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

ORDER PO-2923

Appeal PA09-451

Human Rights Tribunal of Ontario

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

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

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

NATURE OF THE APPEAL:

The appellant made a request to the Human Rights Tribunal of Ontario (the Tribunal) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Complaint initiated by [one of the two complainants] against Town of Arnprior, [named Mayor] and members of council together with reply or response of all those respondents who responded.
>
> Tribunal Docket [specified number], [specified number], [two complainants] and The Corporation of the Town of Arnprior & [named Mayor].

The Tribunal issued a time extension decision in order to notify individuals whose interests may be affected by the request (the affected persons). The Tribunal notified 12 affected persons of its decision to grant partial access to the responsive records, seeking their views on disclosure. Three affected persons objected to disclosure, the others did not submit representations. The Tribunal subsequently issued a decision to the affected persons and the appellant advising that access had been denied to the nine responsive records in accordance with section 21(1) (personal privacy) with reference to the presumptions in sections 21(3)(a), (d), (f) and (h) and the factors in section 21(2) of the *Act*.

During mediation the Tribunal advised that although there are nine records referred to in the decision letter, the records more accurately consist of five records, as the fifth record includes five documents, which were originally considered five separate records.

The appellant indicated to the mediator that there is a public interest in the disclosure of the records and raised section 23 of the *Act*. The appellant further indicated that he is not pursuing access to the affected persons' names, addresses and phone numbers, which may be contained in the records. Accordingly, this information is no longer at issue.

Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, I sought representations from the Tribunal, affected persons and the appellant. I received representations from the Tribunal, one affected party (a lawyer representing the Township and an affected person) and the appellant only. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

The records at issue consist of the following:

1. FORM 1: Application in Tribunal File [from two complainants]

2. Applicant's Reply in Tribunal File [from two complainants]

3. Response delivered by [9 named affected persons]

4. Response delivered by [1 named affected person]

5. Response delivered by [2 named affected persons]

DISCUSSION:

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. That term is defined in section 2(1) 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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. 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 and PO-2225].

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 and MO-2344].

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.)].

The Tribunal submits that the records contain recorded information about three individuals within the meaning of "personal information" as defined by section 2(1) of the *Act*. These are the three individuals (two complainants and one respondent) named in the request. Further, the Tribunal also argues that the records contain information relating to nine individuals in their professional, official or business capacity (the respondents). The Tribunal submits that when it gave notice to the respondents, they made written representations, through counsel, that:

> … they were at all material times (i.e. in all contexts in which they are named in the responsive records) acting "in the ordinary course of their employment" or "only in their capacity pursuant to the *Municipal Act*, Ontario as members of Council"…

Further, although the appellant has confirmed that he does not wish to have the names and contact information of the affected persons in the records, the Tribunal argues that it is reasonable to expect that these individuals would be identifiable if the records were disclosed, for the following reasons:

- the records in question are the initiating documents in a public proceeding before the [Tribunal];
- at the time of the Tribunal's submissions, two interim decisions in respect of this proceeding have been published and [the three individuals named in the request] are identified by name (as well as the other individual third parties, in one of the two decisions)
- the requester identified [the three named individuals] by name in the access request
- the proceeding has been the subject of general public and media scrutiny and interest

- with the information already available in the public realm, the overall context of the responsive records will likely make identification of specific individuals' personal information readily identifiable.

I find that the records contain personal information about the three named individuals (two complainants and one respondent) in the request as defined in paragraphs (a), (b), (c), (d), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. Furthermore, I find that even if the names, addresses and contact information of these individuals are removed, these individuals would still be identifiable for the reasons set out about by the Tribunal.

Moreover, in the circumstances, I find that the information relating to those individuals, who submitted that they were acting in their official capacity, is also personal information. The complainants allege that they were subject to discrimination under the *Human Rights Code* by the named respondents. Accordingly, I find that the information about the respondents is personal information within the meaning of that term as defined by section 2(1) of the *Act*.

Finally, I note that the records do not relate to the appellant nor do they contain his personal information and thus I will now consider whether the personal information is exempt from disclosure under section 21(1).

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (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. The appellant submits that the exception to the prohibition against the disclosure of personal information in section 21(1), that is referred to in section 21(1)(c), may apply as the records were filed with the Tribunal for consideration at a public hearing. Section 21(1)(c) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > personal information collected and maintained specifically for the purpose of creating a record available to the general public;

21(1)(c): public record

The appellant submits that section 21(1)(c) applies as the Tribunal accepted and maintained the records for the purposes of a public hearing. The appellant states:

> … the public had full access to the hearing which was held over the course of approximately 10 days and at which the contents of the records were made available to all members of the public who attended and to all of the parties.
>
> Disclosure would not constitute "an unjustified invasion of personal privacy" given that the information was given to the Tribunal in the full knowledge that [the information] would be the subject of the complaints themselves which the Tribunal considered in public and at which hearings the person or persons supplying the information themselves gave sworn evidence in public. That evidence consisted of, in part, re-iteration of the personal information which the Tribunal now seeks to withhold and which information itself was put in issue by the person supplying it and with the full knowledge that same would be available to the public at the hearing.

In response, the Tribunal submits that past decisions of this office have explicitly rejected the application of section 21(1)(c) to documents filed by parties to an application before other administrative tribunals and cites Orders PO-2109 and PO-2265.

It is well established that unless the information is collected and maintained for 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 Tom Mitchinson held 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*…
> >
> > 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.

I concur with the former Assistant Commissioner's reasoning and apply it here. In the present appeal, the Tribunal collects the personal information about the complainant, the alleged discrimination and the respondents for the purposes of determining whether discrimination occurred in a public hearing. The personal information is collected and maintained for adjudicative purposes only. Accordingly, as the personal information at issue in the records was not specifically collected and maintained for the purposes of creating a record available to the general public, I find that section 21(1)(c) does not apply.

Section 21(3)

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Based on my review, I find that section 21(4) is not applicable in the circumstances. The appellant submits that the public interest override in section 23 does apply and I will address this issue below.

The Tribunal submits that disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy under sections 21(3)(a), (d), (f) and (h) of the *Act*. While the Tribunal did not make submissions on section 21(3)(b), I find that this presumption may also be applicable in the circumstances. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The appellant did not make representations on the application of the presumptions in section 21(3), instead focusing on the factors in section 21(2).

Based on my review of the records, I find that the presumptions at sections 21(3)(a), (d), (f), and (h) apply to some of the personal information contained in the records, which consist of details of a complaint of discrimination based on sexual orientation under the *Human Rights Code* by two named complainants. This includes a description of the grounds of discrimination and the effect of the alleged discrimination on the complainants' lives. I accept that the records contain medical, employment, and financial information whose disclosure is presumed to constitute an unjustified invasion of the personal privacy of these individuals.

I also find that the presumption in section 21(3)(b) applies as the records were compiled and are identifiable as part of an investigation into a possible violation of law, the Ontario *Human Rights Code*. Previous orders have established that OHRC investigations undertaken pursuant to the *Code* are law enforcement matters that fall within section 21(3)(b) (Orders PO-1858, PO-2201 and PO-2359). I find that all of the records at issue relate to the Tribunal's investigation of the human rights complaint under the *Code*.

As I have found that disclosure of the personal information in the records is presumed to be an unjustified invasion of the personal privacy of the individuals identified in the records under sections 21(3)(a), (b), (d), (f) and (h), I need not consider the application of the factors in section 21(2). As noted above, the Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). Accordingly, I find that the records are exempt under section 21(1), subject to my finding on the application of the public interest override in section 23.

PUBLIC INTEREST OVERRIDE

The appellant submits that there is a compelling public interest in disclosure of the records that outweighs the purpose of the section 21 exemption. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

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

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

The appellant and one of the respondents submit that the open court principle[1], the *Statutory Powers Procedure Act* and other contextual factors in the present appeal result in there being a compelling public interest in the records at issue. They both argue that while the open court principle applies to the conduct of the hearings and the tribunal's decision, it also requires that

[1] The affected party provided the following quote which describes the *open court principle*:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.
>
> *R.* v. *Wright*, 8 T.R. 293, cited in *A.G. (Nova Scotia)* v. *MacIntyre*, [1982] 1 S.C.R. 175.

records filed by the complainants and respondents in the present appeal be open to the public so that the public can review the operations of the Tribunal[2]. The appellant argues:

> Without access to the Pleadings, members of the public are unable to make a fully informed assessment and evaluation of the operation of the Tribunal, and, indeed, whether or not the ultimate law making authority, the legislature, should re-write or re-define the Tribunal's scope of scrutiny or its' procedures.

The appellant goes on to argue that if he had attended the public hearings at the Tribunal to hear the adjudication of the complaint, which is the subject of his request, he would have had the very same information he now seeks. The appellant states:

> How can it be said that the disclosure in public, the contents of the Pleadings, and the evidence at the public hearing is reasonable and fully proper, whereas making those same Pleadings, or the contents of them, available by mail is somehow the exact opposite?

Finally, the affected party makes the argument that the head of the institution is in a conflict of interest position because the head of the Tribunal (the Chair) who made the access decision in this appeal, also was responsible for hearing the complaint which is the subject of the appeal. The affected party states:

> [The Chair's] two decisions are irreconcilable: he cannot conclude that the public interest favours an open hearing while at the same time concluding that the public interest does not favour disclosing the pleadings.

Further, the Tribunal also submits that there is a compelling public interest in the records at issue. The Tribunal states:

> The records in question are the initiating documents in an application filed with the Tribunal under the *Code*. In order to commence a proceeding under the *Code*, the applicant must file a completed application with the Tribunal. Responding parties must file a completed response to that Application. In both case[s] the parties are required to use specific forms which are mandatory under the Tribunal's applicable Rules of Procedure. Proceedings before the Tribunal under the *Code* have been described as quasi-judicial in nature. These proceedings

[2] The affected party also provided the following cite, in support of its position that the open court principle should apply to the pleadings, and thus the records at issue in the present appeal. The affected party submits:

> Justice LeBel in *Named Person* (in dissent, but not on this point) specifically identified pleadings as one aspect of the open court principle, stating:
>
> > Accordingly, legal proceedings are generally open to the public. The hearing rooms where the parties are present their arguments to the court must be open to the public, which must have access to **pleadings**, evidence and court decisions [emphasis added].

> involve the resolution through mediation or adjudication of claims that statutory rights have been infringed. The Tribunal is not a party to the proceedings. The rights under the *Code* have been described by the courts as quasi-constitutional in nature.
>
> It is the Tribunal's view that there is a compelling public interest in access to such documents in order to allow for the consideration of the basis upon which the Tribunal may make a decision or order determining the rights and interests of the parties under the *Code*. Access to such records helps members of the public understand how the Tribunal comes to decisions it makes. Public confidence in the integrity of the administrative justice system and understanding of the administration of justice are thereby fostered.

While the Tribunal makes the argument that there is a compelling public interest in disclosure of the records, it goes on to recognize that this office has not accepted the "open court principle" as a basis for overriding the exemption in section 21 in Orders PO-2265 and PO-2511.

As stated above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. While I do not dispute that the open court principle is important to the operation of the Tribunal, I do not accept that this principle establishes a compelling public interest in the records at issue. The parties have not convinced me that disclosure of the records at issue, what the parties have described as the "pleadings," would serve the purpose of informing the citizenry about the activities of the Tribunal.

The Tribunal's assertion that this argument has not been accepted by this office in the past is correct. Furthermore, I see no reason in the present appeal to depart from that course. In order PO-2265, former Assistant Commissioner Tom Mitchinson, cited above, explains the relationship between the *Act* and the open court principle:

> 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.

Later, in the same decision, the Assistant Commissioner addresses the issue of the institution's application of section 21 privacy exemption and the factor favouring disclosure in section 21(2)(a):

> 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 under section 21(2)(a).

Neither the appellant, the affected party or the Tribunal have provided sufficient evidence for me to find that disclosure of the records at issue in the present appeal would serve the purpose of informing the citizenry about the activities of the Tribunal. Further, while the affected party alleges that the Tribunal Chair is in a conflict of interest position as he is both the head of the institution and the Chair of the complaint hearing, the affected party has not provided sufficient

evidence for me to establish that there is a compelling public interest in the records for this particular complaint.

Moreover, even if I were to have found that there was a compelling public interest in the records, the parties have not established that the interest in the records outweighs the purpose of the section 21 exemption.

Accordingly, I find that the public interest override in section 23 does not apply to the records, and I uphold their exemption under section 21(1) of the *Act*.

ORDER:

I uphold the Tribunal's decision.

Original signed by: October 21, 2010
Stephanie Haly
Adjudicator