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

# ORDER PO-2544

## Appeal PA-040312-1

## Ontario Rental Housing Tribunal

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## BACKGROUND

### Order PO-2109

In Order PO-2109, former Assistant Commissioner Tom Mitchinson reviewed a decision issued by the Ontario Rental Housing Tribunal (the Tribunal) in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a weekly list prepared by the Tribunal consisting of "… all names, addresses, hearing dates and the location of the hearing of tenants whose landlords, in the future, file an application to evict with the Tribunal".

During the course of that appeal, it was brought to former Assistant Commissioner Mitchinson's attention that the Tribunal had a practice of disclosing "custom reports" to commercial clients outside of the access provisions of the *Act*. The reports were frequently disclosed under terms outlined in Memoranda of Understanding between the Tribunal and the individual requesters, but were also disclosed in response to individual requests for selected information contained in various application files. These reports were provided to a number of requesters on a regular basis.

The reports reviewed by former Assistant Commissioner Mitchinson contained the personal information of individuals (names, addresses, dates and locations of eviction proceedings) other than the requesters. After conducting an inquiry, the former Assistant Commissioner found that the information at issue qualified as "personal information" as that term is defined in section 2(1) of the *Act*, and that none of the exceptions to the mandatory section 21 exemption (invasion of personal privacy) dealing with this type of information were present. The former Assistant Commissioner also advised the Tribunal, in a postscript to Order PO-2109, to review its policy of providing these "custom reports" containing personal information of tenants to ensure that any such disclosure is in accordance with the privacy protection provisions of the *Act*.

In response to Order PO-2109, the Tribunal rescinded its outstanding Memoranda of Understanding for "custom reports" and denied subsequent requests under the *Act* for the personal information contained in Tribunal application files and Orders.

### Order PO-2265

Subsequent to Order PO-2109, the Tribunal received a request for the release of "hearing document information" to the Tenant Duty Counsel Program, at least one day before the day of hearing. The Tenant Duty Counsel Program specifically sought access to a document entitled "Cases in a Hearing Block with Party Names", otherwise known as the "Hearing Docket". The information contained in the Hearing Docket includes:

- Date, time and location of hearing,
- File number of the application to be heard,
- Address of the affected building, including unit, city and postal code,
- Name of tenant and/or tenant's representative,
- Name of landlord and/or landlord's representative,

- Type of application,
- Date the application was filed.

The Tribunal denied access to the record in accordance with section 21(1) of the *Act*. The Tenant Duty Counsel Program appealed the Tribunal's decision and the matter proceeded to adjudication. In Order PO-2265, former Assistant Commissioner Mitchinson upheld the Tribunal's decision to withhold the tenant names and the unit number component of the address information under the section 21(1) exemption, but ordered the Tribunal to disclose the other information contained in the Hearing Docket.

In Order PO-2265, former Assistant Commissioner Mitchinson also found that the public interest override in section 23 did not apply to permit the disclosure of the tenant names and unit number component of the address information.

## NATURE OF THE APPEAL:

The Tribunal received a request from the Tenant Duty Counsel Program under the *Act* for ongoing access to information about the cases heard daily by the Tribunal. Specifically, the Tenant Duty Counsel Program asked that the Tribunal provide:

> [A]ll tenant duty counsel associated with the Tenant Duty Counsel Program with a copy of the document "Cases in a Hearing Block with Party Names" (the "docket") on each day.

The Tribunal denied access to the requested record pursuant to section 21(1) of the *Act*.

The Tenant Duty Counsel Program (now the appellant), appealed the Tribunal's decision.

During mediation, the parties indicated that the appeal was the result of their differing interpretations of Order PO-2265. The Tribunal advised that its interpretation was that Order PO-2265 stipulates that documents containing personal information, relating to tenants, should not be made available to the public, even on the hearing day. The appellant advised that based on its interpretation, Order PO-2265 allowed for the routine disclosure of the docket lists, including tenant names, to tenant duty counsel on the day of the hearing (rather than prior to the date of the hearing as previously requested). It argues that disclosure of this information would not raise personal privacy concerns.

During mediation, it was also established that the public interest override provision at section 23 might have some application. Accordingly, section 23 was added as an issue in the appeal.

As further mediation was unsuccessful, the appeal was transferred to adjudication.

A Notice of Inquiry was initially sent to the Tribunal. The Tribunal provided representations in response. A Notice of Inquiry was then sent to the appellant, along with a complete copy of the

Tribunal's representations. The appellant also provided representations. In its representations, the appellant addressed the possible application of section 23. The appellant stated:

> … [W]e accept that previous decisions of the Information and Privacy Commissioner do not support a finding that the request meets the test of establishing "a compelling public interest in disclosure" that would be found to outweigh the purpose of the section 21 exemption.

Section 23 is therefore no longer at issue in this appeal.

As the appellant's representations raised issues to which the Tribunal should be given an opportunity to reply, a copy of the complete representations of the appellant was sent to the Tribunal. As the reply representations of the Tribunal also raised issues to which the appellant should be given an opportunity to reply, the appellant was invited to provide a sur-reply. The appellant did so.

Subsequently, this office was served with an application for judicial review of Order PO-2418 which upheld the Ontario Rental Housing Tribunal's decision to grant partial access to the record known as "Cases in a Hearing Block" with unit numbers severed. As the requested record in Order PO-2418 is identical to that in the current appeal, the present appeal was placed on hold pending the resolution of the judicial review.

The deadline for the applicant to perfect the judicial review application has passed. Following inquiries, this office was advised by the Divisional Court that the dismissal order for the judicial review application has now been executed. Accordingly, Order PO-2418 remains good law and the present appeal was taken off hold. I will now proceed with the Inquiry process.

## RECORD:

The record at issue in this appeal is a report entitled "Cases in a Hearing Block with Party Names", which is otherwise known as the "Hearing Docket". Currently, the Hearing Docket is available to the appellant but with the names of the tenants and their unit numbers severed. Accordingly, at issue is whether the names of the tenants and the unit numbers of the address information identified on the Hearing Docket can be disclosed to the appellant on the day of the hearing.

## DISCUSSION:

### PRELIMINARY JURISDICTIONAL MATTER

In its representations, the appellant raises a preliminary jurisdictional issue regarding the application of the *Act* to the disclosure of the Hearing Docket. The appellant submits:

> It is respectfully submitted that access to the Hearing Docket is governed by the *SPPA* [*Statutory Powers Procedure Act*], and that the Privacy Commissioner does not have jurisdiction over this issue.

The appellant explains that the *SPPA* has a broad primacy clause that states that its provisions prevail over the provisions of other conflicting legislation unless it is otherwise expressly provided in the conflicting legislation. It submits that in contrast, the *Act's* provision on conflicts with other legislation is more limited, providing only that the *Act* prevails over confidentiality provisions in other legislation unless the other legislation specifically provides otherwise.

The appellant also submits that there is nothing in the *Act*, or in the report which lead to the *Act*, "*Public Government for Privacy People: The Report of the Commission on Freedom of Information and Individual Privacy*" (the Williams Commission Report), "that indicates that it was the intention of the legislature to displace the *SPPA* rules governing the public hearing process administrative tribunals". Rather, the appellant submits that the Williams Commission Report stresses the importance of an open judicial process in the tribunal section.

The Tribunal submits in its reply representations that the *SPPA* sets out minimum rules for a tribunal's proceedings but does not require it to produce or distribute a hearing docket or specify the contents of a hearing docket, if one is produced. It submits that section 9 of the *SPPA* (cited below), does require that administrative tribunals are required to hold their hearings in public. However, the Tribunal submits that based on Orders PO-2109 and PO-2265, it interprets section 9 of the *SPPA* to mean that the public is entitled to attend hearings before administrative tribunals but not that it is entitled to written documents containing the names of individuals who appear at those hearings.

The Tribunal references two orders issued by this office that specifically address the interplay between the *SPPA* and the *Act*. In Order 53, the Ontario Highway Transport Board argued that access to documents in the Board's custody and control should be governed by the *SPPA* and not the *Act*. The Tribunal submits that former Commissioner Sidney Linden disagreed and stated:

> Disclosure of records which are in the custody and control of any institution governed by the [*Act*] must be determined in accordance with the terms of that *Act*. The Board has been designated as an institution under Ontario Regulation 532/87, as amended, and as such, has the same responsibilities and obligations as all other institutions with respect to complying with the provisions of the *Act*.

In Order PO-2265, former Assistant Commissioner Mitchinson set out that "… while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information outside the actual hearing process must be determined in accordance with the requirements of the *Act*." The Tribunal notes that in Order PO-2265 former Assistant Commissioner Mitchinson goes on to state:

> The fact that hearings are held in public and the procedures followed by the Tribunal are governed by the *SPPA* means that relevant personal information of tenants in the context of hearings is not kept confidential. However, it does not necessarily follow that this personal information *in its recorded form* (emphasis added by Tribunal in their representations) is freely and broadly available to the public generally outside the context of these hearings."

In its sur-reply representations, the appellant submits that an open hearing process includes a number of facets, including open hearing room, open files, open decisions and the public posting of the hearing docket with party names and its release to duty counsel.

The appellant also submits that former Commissioner Linden's findings in Order 53 are not at odds with the disclosure of the hearing docket because:

> According to [former Commissioner] Linden, disclosure of the records held by tribunals subject to [the *Act*] must be "examined in light of [the *Act*], together with the traditions of the administrative tribunal and the rules of natural justice." He goes on to state that "In my view, the *Act* and its exemptions do not operate in a way which would deny access to information through other legal rules or principles, including the rules of natural justice and the requirements of the SPPA". [Former Commissioner] Linden "**does not** determine that access issues in the Tribunal sector are within the exclusive domain of [the *Act*].

The appellant submits that the traditions of the Tribunal prior to March 2003 [when it released the hearing docket to tenant duty counsel], the rules of natural justice and the *SPPA*, all support a "truly open hearing process and the release of the docket". It submits that "the *Act* should not, and was never intended to undermine this openness".

**Analysis and finding on the jurisdictional issue**

I disagree with the appellant's position. In my view, in the circumstances of this appeal, there is no jurisdictional conflict between the *SPPA* and the *Act*. Applying the provisions of the *Act* to determine whether the names of tenants and unit numbers should be disclosed on the Hearing Docket neither interferes with nor displaces any of the rules outlined in the *SPPA* that govern the Tribunal's hearing process. In my view, in the circumstances of this appeal, both the *Act* and the *SPPA* can work contemporaneously.

The *SPPA* sets out the minimum rules for a tribunal's proceedings. Section 9 of the *SPPA* requires that administrative tribunals must hold their hearings in public. That section reads:

> An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or

> (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.
>
> In which case, the tribunal may hold the hearing in the absence of the public.

In my view, although this provision requires the Tribunal to hold its hearings in public, as mentioned by the Tribunal, neither this provision nor any other provision in the *SPPA* obliges a tribunal to produce a hearing docket, or if one is produced, require that it contain party names or be disclosed to the public.

Although some personal information, such as the names of the tenants and their dwelling unit number, must be disclosed orally in the context of the hearing itself, the *SPPA* imposes no obligation on the Tribunal to disclose such personal information in recorded form. This line of reasoning is in keeping with the findings of former Assistant Commissioner Mitchinson in Order PO-2265, as quoted above by the Tribunal.

In addition, I do not accept the appellant's submission that the requirement that the hearing process be open to the public as stipulated in section 9 of the *SPPA* implies that a tribunal is required to produce a hearing docket, publicly post such docket with party names, and release the docket to duty counsel. In my view, for the hearing process to be open it does not necessarily have to include the disclosure of recorded information containing personal information, particularly in the context of institutions covered by the *Act*.

I do, however, agree with former Assistant Commissioner Mitchinson's statement in Order PO-2265 that disclosure of personal information outside the actual hearing process must be determined in accordance with the requirements of the *Act*. In my view, the Hearing Docket itself, while perhaps used as an administrative tool by the Tribunal in conducting its hearings, does not form part of the "actual hearing process", as that term was used by former Assistant Commissioner Mitchinson. Accordingly, its disclosure must conform to the *Act*.

Both parties reference portions of Order 53 in which former Commissioner Linden discussed the interplay between the *SPPA* and the *Act* and disagreed with the Ontario Highway Transport Board's position that access to records in the custody or control of quasi-judicial administrative tribunals should be governed solely by the terms of the *SPPA*. In my view, the following more complete version of the findings of the former Commissioner Linden should be considered.

> …Disclosure of records which are in the custody and control of any institution governed by the [*Act*] must be determined in accordance with the terms of that *Act*. The Board has been designated as an institution under Ontario Regulation

> 532/87, as amended, and as such, has the same responsibilities and obligations as all other institutions with respect to complying with the provisions of the *Act*.
>
> In my view, if there is a perceived conflict between the practice of an administrative tribunal covered by the *Act* and the *Act* itself, disclosure of records by those tribunals should be examined in light of the *Freedom of Information and Protection of Privacy Act*, together with the traditions of the administrative tribunal and the rules of natural justice. The *Act* establishes a right of access to government information subject to certain exemptions. In my view, the *Act* and its exemptions do not operate in a way which would deny access to information through other legal rules or principles, including the rules of natural justice and the requirements of the *Statutory Powers Procedure Act*. I find support for this conclusion in section 64 of the *Act*, which provides as follows:
>
> > (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
> >
> > (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.
>
> In my view, the *Act* was not intended to prevent administrative tribunals from carrying out their statutory functions. However, the *Act* has introduced a new scheme for access to information and protection of privacy in the province, which must be implemented by all institutions covered by the *Act*, including designated administrative tribunals. In my view, the *Act* can and should operate as an independent piece of legislation.

I concur with the former Commissioner's statements and apply them to the circumstances in the current appeal.

In my view, even looking at this denial of information in light of the Tribunal's own "traditions", the rules of natural justice and the *SPPA*, I do not accept that the *Act* would operate to deny access to information that is otherwise made available through other legal rules or principles. Nothing in either the *SPPA* or principles of natural justice requires that the information at issue be disclosed and available to the public. Specifically addressing any alleged "traditions" suggested by the appellant, the Tribunal was created in 1998, when the *Act* was already in force. Therefore, the "tradition" to disclose hearing dockets with names and unit numbers does not pre-date the *Act*. I do not accept that a tradition established prior to the enactment of the *Act* that may or may not be in contravention of the rules of the *Act* can serve as justification to disregard its application.

Accordingly, I find that in the circumstances of this appeal, there is no jurisdictional conflict between the *SPPA* and the *Act* and both acts work in conjunction with one another.

As the Tribunal is subject to the *Act*, it is within my jurisdiction to determine whether the names of tenants and unit number should be disclosed on the Hearing Docket or whether they fall within one of the exemptions listed in the *Act*.

**PERSONAL INFORMATION**

The mandatory section 21 personal privacy exemption applies only to information that qualifies as "personal information" as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> …
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (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, the information must be about the individual in a personal capacity. It must also be reasonable to expect that an individual may be identified from the information [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

**Representations**

The Tribunal submits that the only difference between the information at issue in the current appeal, and that which was at issue in PO-2265, is the timing of disclosure. It submits:

> In both cases, the record contains the names and unit numbers of tenants who are subject to applications before the Tribunal. In Order PO-2265, [former] Assistant Commissioner Mitchinson found that the names and unit numbers of tenants subject to applications before the Tribunal is personal information as defined in section 21(1). The same finding should be made in this appeal.

The appellant submits that for the purposes of this appeal, it accepts the findings of Order PO-2265 concerning whether the record contains "personal information" as defined in section 2(1).

**Analysis and findings**

In Order PO-2265, former Assistant Commissioner Tom Mitchinson made the following finding with respect to whether an individual could be identified by the disclosure of the unit number related to their address:

> In this appeal, the appellant is seeking the street address, city, postal code and specific unit number that is subject to an application before the Tribunal. In my view, if all of this address-related information is disclosed, it is reasonable to expect that the individual tenant residing in the specified unit can be identified. Directories or mailboxes posted in apartment buildings routinely list tenants by unit number, and reverse directories and other tools are also widely available to search and identify residents of a particular unit in a building if the full address is known. Accordingly, I find that the full addresses or units subject to Tribunal applications consist of the "personal information" of tenants residing in those units, as contemplated by paragraph (d) of the definition.
>
> That being said, if unit numbers are removed, I find that the street address, city and postal code on their own do not provide sufficient information to reasonably identify a specific resident of a unit within a residential rental accommodation. The vast majority of rental units in the province are contained in multi-unit buildings and, in the absence of any other associated field of information that would itself constitute a tenant's "personal information", disclosing address related information with the unit number removed would render identifiable information non-identifiable, thereby removing it from the scope of the definition of "personal information". Accordingly, the address-related information, with unit numbers severed, should be provided to the appellant.

In Order PO-2265, the former Assistant Commissioner concluded that the only information requested by the appellant that fell within the scope of the definition of "personal information" in section 2(1) was the tenant name and the unit number component of the address listed on the records. I agree with former Assistant Commissioner's approach and findings with respect to this information. As the information at issue in this appeal is identical in nature to information that was also at issue in the appeal related to Order PO-2265 and both parties accept the findings in that Order, I adopt the approach taken by former Assistant Commissioner Mitchinson.

I find that the withheld information, the tenant's name and unit number, qualifies as "personal information" as defined in paragraphs (d) and (h) of the definition at section 2(1) of the *Act*.

**PERSONAL PRIVACY**

Section 21(1) of the *Act* prohibits the Tribunal from releasing "personal information" unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. If the information fits

within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1).

In the circumstances of this appeal, the appellant submits that disclosure of the withheld information would not be an unjustified invasion of personal privacy under sections 21(1)(c) and (f). Those sections read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (c) personal information collected and maintained for the purpose of creating a record available to the general public;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

**Section 21(1)(c): public record**

The appellant takes the position that the personal information in this case is collected and maintained for the purpose of creating a record available to the general public. The appellant states that "the Hearing Docket is a public record that is created and used by the Tribunal specifically for the purpose of holding a public hearing process". The appellant submits:

> This request is for the Hearing Docket on the day of the hearing, when the information at issue has become public, or will shortly become public, through the open hearing process as governed by the *SPPA* [*Statutory Powers Procedure Act*].

The appellant refers to section 9(1) of the *SPPA* (cited above), which requires that tribunals governed by the *SPPA* hold open, public hearings, and submits that "the full Hearing Docket, with tenant names and unit numbers included is generated by the Tribunal on a daily basis as part of the Tribunal's hearing process". The appellant submits that the Hearing Docket is used by a variety of Tribunal staff and prior to the issuance of Orders PO-2109 and PO-2265 by this office, it was posted outside hearing rooms and shared with Tenant Duty Counsel Program duty counsel "as a public document that was part of the hearing process".

The appellant also refers to Tribunal Rule 16 which deals with public access to hearings based on section 9(1) of the *SPPA*. The appellant submits that prior to the release of Order PO-2109 Rule 16 established that both hearings and files were open to the public, while after both Order PO-2109 and PO-2265, the Tribunal amended Rule 16 so that files were not longer accessible to the public. The appellant submits that this change in disclosure policy resulted from a misinterpretation of the orders. The appellant presents its interpretation of both orders as follows:

In Order PO-2109, the [former] Assistant Commissioner states:

> In my view, [the Tribunal] does not collect and maintain the personal information that would be responsive to the appellant's request specifically for the purpose of creating a record available to the public. Rather, **the information about tenants** who are alleged to be in arrears of rent **is collected and maintained by [the Tribunal] for the purpose of the hearing** that will consider the allegation and make a determination under the authority provided to [the Tribunal] under the Tenant Protection Act. [emphasis added]

In PO-2109, the [former] Assistant Commissioner goes on to draw a distinction between personal information that is not confidential in the context of the public hearings, and the information that was the subject of the request before him. [Former] Assistant Commissioner Mitchinson states:

> The fact that hearings are held in public and that the procedures followed by the [Tribunal] are governed by the *Statutory Powers Procedure Act* means that the relevant personal information of tenants in the context of hearings is not kept confidential … However it does not necessarily follow that this personal information is freely and broadly available to the public generally outside the context of these proceedings, particular in bulk and in electronic format.

The harm that the Order addresses is the disclosure of personal information of tenants pursuant to the then current practice of the Tribunal of selling bulk electronic records of application information. The request in PO-2109 was not for the Hearing Docket, but for the creation of a list pending applications, entitled *Report of Active Hearings Scheduled*, to be released in electronic format and on a weekly basis.

In Order PO-2265, the Assistant Commissioner again relies on the distinction between hearing documents and other Tribunal records of application information. The Order clearly distinguishes between "records outside the actual hearing process" and "relevant personal information of tenants in the context of hearings". The Order specifically notes and accepts that the latter "is not kept confidential".

The appellant takes the position that the "Hearing Docket falls squarely within the second category as set out in Order PO-2109 and PO-2265" and submits that the "Hearing Docket is a record containing personal information that is created specifically "for the purpose of the hearing" (PO-2109) for use "in the context of the hearings" (PO-2265).

The appellant also draws parallels between the Tribunal hearings and provincial criminal and family courts where, it submits, that the hearing dockets become public in the context of the hearing process and posting is "an accepted feature associated with the conduct of an open hearing, whether in the courts or in tribunals". The appellant also submits that the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board and the Pay Equity Hearings Tribunal have shared electronic hearing lists which include the names of the parties and are in hallways outside hearing rooms. The appellant submits that the Worker Safety and Insurance Appeals Tribunal does not post party names on a public hearing docket because, unlike the other cited tribunals, it is not covered by the *SPPA*.

**Section 21(1)(c): analysis and finding**

The information at issue in this appeal is similar to the record at issue in Order PO-2109 and is identical in nature to the record at issue in Order PO-2265. From my review of Order PO-2265, it appears that the appellant's representations on the application of section 21(1)(c) to information at issue are substantially similar to those put forward before former Assistant Commissioner Mitchinson in PO-2265.

It is well established that if the information is collected and maintained for purposes other than the specific purpose of making records available to the public, then section 21(1)(c) does not apply (Orders P-318, M-170, M-527, M-849, PO-1786-I). In Order PO-2109 and later in PO-2265, former Assistant Commissioner Mitchinson found that it is clear from this line of orders, that for the exception to apply, the personal information at issue must be "collected and maintained **specifically** for the purpose of creating a record available to the general public".

In Order PO-2265, former Assistant Commissioner Mitchinson quotes from his Order PO-2109 in his analysis to support a finding that section 21(1)(c) does not apply to the production of a Hearing Docket, among other Tribunal records. He states:

> In Order PO-2109 I stated:
>
> > In my view, the ORHT [the Tribunal] does not collect and maintain the personal information that would be responsive to the appellant's request specifically for the purpose of creating a record available to the public. Rather then information about tenants who are alleged to be in arrears of rent is collected and maintained by the ORHT for the purpose of the hearing that will consider the allegation and make a determination under the authority provided to ORHT under the *Tenant Protection Act*. The fact that hearings are held in public and that the procedures followed by the ORHT are governed by the *Statutory Powers Procedure Act* means that relevant personal information of tenants in the context of hearings is not kept confidential, and the notice under section 29(2) of the *Act* contained on the bottom of the various forms makes it clear

> that once the personal information is provided it "may become available to the public". However it does not necessarily follow that this personal information is freely and broadly available to the public generally outside the context of these proceedings, particularly in bulk and in electronic format. The section 39(2) notice provisions also do not constitute consent for any subsequent disclosure of personal information, which is made obvious by the fact that some forms would appear to collect personal information about tenants from landlords rather than from tenants directly.
>
> In my view, the situation in this appeal is similar to the one I faced in Order M-849. I found that in that case that the arrest sheet records were created for the purpose of prosecuting a crime and, although made available to the public on an individual record basis, they were not collected and maintained **specifically** for that purpose. Similarly here, the personal information on the various ORHT forms is collected by the OHRT from the landlord or tenant filing the form for the purpose of adjudicating disputes under the *Tenant Protection Act*. Although information may become available to the public in the context of hearings, in my view, this is a necessary consequence or outcome of the adjudicative process, and it does not necessarily follow that the personal information was collected and maintained **specifically** for the purpose of making this information publicly available.

The appellant also relies on Privacy Investigation Report PC-980049-1 and PO-138. It suggests that because a legal duty exists under the *SPPA* to make hearings public, applying the rationale from these two previous decisions, I should order the personal information at issue in this appeal to be disclosed.

I do not accept the appellant's position. In my view, Privacy Investigation Report PC-980049-1 and Order PO-138 can be distinguished from the facts of this appeal (and also from Order PO-2109) on the basis that the personal information at issue in the two previous cases was collected **specifically** for the purpose of creating a public record. Here, as the appellant appears to acknowledge, the primary purpose for collecting any personal information contained on Tribunal applications is for the adjudication process, not to create a public record.

Although the appellant's analogy between open court processes and the transparent conduct of hearings by tribunals covered by the *SPPA* has some merit, they are not identical. For example, section 65(4) of the *Act* excludes documents prepared and filed for the purposes of proceedings before the Courts from coverage under Ontario's freedom of Information regime; while administrative tribunals, including the Tribunal, are subject to the *Act* and bound by its access

> and privacy requirements. Accordingly, while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information contained in records outside of the actual hearings process must be determined in accordance with the requirements of the *Act*.
>
> The record at issue in this appeal is substantially similar to the record at issue in Order PO-2109, and I find that the same reasoning from the previous order applies here. The fact that hearings are held in public and that the procedures followed by the Tribunal are governed by the *SPPA* means that relevant personal information of tenants in the context of hearings is not kept confidential. However, it does not necessarily follow that this personal information in its recorded form is freely and broadly available to the public generally outside the context of these hearings. The specific statutory provisions under the *SPPA* and the previous jurisprudence from this office do not assist the appellant in distinguishing the case from Order PO-2019.
>
> Accordingly, I find that the exception in section 21(1)(c) has not been established.

I concur with the former Assistant Commissioner's finding and apply it here.

At the outset, the appellant takes the position that this request for information differs from that in Order PO-2265 because in the current appeal it is asking for the information on the *day of* the hearing rather than *in advance of the day of* the hearing. The appellant suggests that the difference lies in the fact that the information at issue will become orally disclosed in the hearing room, that same day, rather than several days in the future. The appellant has not submitted any other representations that demonstrate how this difference alters the character of the record sufficiently to permit the application of the exception at section 21(1)(c) when it was not found to apply to the very same information in Order PO-2265.

Although a tenant's name and apartment unit number will most likely, if not almost invariably, be orally disclosed in the hearing room in the context of a hearing, in my view, whether the disclosure of this information occurs mere minutes or hours prior to the hearing rather than days prior to the hearing does not change the character of the record in a way that might possibly bring it within the realm of section 21(1)(c) and qualify it as a record created specifically for the public.

In its representations, although the appellant characterizes its position as its "interpretation" of former Assistant Commissioner Mitchinson's Orders PO-2109 and PO-2265, it appears to disagree with the findings in those orders and is attempting to revisit the issue in this appeal. The appellant argues that it interprets Assistant Commissioner Mitchinson's distinction in Order PO-2265 between "records outside of the actual hearing process" and "relevant personal information of tenants in the context of hearings" as supporting the disclosure of the information at issue because the tenant names and unit numbers listed on the Hearing Docket qualifies as "personal information of tenants in the context of hearings".

The appellant appears to argue that because of the open nature of the Tribunal's hearings the Tribunal's collection and maintenance of information for the *purpose of the hearing* can be equated to information that is specifically collected and maintained for the *purpose of creating a record available to the general public*. I disagree with this interpretation. In my view, these are two separate and distinct purposes for creating a record. While the information contained in the Hearing Docket may be used and disclosed in the context of the *oral* hearing as a "necessary consequence or outcome of the adjudicative process", in my view, the specific purpose of the collection and maintenance of this *recorded* personal information is for the Tribunal's administrative purposes in conducting hearings, not to create a document that is to be available to the general public in recorded form.

Moreover, I find the appellant's interpretation to be untenable. Had the former Assistant Commissioner intended his reasoning to be interpreted in that way he would have disclosed the tenant names and unit number in the Hearing Docket in PO-2265.

Accordingly, I agree with the reasoning applied by former Assistant Commissioner Mitchinson in the PO-2265 and find that it has equal application in the circumstances of this appeal; I see no reason to reach a different conclusion.

Therefore, I find that the information contained in the document was not collected and maintained **specifically** for the purpose of creating a public record. Therefore, the exception in section 21(1)(c) has not been established.

**Section 21(f): the factors listed under section 21(2)**

The factors and presumptions in sections 21(2), (3) and (4) provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy under section 21(1)(f). Section 21(2) lists some criteria for the Tribunal to consider in making this determination; section 21(3) identified certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

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 section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is subject to 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 (Div. Ct.)].

**Representations on section 21(f) and the factors listed under section 21(2)**

The Tribunal submits that in Order PO-2265, the former Assistant Commissioner found that neither section 21(3) nor section 21(4) had any application in the circumstances of that appeal and that there were no factors under section 21(2) that favoured disclosure of the tenant's names and unit numbers. The Tribunal takes the position that the application of section 21 to the

information at issue in the current appeal "should be subject to the same reasoning [former] Assistant Commissioner Mitchinson applied in Order PO-2265".

The appellant agrees that neither section 21(3) or (4) apply in this appeal but takes the position that several factors listed in section 21(2) which favour disclosure are present while none of the factors favouring the protection of privacy can be established. The appellant identifies most of the factors listed in section 21(2) as relevant considerations in this appeal. The relevant sections read as follows:

> 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> …
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The factors in paragraphs (a), (b), and (c) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h), and (i) weigh in favour of privacy protection.

***Section 21(2)(a): public scrutiny***

The appellant submits that the disclosure of the records at issue is desirable for the purpose of subjecting the activities of the Tribunal to public scrutiny.

The appellant identifies the two elements that must be established for section 21(2)(a) to be considered relevant, as outlined in Order M-1174:

1. The activities of the institution must have been publicly called into question; and

2. The disclosure of the personal information must be desirable in order to subject the activities of the institution to public scrutiny.

Addressing the first element, the appellant states that the Tribunal's activities have been publicly called into question by several legal aid clinics that are on record as publicly criticizing the fairness of Tribunal processes under the *Tenant Protection Act* in respect of the low-income clients served by the clinic system. The appellant submits that two of these legal clinics filed a complaint with the Ombudsman in 2002 that specifically addressed the Tribunal's eviction processes. The appellant also submits that the Tribunal and the *Tenant Protection Act* has been the subject of critical comment in mainstream media.

Turning to the second element, the appellant submits that the disclosure of the information at issue would have the desirable effect of ensuring that the activities of the Tribunal are open to public scrutiny. The appellant states that the Tribunal deals with more Ontario residents than any other single Ontario adjudicative agency and points to statistics which demonstrate that eviction applications (generally sought by landlords) comprise the predominant work of the Tribunal. The appellant also submits that "the tenant population appearing before the Tribunal is characterized by disadvantage" and by "an overrepresentation of groups identified by a prohibited ground of discrimination" and argues that for this reason "it is particularly important that the Tribunal processes be open to public scrutiny and be seen to be demonstrably fair to tenant parties".

The representations are fundamentally similar, and in some instances identical, to the arguments that were put before former Assistant Commissioner Mitchinson in Order PO-2265. Assistant Commissioner Mitchinson accepted that certain activities of the Tribunal in discharging its mandate under the *Tenant Protection Act* have been called into question, thereby establishing the first element required for section 21(2)(a) to be considered relevant.

Addressing the second element, Assistant Commissioner Mitchinson stated:

> I accept that one reason proceedings before administrative tribunals are generally open is to ensure that the public has an ability to witness the operation of the tribunal and to prevent what could be characterized as "secret law". In my view,

> including most administrative tribunals (including the Tribunal) under the scope of the *SPPA* is strong evidence of a public expectation that these bodies would operate in a transparent fashion. However, it does not necessarily follow that the names of tenants and the unit numbers of apartment buildings where they reside, which is the only information under consideration here, must be made available to an individual who is not a party to those proceedings in order to meet this expectation.
>
> The Tribunal is an "institution" covered by the *Act* and is bound by its provisions, including the mandatory section 21 privacy exemption. When a request has been made under the *Act* for access to Tribunal records, even records that relate directly to files that proceed to a public hearing, the request must be tested under the access provisions in the *Act* when considered outside the context of the Tribunal's proceedings. In the case of information that qualifies as "personal information" under the *Act*, there is a strong assumption against disclosure, although the balancing process under section 21(2) recognizes that, in certain circumstances, factors favouring disclosure will be sufficient to outweigh those favouring privacy protection. While the *SPPA* addresses public scrutiny considerations in the context of hearings, in my view, it does not necessarily follow that personal information must be accessible outside the context of these proceedings in order to ensure that the Tribunal is operating in an open and transparent manner.
>
> The accessibility of "personal information" is governed by the *Act*. I do not accept the appellant's position that providing access to the tenant names and unit numbers of apartments subject to various Tribunal applications is either necessary in order to meet public scrutiny concerns or effective in subjecting the Tribunal's activities to public scrutiny, as required by section 21(2)(a).
>
> Accordingly, I find that section 21(2)(a) is not a relevant factor as it relates to the disclosure of tenant names and apartment unit numbers contained in the records.

I concur with the former Assistant Commissioner's finding and apply it here.

While I accept that the activities of the Tribunal have been publicly called into question, like former Assistant Commissioner Mitchinson, I do not accept that the disclosure of the specific personal information at issue in this appeal is desirable to subject the activities of the institution to public scrutiny.

The appellant has not provided me with any arguments or evidence to demonstrate how the difference in the timing of the disclosure of the personal information at issue in the current request might alter the analysis taken by former Assistant Commissioner Mitchinson in Order PO-2265, such that the disclosure of the personal information might now warrant consideration of the factor at section 21(2)(a).

Accordingly, I find that section 21(2)(a) is not a relevant factor as it relates to the disclosure of tenant names and the apartment unit numbers contained in the Hearing Docket.

***Section 21(2)(b): public health and safety***

The appellant argues that disclosing the requested information may promote public health and safety. It submits that despite quantitative data addressing the impact of the Duty Counsel Program, "it is a fair assumption that tenants who have been apprised of their legal rights and obligations will be in a better position to protect their home and their health, and avoid pecuniary loss or the other harms associated with homelessness".

The appellant also submits that children who are homeless face a greater risk of being apprehended by the Children's Aid Society, and suffer serious long-term effects relating to health, ability to perform at school, ability to socialize and make friends.

In Order PO-2265, former Assistant Commissioner Mitchinson addressed identical arguments. He stated:

> I do not dispute the appellant's position that actions taken to prevent homelessness are positive and contribute to a healthier and safer society. However, I am not persuaded that disclosing tenant names and unit numbers of apartments whose residents are subject to Tribunal applications can itself assist any person, including the appellant in this case, to promote public health and safety. In my view, any connection to the ability to promote public health and safety is simply too remote to bring it within the scope of section 21(2)(b) factor.

Again, I concur with the former Assistant Commissioner's reasoning. Having been provided with no evidence that would demonstrate a difference between the circumstances in the current appeal and those described in the appeal related to Order PO-2265, I see no reason to reach a different conclusion here. Therefore, I find that section 21(2)(b) is not established with respect to the tenant names and apartment unit numbers. Disclosure of this information would not promote public health and safety.

***Section 21(2)(c): purchase of goods and services***

The appellant submits:

> Duty counsel provide legal advice and assistance to eligible tenants appearing before the [Tribunal] in respect of their landlord's application to terminate their tenancy agreements. The main purpose of this advice is to ensure that tenants can make informed choices about whether or not eviction can, and should in all the circumstances, be opposed in the public hearing. In the most common and typical case, a duty counsel will assist the tenant facing eviction to make an informed decision about whether it is in their legal and financial interest to try to maintain

> their tenancy agreement (that is, whether they should continue to rent, or "purchase", their accommodation). If the tenant has a good legal and financial basis for opposing eviction, the duty counsel will then assist the tenant in asserting their rights before the adjudicator or in mediation.
>
> …[T]he Hearing Docket is a key tool that duty counsel can use to effectively provide advice to the maximum number of tenants appearing before the [Tribunal] in any particular hearing bloc. The release of the Hearing Docket to the duty counsel in the past was invaluable in assisting them to provide the best service to as many tenants as possible.

Addressing very similar arguments in Order PO-2265 former Assistant Commissioner Mitchinson stated:

> Again, I am not persuaded that disclosing tenant names and unit numbers of residential buildings occupied by tenants who are the subject of an application before the Tribunal would "promote informed choice in the purchase of goods and services". Clearly, parties to any application before the Tribunal have a right to seek advice and/or representation by an individual who is knowledgeable and experienced in the practices of the Tribunal. However, this is a right that belongs to a party, not a provider of services such as the appellant. Although I accept that disclosing the unit numbers would facilitate the appellant in contacting tenants to promote its services, it does not necessarily follow that all tenants would necessarily want to be contacted by the appellant, nor does it reasonably follow that without solicitation tenants will remain unrepresented or without means to obtain advice on how or whether to defend against the eviction applications made against them. Tenants subject to Tribunal applications are able to seek representations and advice of their own volition by consulting with lawyers, agents and community legal clinics. As well, the appellant is in a position to promote its services without the need to access the tenants' personal information.

As with the factors listed in sections 21(2)(a) and (b), I concur with the former Assistant Commissioner's reasoning on the application of the factor at section 21(2)(c) to the information at issue. Once again, I have not been provided with sufficient reasons to warrant reaching a different conclusion here. Accordingly, I find that section 21(2)(c) has not been established.

The appellant has not raised the application of the factor listed at section 21(2)(d), and I do not find that it has any application in the circumstances of this appeal.

**Summary and conclusion**

In Order PO-2265, former Assistant Commissioner Mitchinson summarized his conclusions from his analysis of the factors listed in section 21(2):

> I have determined that there are no factors under section 21(2) that favour disclosing the tenant names and unit number of apartments whose residents are subject to applications before the Tribunal. Because section 21 is a mandatory exemption, in the absence of any factors favouring disclosure I must conclude that the requirements of the exception in section 21(1)(f) are not present, and that disclosing the tenant names and unit numbers would constitute an unjustified invasion of the privacy of tenants residing in these units. Therefore, the tenant names and unit numbers contained on the various application forms qualify for exemption and, subject to my discussion of section 23 below, must not be disclosed.

I again concur with the Assistant Commissioner's finding. In the absence of any factors favouring disclosure under section 21(2), there is no basis for concluding that disclosure would not be an unjustified invasion of personal privacy, as required for the exception in section 21(1)(f) to apply. The appellant has not provided me with further evidence that the factors favouring disclosure in section 21(2) apply such that disclosure of the tenant names and the unit number would not be an unjustified invasion of personal privacy. I therefore find that the exception at section 21(1)(f) does not apply.

Since none of the applicable exceptions to the mandatory exemption at section 21(1) apply in this case, and the appellant has accepted former Assistant Commissioner Mitchinson's finding in Order PO-2265 that the section 23 "public interest override" does not apply to the disclosure of the information at issue, I find that the exemption at section 21(1) applies and the tenant names and apartment unit numbers should not be disclosed.

## ORDER:

I uphold the Tribunal's decision to withhold the tenant names and the unit number component of the address information contained in the record entitled "Cases in a Hearing Block with Party Names" and dismiss the appeal.

Original signed by: January 24, 2007
Catherine Corban
Adjudicator

## POSTSCRIPT

I understand that the appellant wishes to obtain access to the information at issue in this appeal to facilitate its mandate in providing legal services to eligible tenants appearing before the Tribunal. I also understand that this service depends on the appellant being able to communicate its

services with those tenants. While personal solicitation by means of access to a tenant's personal information is not the only way in which the appellant can communicate its services to tenants, the appellant appears to believe that it is the most effective way in which to do so.

Personal information can be disclosed in accordance with the *Act* if the person to whom it relates consents to its disclosure (section 21(1)(a)). Contemplating section 21(1)(a), I would encourage the appellant to consider working with the Tribunal to determine whether or not there is a way in which a tenant could provide his or her consent to the Tribunal, for the disclosure of his or her personal information to the appellant, should he or she wish legal representation before the Tribunal.