronic publication of the personal information in Appeals Board decisions on the Internet.

14. The open court principle can co-exist effectively with the PAB's statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any Appeals Board decisions posted online by replacing names with random initials. Where there is a compelling public interest in disclosure of identifying information that clearly outweighs the resultant invasion of privacy, the PAB may exercise its discretion under subparagraph 8(2)(m)(i) to disclose personal information in identifiable form in Appeals Board decisions. Thus, there is no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.

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15. The PAB also expressed the view that section 8(2)(a) of the Act authorizes the type of disclosure in issue. However, the PAB was previously advised by this office that the electronic disclosure of Appeals Board decisions on the Internet is not the purpose for which the information was obtained. Moreover, such a disclosure is not, in the view of this office, consistent with the reasonable expectations of individuals who participate in the Appeals Board process. As such, it fails to satisfy the guidelines for identifying a consistent use promulgated by the Treasury Board Secretariat.

16. Disclosing Appeals Board decisions *in identifiable form* on the Internet as a matter of course is not reasonably necessary for the accomplishment of the Appeals Board's mandate. There is no obvious, necessary or direct connection between publication on the Internet of Appeals Board decisions *in identifiable form* and the discharge of the Appeals Board's mandate in each and every case.

17. Moreover, the actual uses to which personal information in the Appeals Board decisions disclosed on the Internet may be put are unascertainable, virtually limitless and have considerable potential to be inconsistent with or totally unrelated to the purpose for which the PAB originally collected the personal information.

18. Thus, it is difficult to see how the disclosure of Appeals Board decisions on the Internet *in identifiable form* relying on the open court principle could be a disclosure for a use that is itself consistent with or sufficiently related to the purpose for which personal information was obtained.

19. It is also noteworthy in the Personal Information Index it is obliged to maintain under subparagraph 11(1)(a)(iv) of the *Privacy Act*, the PAB lists as the only consistent use of Appeals Board files "*use for an administrative purpose*". This would not include the posting of Appeals Board decisions on the Internet as a consistent use.

20. In the letter of August 17, 2007, noted above, the PAB was advised that this office was inclined to reject any suggestion that the publicly *accessible* nature of its hearings rendered the personal information disclosed therein publicly *available*.

21. Subsection 69(2) of the *Privacy Act* states that *"[s]ections 7 and 8 do not apply to personal information that is publicly available*". If information disclosed in a publicly accessible hearing is "*information that is publicly available*", the limits

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section 8 place on the disclosure of personal information under the control of a government institution would not apply.

22. This office did not accept that information disclosed during the course of proceedings before the Board is "*publicly available*" for the purposes of subsection 69(2) of the *Privacy Act*. The publicly accessible nature of the Board's proceedings does not, in itself, render any personal information discussed therein publicly available for the purposes of subsection 69(2) of the Act. This is particularly true of written hearings or hearings conducted by teleconference. Similarly, disclosure of personal information to the parties to a proceeding does not, in itself, render the personal information in issue generally available to anyone in the public domain.

23. While the PAB did not cite or rely on subparagraph 8(2)(m)(i) of the *Privacy Act* in its representations to this Office, other government institutions, in related complaint investigations, have. The PAB has been advised of this office's analysis on this issue since it is relevant to the conclusions in this matter.

24. Subparagraph 8(2)(m)(i) provides that a government institution may disclose personal information "*for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure*". Subparagraph 8(2)(m)(i) is not properly invoked where there are more minimally impairing options like depersonalizing decisions available. Moreover, subparagraph 8(2)(m)(i) cannot apply to authorize bulk disclosures of personal information via the Internet as a matter of practice in every case. Only in exceptional circumstances that pass the very high threshold expressed in this provision of the *Privacy Act* could subparagraph 8(2)(m)(i) apply to authorize the disclosure of personal information in Appeals Board decisions on the Internet.

25. Subparagraph 8(2)(m)(i) requires the PAB to observe the following guidelines when exercising discretion under subparagraph 8(2)(m)(i) to disclose, in electronic form on the Internet, personal information in PAB decisions.

- When contemplating exercising its discretion under sub-paragraph 8(2)(m)(i), a government institution should identify the specific and *bona fide* public interest(s) that disclosure of the personal information in a decision will further. The public interest(s) in disclosure a government institution identifies should be considered in light of and weighed against the fact that it is in the public interest to prevent unnecessary invasions of privacy.

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- A government institution should ensure that the contemplated disclosure of personal information is reasonably necessary to the accomplishment of the specific and *bona fide* public interest(s) in question by demonstrating that it is impossible to adequately further the public interest(s) in disclosure without disclosing personal information in an identifiable form.

- If it is determined by a government institution that the specific and *bona fide* public interest(s) in disclosure it has identified actually requires the disclosure of personal information in an identifiable form, it must assess the nature and severity of the invasion of privacy that any reasonably identifiable individual discussed in its reasons for decision could suffer, considering the following list of non-exhaustive decision-making criteria:

    - whether advance notice of the potential for public disclosure of personal information in electronic form on the Internet was provided to individuals;

    - the degree to which personal information was provided under compulsion, in order to access a government benefit or service normally of a personal or private character;

    - the extent to which an individual maintains a reasonable expectation of privacy in the personal information in issue;

    - the sensitivity and accuracy of the personal information being considered for disclosure;

    - the possibility that the individual to whom the information relates will be unfairly exposed to monetary, irreparable reputational or any other harm;

    - the possibility that the individual to whom the information relates could suffer discrimination as a result of the disclosure;

    - the privacy-invasive uses that could be made of the personal information, the likelihood and severity of which increase where personal information is disclosed in electronic form for publication on the Internet;

    - any special circumstances or privacy interests specific to individual cases.

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- There should be a clear record setting out the institution head's assessment of why the disclosure is in the public interest and clearly outweighs any invasion of privacy for the individual(s) affected in order to facilitate judicial review.

- Only where the specific and bona fide public interest(s) in disclosure of personal information "*clearly outweighs*" the competing privacy interests in non-disclosure may subparagraph 8(2)(m)(i) properly be relied on to justify a disclosure of personal information.

- Where the government institution, following this analysis, is satisfied that the invasion of privacy necessarily inherent in the non-consensual publication of personal information on the Internet is authorized by subparagraph 8(2)(m)(i), it should provide the Privacy Commissioner with meaningful notice under subsection 8(5) sufficient to enable the Privacy Commissioner to contact the individual(s) affected in advance of the intended disclosure, particularly in cases where the decision maker has not notified the individual(s) directly.

26. On September 5, 2007 we were advised by the PAB that it was embarking upon a review of the existing legislation and case law with a view to arriving at a principled approach to balancing the PAB's obligations under the open court principle with its statutory obligations under the *Privacy Act*.

27. On November 26, 2007 the PAB communicated the results of its internal review, namely a decision to henceforth identify claimants only by initials in all Appeals Board decisions posted on the Internet.

28. On March 27, 2008, this office responded to the PAB's representations. We were pleased with the Pension Appeals Board's thoughtful and responsive approach to the issues raised in this complaint and the preliminary assessment of the matter. This letter also advised the PAB that "*where Appeals Board decisions are reasonably depersonalized through the use of randomly assigned initials in place of individuals' names, they may be posted on the PAB website in compliance with the Privacy Act*". On the understanding that PAB decisions would henceforth be "reasonably depersonalized through the use of randomly assigned initials", consistent with the office's indication of what the *Privacy Act* requires, the PAB was advised that this office was pleased to find the matter, though well-founded, resolved.

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Section 35(1) of the *Privacy Act*

29. Pursuant to paragraph 35(1)(a) of the *Privacy Act*, which requires that in well-founded complaints the Privacy Commissioner provide the head of a government institution with a report containing the findings of the investigation and any recommendations the Commissioner considers appropriate, four recommendations were made to the PAB. Specifically, it was recommended to the PAB that it:

- apply the depersonalization policy described in its letter to Raymond D'Aoust of November 26, 2007 for future decisions, using randomly assigned initials OR post on the Internet only a summary of the decision with no identifying personal information.

- observe the guidelines respecting the application of sub-paragraph 8(2)(m)(i), set out above, in any case where the PAB proposes to disclose personal information in Appeals Board decisions in electronic form on the Internet.

- remove the Appeals Board decision that forms the basis of this complaint from the PAB website on a priority basis until it can be depersonalized through the use of randomly assigned initials and re-posted in compliance with the *Privacy Act*.

- restrict the indexing by name of past Appeals Board decisions by global search engines through the use of an appropriate "web robot exclusion protocol" OR remove from or depersonalize all past Appeals Board decisions on the PAB website through the use of randomly assigned initials, within a reasonable amount of time.

Response from the PAB

30. On July 8, 2008, we received the PAB's response to this office's report and recommendations. The PAB advised that it will consider requests from claimants that a decision rendered in their case not be made public on a case-by-case basis. The PAB further advised that the Chairman of the PAB and his members apply an extensive body of jurisprudence when arriving at their decisions on each and every matter including the issue of posting decisions on the web.

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31. In view of the fact that a PAB decision has not yet been rendered in the complainant's case, the recommendation to depersonalize any decision that forms the basis of her complaint is not applicable to the circumstances of this specific case.

32. Consistent with OPC's last recommendation that the PAB restrict the indexing by name of past Appeals Board decisions by global search engines through the use of an appropriate "web robot exclusion protocol", the PAB indicated that its Internet service provider has blocked access to PAB decisions from any external or global search engines.

Findings

33. The open court principle does not require or justify the electronic publication of the personal information in Appeals Board decisions on the Internet.

34. The open court principle can co-exist effectively with the PAB's statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any Appeals Board decisions posted online by replacing names with random initials. Where there is a compelling public interest in disclosure of identifying information that clearly outweighs the resultant invasion of privacy, the PAB may exercise its discretion under subparagraph 8(2)(m)(i) to disclose personal information in identifiable form in Appeals Board decisions. Thus, there is no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.

35. Disclosing Appeals Board decisions *in identifiable form* on the Internet as a matter of course is not reasonably necessary for the accomplishment of the Appeals Board's mandate. There is no obvious, necessary or direct connection between publication on the Internet of Appeals Board decisions *in identifiable form* and the discharge of the Appeals Board's mandate in each and every case.

36. The electronic disclosure of Appeals Board decisions on the Internet is not the purpose for which the information was obtained. Moreover, such a disclosure is not consistent with the reasonable expectations of individuals who participate in the Appeals Board process. As such, it fails to satisfy the guidelines for identifying a consistent use promulgated by the Treasury Board Secretariat.

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37. Moreover, the actual uses to which personal information in the Appeals Board decisions disclosed on the Internet may be put are unascertainable, virtually limitless and have considerable potential to be inconsistent with or totally unrelated to the purpose for which the PAB originally collected the personal information.

38. The publicly accessible nature of the Board's proceedings does not, in itself, render any personal information discussed therein publicly available for the purposes of subsection 69(2) of the Act. This is particularly true of written hearings or hearings conducted by teleconference. Similarly, disclosure of personal information to the parties to a proceeding does not, in itself, render the personal information in issue generally available to anyone in the public domain.

39. Moreover, subparagraph 8(2)(m)(i) cannot apply to authorize bulk disclosures of personal information via the Internet as a matter of practice in every case. Only in exceptional circumstances that pass the very high threshold expressed in this provision of the *Privacy Act* could subparagraph 8(2)(m)(i) apply to authorize the disclosure of personal information in Appeals Board decisions on the Internet.

40. Despite some significant movement toward greater privacy protection for claimants appearing before it, this Office was disappointed to learn from the PAB's most recent correspondence that the PAB has refused to reasonably depersonalize Appeals Board decisions through the use of randomly assigned initials in place of individuals' names. While the courts have found the use of actual initials to be acceptable in cases where the privacy interests of the parties are protected, it cannot be said that decisions reported in this way are reasonably depersonalized in view of the myriad of other personal information typically contained therein. The use of actual initials unacceptably increases the risk of re-identification.

41. A preliminary conclusion that the complaint was well-founded and resolved was expressly prefaced by the indication that the use of "*randomly assigned initials in place of individuals' names*" was required to ensure compliance with the *Privacy Act*.

42. Based on the additional information provided to this office by the PAB in its letter of July 8, 2008, it appears that the PAB's internet publishing practices do not meet the standard set out in the *Privacy Act*. Because the use of

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individuals' actual initials no longer renders their personal information reasonably depersonalized and, where PAB decisions are to be posted on the Internet, this is what compliance with the *Privacy Act* requires, this well-founded complaint can no longer be considered resolved.

43. Based on the foregoing, this complaint is well-founded.

44. Despite the somewhat unsatisfactory conclusion to this complaint, the Office will continue its dialogue and efforts to work with government institutions including the PAB to secure a more positive response to the important privacy issues at stake.