



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-2047-I

Appeal MA-040278-1

Kingston & Frontenac Housing Corporation



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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) the Kingston & Frontenac Housing Corporation (the Housing Corporation) received a request from an individual (the requester) through her legal representative, for the file relating to her tenancy with the Housing Corporation. She signed an authorization directing the disclosure of any information in her tenancy file to her representative, and this authorization was submitted with the request.

The rental unit relating to the requester's tenancy is in a subsidized housing complex. She resides in the unit with her young children. The request arose out of an allegation that other individuals were residing in her rental unit. The requester's representative explains in his representations that if the Housing Corporation is justified in finding that other individuals are residing with the appellant, an overpayment might be declared. He says this could lead to the loss of the appellant's right to subsidized housing in Ontario, under section 7(1) of the regulations to the *Social Housing Reform Act*.

In its initial decision letter the Housing Corporation identified records responsive to the request and denied access to them in full under the exemption in section 38(b) of the *Act* (personal privacy).

Through her representative, the requester (now the appellant) appealed the decision.

During mediation, the Housing Corporation issued a revised decision letter granting partial access to some of the responsive records. Also at mediation, the Housing Corporation advised that it would specifically be relying on sections 14(1)(f) (personal privacy), 14(2)(f) (highly sensitive) and 14(2)(h) (supplied in confidence) in conjunction with section 38(b) to deny access to the remaining responsive records.

No further matters could be resolved at mediation. Accordingly, the mediator prepared a report setting out the results of mediation and the matter was referred to the adjudication stage.

The appellant's representative sent a letter in response to the report. In the letter he sets out his understanding of the origin of the access request and makes submissions why access should be granted. He also requested an oral hearing, in person or by way of conference call.

I considered the appellant's request for an oral hearing and determined that there were no reasons provided that would lead me to depart from the standard hearing procedures as set out at section 7 and following of this office's *Code of Procedure*. In accordance with the standard practices of this office, I proceeded by way of a written hearing.

I sent a Notice of Inquiry to the Housing Corporation initially inviting it to make written representations. As my review of the appeal file indicated that sections 14(2)(d), 14(2)(e), 14(2)(i), 14(3)(c) and 14(3)(f) of the *Act* also might apply in conjunction with sections 14(1) and 38(b), in the Notice of Inquiry I invited representations on those sections.

The Housing Corporation provided representations in response. In its representations, for the very first time, the Housing Corporation alleged that the request for access should be denied in accordance with section 4(1)(b) of the *Act* because it claimed the request was frivolous or vexatious. The Housing Corporation also asked that a portion of their representations be withheld due to confidentiality concerns.

By letter dated April 13, 2005, I ruled that, in accordance with the criteria in section 5 of Practice Direction 7, the majority of their representations should be shared. Accordingly, I sent a revised Notice of Inquiry along with the non-confidential portions of the representations to the appellant. In the Notice of Inquiry I added a section inviting the appellant to address the Housing Corporation's allegation that the request was frivolous or vexatious. The appellant provided representations in response.

As the appellant's representations raised issues to which I determined that the Housing Corporation should be given an opportunity to reply, I sent them to the Housing Corporation with a covering letter inviting their reply representations. The Housing Corporation provided representations in reply.

RECORDS:

At issue is the denial of access to all or a portion of records from the appellant's tenancy file which include letters, handwritten notes, emails, calculation sheets, ledgers, permit documents, application, request and review forms, drug benefit and tracking documents, income tax returns(s), bank statements, direct deposit documents, cards, tenancy agreements(s) and Notices.

In particular, the Housing Corporation withheld access to the severed portions of pages 1, 22, 25, 26, 27, 28, 29, 30, 50, 51, 52, 53, 54, 58, 60, 62, 63, 65, 66, 67, 82, 87, 95, 96, 100, 102, 103, 160, 163, 170, 171, 172, 175, 178, 179, 180, 181, 182, 183, 184 and 185 and to all of pages 41, 42, 43, 44, 45, 46, 47, 48, 68, 69, 72, 73, 97, 98, 99, 104, 108, 109, 173 and 174 of the records.

Although the Housing Corporation labeled each page of the records individually, in the determinations that follow, I have considered each record as being composed of one or a number of pages, depending on its nature.

DISCUSSION:

PRELIMINARY ISSUE

Section 54(c) of the *Act* permits the exercise of rights under the *Act* on behalf of persons under sixteen, in the following manner:

Any right or power conferred on an individual by this *Act* may be exercised,
if the individual is less than sixteen years of age, by a person who
has lawful custody of the individual.

There is no dispute that the appellant's children are under the age of sixteen, and based on the information before me I am satisfied that she has lawful custody of her children. Accordingly, in light of the wording of the request, I find that the appellant is entitled to rely on section 54(c) of the *Act* and exercise her daughters' rights of access to the records. This would also entitle her to direct disclosure to her representative, as she could do with her own information.

FRIVOLOUS OR VEXATIOUS REQUEST

The provisions to be considered in determining whether a request is frivolous or vexatious are sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

Section 4(1)(b) of the *Act* specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the *Act* go on to indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 823 provide guidelines for determining whether a request is frivolous or vexatious. They prescribe that a head shall conclude that a request for access to a record or personal information is frivolous or vexatious if:

- (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
- (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, former Assistant Commissioner Tom Mitchinson observed that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*", and that this power should not be exercised lightly.

The Housing Corporation alleges that the request at issue in this appeal was made in bad faith, and is frivolous or vexatious. Its representations in this regard focus on the actions and conduct of the appellant's representative, not the appellant. The Housing Corporation also questions the purpose of the request in light of the alleged co-resident having already vacated the unit.

In response the appellant's representative explains his role as an advocate in a legal clinic that acts for tenants of the Housing Corporation. He also points out that this allegation was made after mediation and after the matter had been referred to adjudication. He asserts that this demonstrates that the allegation was not made in good faith.

I do not find the request for access to be frivolous or vexatious. Not only did the Housing Corporation fail to state this as a ground for refusal in its decision letter as provided for in section 20.1(1), but it has focussed on the conduct of the appellant's representative, not the appellant. Although it may be that in certain circumstances the conduct of the appellant and its agent or representative is one and the same, I am not prepared to make that finding in the circumstances of this appeal. It must therefore be the conduct of the appellant that fits within the wording of section 5.1(a) and/or (b) of Regulation 823. There is no evidence before me that the conduct of the appellant supports a finding that the access request was frivolous or vexatious. Furthermore, even if I were applying the "frivolous or vexatious" provisions to the conduct of the appellant's representative, I would not find that the representative had brought this request within the definition of "frivolous or vexatious". In my opinion, the vigorous pursuit by an advocate for access under the *Act*, such as here, does not qualify as the type of behaviour that falls within the meaning of "frivolous or vexatious". As former Assistant Commissioner Mitchinson observes, the frivolous or vexatious provisions of the *Act* confer a significant discretionary power with serious implications that ought not to be exercised lightly. In addition, the question of whether the other alleged residents may have vacated is also irrelevant to the appellant's right to request access to the responsive information under the *Act*. In my view, there is nothing in the facts before me to indicate that any of the "frivolous or vexatious" criteria are met.

As a result, even if the Housing Corporation had complied with section 20.1(1), which it did not, it failed to meet its onus of demonstrating that the request for access is frivolous or vexatious. I find therefore that the appellant's request is not frivolous or vexatious.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) 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.

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

As noted above, in addition to her rights in relation to her own personal information under the *Act*, because of the application of section 54(c), the appellant also stands in the shoes of her children for the purposes of the *Act*, and is entitled to receive any information to which they would have a right of access under the *Act*, and to direct the disclosure of that information to her representative.

I have reviewed the records at issue in this appeal and find that records numbered pages 1, 22, 25, 26 to 27, 28, 29 and 30, 50, 51, 52, 53, 54, 60, 62, 63 to 64, 65, 66, 67, 69, 82 to 94, 95, 97 to 98, 99, 100 to 103, 160, 161 to 168, 170 to 171, 172, 173, 174, 175, 178, 179, 180, 181, 182, 183, 184 and 185 relate to the appellant's tenancy and contain the personal information of the appellant and her children along with personal information which relates to other identifiable individuals.

Although found in the appellant's tenancy file, records numbered pages 41 to 42, 43 to 44, 45 to 46, 47 to 48, 58, 68, 72 to 73, 96, 104 and 108 to 109 contain the personal information of individuals other than the appellant and her children.

None of the records at issue in this appeal contain only the personal information of the appellant and her children.

INVASION OF PRIVACY/PERSONAL PRIVACY

Under section 14(1) of the *Act*, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy”.

If a record contains the personal information of the requester along with the personal information of another individual, section 38(b) of the *Act* applies.

Section 38(b) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) if the disclosure would constitute an unjustified invasion of another individual’s personal privacy.

Accordingly, under section 38(b) where a record contains personal information of both the appellant and an individual other than her children, and disclosure of that information would “constitute an “unjustified invasion” of the other individual’s personal privacy, the Housing Corporation may refuse to disclose that information to the appellant.

That does not end the matter however. Despite this finding, the Housing Corporation may exercise their discretion to disclose the information to the appellant. This involves a weighing of the appellant’s and her children’s right of access to their own personal information against the other individual’s right to protection of their privacy.

Under sections 14 and section 38(b), the factors and presumptions in sections 14(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold is met.

Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(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 has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Sections 14(3)(c) and (f)

Sections 14(3)(c) and (f) read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (c) relates to eligibility for social service or welfare benefits or to a determination of benefits levels
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or creditworthiness.

In my view the disclosure of personal information in a record that directly or indirectly serves to identify individuals in receipt of social service or welfare benefits, and/or personal information relating to an individual's eligibility for social service or welfare benefits or to a determination of benefits levels, falls within the scope of the section 14(3)(c) presumption (See in this regard Order MO-1415). In my view this would include social assistance through the receipt of rent geared to income housing (Order MO-1854-F).

Furthermore, when a record details earnings of individuals and relates this information to their entitlement to subsidized housing it can also be viewed as describing the individual's finances, income and financial activities, the disclosure of which would be a presumed invasion of personal privacy pursuant to section 14(3)(f) (See in this regard Order PO-1667).

The Housing Corporation explains in its representations that information it withheld relates to an individual that resided in the appellant's rental unit, who has since vacated. In the records are references to individuals other than the appellant's children. The Housing Corporation submits that certain information in the records was provided by one of these individuals solely to determine eligibility for certain benefits. A review of the records also demonstrates that information relating to another individual was submitted for the same purpose.

The appellant's representative submits that the request was made in the midst of a concern by the Housing Corporation about the living arrangements of the appellant. He states that if certain allegations were true it might adversely affect the appellant's rent geared to income subsidy.

Analysis

In my view, in both the representations of the Housing Corporation and the appellant, there is a recognition that generally the records that are the subject of the request pertain to the appellant's entitlement to rent geared to income housing and/or a rent geared to income housing subsidy. Furthermore, I am satisfied that the information pertaining to two individuals other than the appellant's children was provided under the auspices of a determination of whether the amount of rent geared to income would change because of their presence, and to determine their eligibility for social assistance through the receipt of rent geared to income housing. To

determine this eligibility they provided financial information which details their earnings or financial position.

The only record that may not fall squarely within this category is that found at page 58, being a permit issued to an individual.

I find that all of the records, except perhaps the record found at page 58, contain information that directly or indirectly serves to identify individuals in receipt of social service or welfare benefits, relates to eligibility for social service benefits and/or describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or creditworthiness, in the context of an assessment of whether the amount of rent geared to income would change by their presence, and to determine their eligibility for social assistance through the receipt of rent geared to income housing. I therefore find that the presumptions at sections 14(3)(c) and/or (f) apply. Disclosure of the personal information from the withheld and/or severed records is therefore presumed to be an unjustified invasion of personal privacy.

The record at page 58 has been withheld under the mandatory exemption at section 14(1). On the basis of the representations, and my review of the record itself, I find that the appellant has failed to establish that disclosure of the information severed from this record would not constitute an unjustified invasion of personal privacy, as required in order to engage the application of the section 14(1)(f) exception to the exemption. The information is therefore exempt.

These records do not contain information to which sections 14(4) or 16 apply, and I find that, subject to the "absurd result" discussion below, disclosure would be an unjustified invasion of personal privacy.

On this basis I find that the mandatory exemption in section 14(1) applies to the severed portion of records numbered pages 58 and 96, and the entirety of records numbered pages 41 to 42, 43 to 44, 45 to 46, 47 to 48, 68, 72 to 73, 104 and 108 to 109. As a result, I uphold the decision of the Housing Corporation to withhold the severed portion of records numbered pages 58 and 96, and the entirety of records numbered pages 41 to 42, 43 to 44, 45 to 46, 47 to 48, 68, 72 to 73, 104 and 108 to 109.

Furthermore, subject to the discussion that follows regarding the absurd result principle and the Housing Corporation's exercise of discretion, the information severed from records numbered pages 1, 22, 25, 26 to 27, 28, 29 to 30, 50, 51, 52, 53, 54, 60, 62, 63 to 64, 65, 66, 67, 82 to 94, 95, 100 to 103, 160, 161 to 168, 170 to 171, 172, 175, 178, 179, 180, 181, 182, 183, 184 and 185 and the personal information in the records numbered pages 69, 97 to 98, 99, 173 and 174 is exempt under 38(b) of the *Act*.

Absurd Result

Where the requester originally supplied the personal information, or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find

otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

The personal information that the Housing Corporation severed from records numbered 1, 22, 25, 29 to 30, 50, 51, 52, 53, 60, 63 to 64, 66, 82 to 94, 100 to 103 and 161 to 168, is contained in records that were either addressed to the appellant, signed by her, or completed by her or on her behalf. I find that the information in those records was provided by her or are clearly within her knowledge. I find that, in the circumstances of this appeal, it would be an absurd result to withhold this information. In the result, the information severed from records numbered 1, 22, 25, 29 to 30, 50, 51, 52, 53, 60, 63 to 64, 66, 82 to 94, 100 to 103 and 161 to 168 is therefore not exempt under section 38(b), and I will order the release of the severed information to the appellant.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose personal information even if it qualifies for exemption under the *Act*. Because section 38(b) is a discretionary exemption, I must also review the Housing Corporation's exercise of discretion in deciding to deny access to the withheld portions of records numbered 26 to 27, 28, 54, 62, 65, 67, 95, 160, 170 to 171, 172, 175, 178, 179, 180, 181, 182, 183, 184 and 185 and the entirety of records numbered pages 69, 97 to 98, 99, 173 and 174.

On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in so doing.

I may find that the Housing Corporation erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In these cases, I may send the matter back to the Housing Corporation for an exercise of discretion based on proper considerations [Order MO-1573].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information

Analysis and Findings

In its initial representations the Housing Corporation requests that the information not be disclosed because it has commenced legal action against the appellant's solicitor and the underlying landlord and tenant matter that gave rise to the request is at an end. In my opinion these are not relevant factors for the Housing Corporation to have taken into account in the exercise of its discretion. Accordingly, I will include a provision in this interim order returning the matter to the Housing Corporation for a proper exercise of discretion under section 38(b) of the *Act*, with respect to the withheld portions of records numbered 26 to 27, 28, 54, 62, 65, 67, 95, 160, 170 to 171, 172, 175, 178, 179, 180, 181, 182, 183, 184 and 185 and the personal information contained in records numbered pages 69, 97 to 98, 99, 173 and 174.

INTERIM ORDER:

1. I uphold the Housing Corporation's decision to withhold access to the severed portions of records numbered pages 58 and 96, and the entirety of records numbered pages 41 to 42, 43 to 44, 45 to 46, 47 to 48, 68, 72 to 73, 104 and 108 to 109.

2. I order the Housing Corporation to release the information it severed from records numbered 1, 22, 25, 29 to 30, 50, 51, 52, 53, 60, 63 to 64, 66, 82 to 94, 100 to 103 and 161 to 168 to the appellant no later than **June 1, 2006** but not before **May 26, 2006**.
3. I order the Housing Corporation to re-exercise its discretion under section 38(b) of the *Act*, in respect of the withheld portions of records numbered 26 to 27, 28, 54, 62, 65, 67, 95, 160, 170 to 171, 172, 175, 178, 179, 180, 181, 182, 183, 184 and 185 and the personal information in the records numbered pages 69, 97 to 98, 99, 173 and 174, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide. I order the Housing Corporation to provide me and the appellant with an outline of the factors considered in exercising discretion in this context by **May 11, 2006**. I then ask the appellant to provide representations to me on whether the Housing Corporation properly exercised its discretion by **May 25, 2006**.
4. In order to verify compliance with Provision 2 of this interim order, I reserve the right to require the Housing Corporation to provide me with a copy of the records it discloses to the appellant.
5. I remain seized of this appeal in order to deal with any issues stemming from the exercise of discretion by the Housing Corporation.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ April 27, 2006