Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4088

Appeal PA19-00121

Human Rights Tribunal of Ontario

November 23, 2020

Summary: The appellant, who was an applicant in a proceeding before the Human Rights Tribunal of Ontario (HRTO), made a request to the HRTO under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), seeking access to her own HRTO file. The HRTO granted access to all the records in the file except for a confidential witness statement found in the pleading of the respondent before the HRTO. The HRTO also took the position that it was responding to the appellant's request outside of *FIPPA*. In this order, the adjudicator finds that the HRTO responded to the appellant's request outside of the *FIPPA* scheme, and that this approach is in conformity with the open court principle as described in *Toronto Star v. Ontario (Attorney General)*. On that basis, the adjudicator declines to conduct an inquiry into the HRTO's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 52(1) and 65(16); *Canadian Charter of Rights and Freedoms,* section 2(b), Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Tribunal Adjudicative Records Act*, 2019, S.O. 2019, c. 78, Sched. 60, section 2; O. Reg. 211/19.

Cases Considered: *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC); *R. v. Mentuck*, 2001 SCC 76.

OVERVIEW:

[1] The issue in this order is whether the Human Rights Tribunal of Ontario (HRTO or the tribunal) properly responded to the appellant's request for access to an adjudicative record outside of the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) and whether, on that basis, I should decline to conduct an inquiry

under the *Act* into her appeal of the HRTO's access decision.

[2] Below, I find that the HRTO responded to the appellant's access request outside of the *Act*'s access scheme, that this approach aligns with the open court principle as described in the Ontario Superior Court of Justice's decision in *Toronto Star v. Ontario (Attorney General)*,[1] and that I should not conduct an inquiry into the appellant's appeal under the *Act*. As a result, I dismiss the appeal.

[3] By way of background, the appellant made an access request to the HRTO under the *Act*, seeking access to her own HRTO file. She was the applicant in the HRTO proceeding. The HRTO issued a decision granting partial access to the records in her file. The decision stated as follows:

> I can grant access to the HRTO file you requested with one exception. I cannot disclose the confidential list of the witnesses the respondent intends to rely on at the hearing that the respondent … included with the Form 2 Response to the application (included in question 18 of the form). This list is explicitly confidential and the Form 2 makes clear that the HRTO will not disclose the list to the applicant.

[4] The appellant appealed the tribunal's decision to this office.

[5] During the mediation stage of the appeal, the HRTO sent the appellant a letter with the same response but also providing the following additional information about its decision on access:

> However, I can confirm that the respondent did not name your son or any other family member in the confidential witness list.

[6] The HRTO also told the mediator that it was not claiming an exemption under *FIPPA* to withhold records from the appellant, and made reference to the above-noted decision of the Superior Court in *Toronto Star*.

[7] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process. The issue that moved forward to adjudication was set out in the mediator's report as follows:

> Application of the *Act*, including the impact of *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586 (CanLII).

[8] As the adjudicator assigned to the matter, I reviewed the appellant's access request, the HRTO's decision, and the record at issue, and made a preliminary decision

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[1] *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586 (CanLII).

to exercise my discretion under section 52(1) of the *Act* not to conduct an inquiry. In my preliminary assessment letter to the appellant, I informed her that I had decided not to conduct an inquiry because the record at issue is an adjudicative record as defined in *Toronto Star*, and because the HRTO responded to her request outside of the freedom of information process, an approach specifically endorsed by the *Toronto Star* decision. I provided reasons for my preliminary assessment and invited the appellant to provide me with representations if she disagreed with it. The appellant provided representations in response.

[9] In this order, I decline to conduct an inquiry under section 52(1) of the *Act* and dismiss the appeal.

RECORD:

[10] The information that the HRTO withheld is witness information found on page 13 of the document titled "Response to an Application under Section 34 of the *Human Rights Code* (Form 2)."

DISCUSSION:

[11] Section 52(1) of the *Act* provides as follows:

> The Commissioner may conduct an inquiry to review the head's decision if,
>
> > (a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or
> >
> > (b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.
> >
> > (emphasis added).

[12] Section 52(1) provides the Commissioner (or her delegate) with the discretion not to conduct an inquiry in an appropriate case.

The appellant's response to the preliminary assessment letter

[13] I have reviewed the material the appellant submitted in response to my preliminary assessment letter, which consists of materials from her HRTO file, and various HRTO decisions. It appears that the appellant disagrees with the HRTO's decisions on her HRTO matters. She did not respond directly to the issues I asked her to address.

The confidential witness list is found in an adjudicative record

[14] The record at issue, which is titled "Response to an Application under Section 34 of the *Human Rights Code* (Form 2)" falls squarely within the definition of an adjudicative record.[2]

[15] In the *Toronto Star* decision, Morgan J described "adjudicative records" as follows:

> The *[Statutory Powers Procedure Act]* contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present Application applies ("Adjudicative Records"). These include:
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> > (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
> >
> > (b) the notice of any hearing;
> >
> > (c) any interlocutory orders made by the tribunal;
> >
> > (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
> >
> > (e) the transcript, if any, of the oral evidence given at the hearing; and
> >
> > (f) the decision of the tribunal and the reasons therefor, where reasons have been given.
>
> To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council.

[16] The Canadian Judicial Council's *Model Policy for Access to Court Records in*

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[2] See *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586 (CanLII), at para. 8. See also *Model Policy for Access to Court Records in Canada*, Judges Technology Advisory Committee, Canadian Judicial Council (September 2005) https://www.cjcccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf.

Canada[3] describes adjudicative records in the following terms:

> "Court records" include any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes, but is not limited to:
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> a) case files;
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> b) dockets;
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> c) minute books;
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> d) calendars of hearings;
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> e) case indexes;
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> f) registers of actions; and
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> g) records of the proceedings in any form.
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> This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.

[17] Item a), case files, is defined as

> "Case file" refers to docket information and documents in connection with a single judicial proceeding, such as pleadings, indictments, exhibits, warrants and judgments.[4]

[18] The record at issue is a "Response to an Application" before the HRTO. It is a pleading, and therefore, it is an adjudicative record.

The Toronto Star decision

[19] On April 27, 2018, the Ontario Superior Court released the *Toronto Star* decision

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[3] *Model Policy for Access to Court Records in Canada*, Judges Technology Advisory Committee, Canadian Judicial Council (September 2005).
[4] *Ibid.*

referred to above. That decision resulted from a court application brought by the Toronto Star, who challenged the application of the *Act* to the adjudicative records (such as pleadings, transcripts, and evidence) of administrative tribunals. This decision considered the application of the "open court principle," as a facet of freedom of expression protected under section 2(b) of the *Charter of Rights and Freedoms*, to the adjudicative records of tribunals containing personal information as defined in *FIPPA*.

[20] In *Toronto Star*, the Court declared the application of the personal privacy exemption at section 21(1) of the *Act* to the adjudicative records of certain tribunals, including the HRTO, to be unconstitutional and of no force or effect.[5]

[21] The decision did not interfere with the procedural scheme under *FIPPA*:

> For those tribunals that adhere to the *FIPPA* regime, the ruling here leaves intact the procedural system established under that legislation. That is, the decision-making authority of the institution heads and, on appeal, the IPC, is not rendered inoperative.

[22] However, *Toronto Star* also made it clear that the open court principle means that tribunals are free to respond to requests for adjudicative records outside of *FIPPA*, even where the request is framed as a *FIPPA* request, provided they follow the model of other tribunals that do so in conformity with the *Charter*'s principles of openness. The Court stated (at paragraph 133) that

> Since 8 of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure that the presumption of openness and disclosure required by s.2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned by this ruling. Other tribunals may follow this model and by-pass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.

[23] The "model" tribunals to which the Court referred "fashioned their own method of handling document requests outside of the *FIPPA* process" which entailed "no delay at all" and "typically anonymized" the names of certain individuals (see *Toronto Star*, paragraph 22).

[24] The Court then went on to note that the openness that the *Charter* requires

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[5] The Court suspended the declaration of invalidity for 12 months, which time period has now passed.

includes a consideration of the *Dagenais/Mentuck* test.[6] That test, which allows a tribunal to withhold information in some circumstances, is discussed further below.

[25] After the *Toronto Star* decision was issued, the *Tribunal Adjudicative Records Act*, 2019,[7] (*TARA*) came into force on June 30, 2019. Section 2(1) of *TARA* provides that certain tribunals, including the HRTO, shall make available to the public all adjudicative records that relate to proceedings commenced after the coming into force of that section (subject to the tribunal's ability to make confidentiality orders in respect of the records).[8]

[26] A new exclusion from *FIPPA* also came into effect on June 30, 2019. The exclusion is found in section 65(16) of *FIPPA*, which states:

> This Act does not apply to adjudicative records, within the meaning of the *Tribunal Adjudicative Records Act, 2019*, referred to in subsection 2 (1) of that Act.

[27] This legislative amendment goes further than the *Toronto Star* decision and removes adjudicative records from the *FIPPA* scheme entirely, provided they relate to proceedings commenced after the amendment came into effect.

[28] The tribunals covered by *TARA* are designated in Schedule 1 to Ontario Regulation 211/19. Currently, 28 tribunals are listed, including the HRTO. However, the requirement in *TARA* to make records available to the public only applies in respect of tribunal proceedings commenced on or after June 30, 2019. The record at issue before me relates to a HRTO proceeding that commenced in 2018. Therefore, neither *TARA* nor the *FIPPA* exclusion under section 65(16) is relevant to this appeal. Where a tribunal chooses to respond outside of *FIPPA* to a request relating to proceedings commenced prior to June 30, 2019, which is the case here, the open court principle and *Toronto Star* are relevant for these adjudicative records.

[29] It is worth stressing that tribunal records other than adjudicative records (for example, administrative records, or documents exchanged in pre-hearing filings but not entered into evidence) are still subject to *FIPPA*. However, no such records are at issue before me.

Impact of Toronto Star on the adjudicative record at issue in this appeal

[30] In my view, the HRTO's decision in this case was to respond to the appellant's

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[6] See *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76 (CanLII). And see: *Toronto Star v. Ontario (Attorney General)*, *supra*, at paras. 89-91, 134-135.
[7] S.O. 2019, c. 78, Sched. 60.
[8] *Ibid*, s. 2.

request outside of *FIPPA*. The HRTO expressly stated that it does not claim that any exemptions in *FIPPA* apply to the withheld information.

[31] I do note that the HRTO's decision letter states as follows:

> If you decide to launch an appeal, please provide the Commissioner's Office with:
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> 1) The above request number,
>
> 2) A copy of this decision letter and your original request for information.

[32] However, this statement does not detract from the HRTO's position that it made its access decision outside of *FIPPA*. Although the HRTO could have been more explicit in this regard, I do not read its letter as a concession that it is obliged to apply the *FIPPA* scheme with respect to its decision to deny access to the information at issue. Rather, the HRTO appears to have informed the appellant of her right to appeal its decision that the record at issue is an adjudicative record that entitles it to respond to the access request outside of the *FIPPA* scheme.

[33] It is also my view that the HRTO's decision that it could respond to the appellant's access request outside of the scheme of the *Act* was correct. The HRTO's response in granting partial access to the appellant's file did not entail undue delay and its decision to withhold the confidential witness list preserves the anonymity of certain individuals in accordance with the usual practice the HRTO has fashioned as set out in Form 2. There is no information before me to suggest that the HRTO's response in this respect reflects anything other than a genuine effort to conform to the model of other tribunals whose processes comply with the *Charter*. The *Toronto Star* decision specifically endorsed this approach when it stated that tribunals are at liberty to follow the model of other tribunals that currently "by-pass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires."

[34] Before concluding, I will briefly explain the so-called *Dagenais/Mentuck* test, which is referred to in the *Toronto Star* decision. Although the open court principle applies to adjudicative records, this includes consideration of the *Dagenais/Mentuck* test. This test was set out by the Supreme Court of Canada in two decisions: *Dagenais v. Canadian Broadcasting Corp*.[9] and *R. v. Mentuck*.[10] According to those decisions, the open court principle can be overridden (i.e., information can be withheld) on a case-by-case basis if:

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[9] 1994 CanLII 39 (SCC).
[10] 2001 SCC 76 (CanLII).

a. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

b. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[35] The *Toronto Star* decision contains a discussion of the *Dagenais/Mentuck* test in the context of administrative tribunals.[11]

[36] In this case, the HRTO has provided the appellant with all of the information in her HRTO file, with the exception of two witness statements. Because the HRTO chose to respond to the appellant's access request outside of the *FIPPA* scheme, and because I have found that it was entitled to do so, I will not comment on whether the information that the HRTO withheld meets the *Dagenais/Mentuck* test. If the appellant is of the view that it does not, her recourse is to the courts and not this office.

ORDER:

I uphold the HRTO's decision to respond to the appellant's access request outside of the *FIPPA* scheme. Under section 52(1) of *FIPPA*, I decline to conduct an inquiry and I dismiss the appeal.

Original signed by: November 23, 2020

Gillian Shaw
Senior Adjudicator

[11] See the *Toronto Star* decision at paras. 89-91, 134-135.