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

ORDER PO-2418

Appeal PA-040326-1

Ontario Rental Housing Tribunal

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BACKGROUND:

The Ontario Rental Housing Tribunal (the Tribunal) received a two-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). One part of the request was for a Tribunal hearing list entitled "Cases in a Hearing Block", including unit numbers.

In Order PO-2265, former Assistant Commissioner Tom Mitchinson dealt with a similar request made to the Tribunal for a record entitled "Cases in a Hearing Block with Party Names". The Tribunal, which had previously disclosed earlier versions of this record, denied access. In its decision letter the Tribunal stated the following:

> Hearing lists of the type described above were previously provided to the Tenant Duty Counsel Program. However, in Order PO-2109, Assistant Commissioner Tom Mitchinson found that names and addresses of parties to Tribunal applications would meet the definition of personal information in section 2 of [the *Act*]. Further, the adjudicator found that this information should fall within the scope of the mandatory exemption under section 21 of [the *Act*] and should not be disclosed. As a result of this order, the Tribunal reviewed its policies related to disclosure of information, and determined it could no longer provide hearing lists that contain the names and addresses of the parties to the applications.
>
> Pursuant to Order PO-2109, I consider the information that you have requested to be personal information pursuant to the definition in section 2 of [the *Act*], and that disclosure of the information would constitute an unjustified invasion of personal privacy pursuant to section 21 of [the *Act*].

The former Assistant Commissioner went on to find that the names of the tenants are personal information. Furthermore, the address of the tenant, in particular, the street address, city, postal code and specific unit number is also personal information. The former Assistant Commissioner did make the distinction that without the unit numbers, a specific resident of a residential rental accommodation could not be identified, and as such the address without unit number is not personal information.

NATURE OF THE APPEAL:

As noted above, the Tribunal received a two-part request under the *Act*. The requester sought access to:

1. the Duty Mediator's Report including tenant names and unit numbers, and

2. …the daily cases in a hearing block, post-hearing, including all the record including the unit [numbers] of the residential complex. Example attached. On October 5, 2004, the cases in the hearing block stopped having the unit numbers on them for some reason.

The requester's example of the "Cases in a Hearing Block" contained the following information: the case number, title (full address including the unit number), case type and filing date.

In its decision, the Tribunal asked for clarification as to which hearing date(s) the requester was seeking and whether he wished to have the above-mentioned reports on an ongoing basis. The requester was also asked if he is seeking both the tenant names and the unit numbers.

The Tribunal subsequently granted partial access to Cases in a Hearing Block and the Duty Mediator's Report, i.e. with the names and unit numbers severed. The requester was advised that he could obtain access to the Cases in a Hearing Block at the front counter but he must obtain access to the Duty Mediator's Report from the Freedom of Information Coordinator. The requester was also advised that the Duty Mediator's Report could be provided every two weeks for an estimated fee of $120.00.

The requester (now the appellant) appealed the decision.

In his letter of appeal, the appellant clarified that he is not interested in obtaining the names of tenants but stated that he does want access to unit numbers. The appellant contends that the full address showing the unit number, without the individual's name, does not constitute personal information under section 2(1) of the *Act*. The appellant is also appealing on the basis that if the unit number is found to constitute personal information, its disclosure does not constitute an unjustified invasion of privacy under section 21 of the *Act*.

The appellant also advised that he is no longer seeking access to the Duty Mediator's Reports. Accordingly, only "Cases in a Hearing Block with unit numbers" remains at issue in this appeal

Mediation was not possible and the appeal was forwarded to adjudication.

I sent a Notice of Inquiry to the appellant along with a copy of Order PO-2265. The appellant provided representations. The appellant also provided further supporting documents and arguments, and later amended his representations.

In his amended representations, the appellant emphasized that he is seeking access to the record "post hearing".

The appellant also submitted further representations including a report entitled "Rental History Report" and an article containing the description of a Federal Court of Appeal decision, *Englander* v. *Telus Communications Inc.*, [2005] 2 F.C.R. S72.

DISCUSSION:

PERSONAL INFORMATION

General principles

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), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (h) the individual's name if 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, 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.)].

Analysis

The appellant submits that there is no personal information in the record as the record is a public document produced by the Tribunal. Furthermore, the appellant distinguishes his request from that in Order PO-2265 as the request for record was made pre-hearing in Order PO-2265 and he is interested in the record post-hearing. The appellant also submits that reverse directories with a unit number do not identify the individuals who reside in any unit. The appellant summarizes his submissions as follows:

> - The Docket is still being produced and prominently displayed throughout the various district tribunal office[s] and is in the care and control of the institution.
>
> - It is a public document and should not be confused with personal information under Part iii of the *Act*.
>
> …

- all matters listed on the Docket are open to the general public. Names, & full addresses are publicly announced when dealing with the parties matter. All hearings are public.

As noted, the appellant submits that he is seeking the record "post-hearing", and argues that this distinguishes his case from Order PO-2265. While the appellant in Order PO-2265 was seeking the information pre-hearing, the record at issue was the Cases in a Hearing Block. Whether the information is pre-hearing or post-hearing does not matter as the record is the same.

The appellant also argues that the record is not personal information because it is "public information". The fact that information may be contained in a document that is or was available to the public does not mean that it is not personal information. Rather, the issue of public availability arises in the analysis of whether any personal information the record may contain is exempt under section 21(1) of the *Act*, which I will consider later in this order.

The first question to be answered is whether the record, and specifically the record containing an address with unit numbers contains personal information.

In Order PO-2265, the former Assistant Commissioner found the following with respect to unit numbers and the issue of whether an individual could be identified:

> 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 of units subject to Tribunal applications consist of the "personal information" of tenants residing in those units, as contemplated by paragraph (d) of the definition.

While the appellant's submission that reverse directories are not able to be searched using unit numbers may be valid, this is only one way of identifying the tenant of a unit. I agree with the former Assistant Commissioner's conclusion on this point in Order PO-2265, and find that the unit number combined with the address is "personal information" for the purposes of section 2.

PERSONAL PRIVACY

General principles

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.

In this case, as the appellant submits that the record he is interested in is a "public record", I will proceed to analyze wither section 21(1)(c) applies. The appellant also submitted the *Englander* v. *Telus Communications Inc.* case, apparently in connection with an argument that there has been consent to disclosure, which is addressed in section 21(1)(a).

In addition, the exemption at section 21(1)(f) could apply.

Sections 21(1)(a), (c) and (f) state:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (c) personal information collected and maintained specifically 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.

Analysis

Section 21(1)(a)

The appellant submitted an article about the Federal Court of Appeal case, *Englander* v. *Telus Communications Inc*. In relation to this case, the appellant submits:

> Enclosed in support, synopsis of a federal court of appeal ruling that any TELUS (only TELUS customers can be accessed by reverse directories) customers (Bell Canada) receives written material setting out the purposes for the collection, use and disclosure of personal information. These brochures indicate that the customers' names, addresses and telephone numbers will also be used for secondary purposes, including dial in and internet directory assistance and CD ROMS.
>
> TELUS was ordered to comply with its obligations to inform first time customers, at the time of enrolment, of the primary and secondary purposes for the collection

> of their personal information and the availability of the NPNS (non published number service).
>
> …
>
> Any argument therefore that information may be obtained about an individual from reverse directories, notwithstanding that there is no provision to insert unit numbers, customers enrolled with TELUS, have given permission to disclose 'information' by opting out of the NPNS. Enrollment in NPNS guarantees that no information may be deduced by any directory, CD ROM or otherwise.

Englander v. Telus Communications Inc., [2005] 2 F.C.R. 572 (F.C.A.) relates to a complaint under the federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act*. The Federal Court of Appeal concluded that Telus had not obtained the valid consent of new customers to include their personal information in telephone directories because it did not explain the opt-out option of having an unpublished number.

In my view, this case does not support any argument that consent has been provided in the present case, even inferentially, to disclosure of the record at issue. The record at issue is a docket produced by the Tribunal.

In addition, in order for section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request [see Order PO-1723]. There is no evidence before me to indicate that any such consent was provided in this case. It is certainly not provided by the *Englander* case.

I find that section 21(1)(a) does not apply in this appeal.

Section 21(1)(c)

The appellant submits the following in support of his position that the record at issue is a public document that should not have been severed by the Tribunal:

> Order PO-2265 is not applicable to my request. I am not obtaining information that might be construed as personal information. I am receiving or was receiving a public document by its nature (the Docket). The Docket (Cases in a Hearing Block) are prominently displayed <u>for deliberate access</u> for the general public.
>
> …
>
> Can the record be severed? No! The Dockets are public documents that should not be tampered with. [emphasis in original]

The appellant also argues that because the personal information of the tenants is disclosed during the hearing, the personal information cannot remain "private". The appellant submits:

> This information is exposed at the hearing(s). The hearings are open to the public. (See literature ('Important Information Your Hearing Today') I can attest to that fact as I have attended numerous hearings over the years. The information [record] I have been obtaining for the past 3 years is a record [the Docket] of the proceedings that have *already taken place*. How then could my information [record] obtained after the tribunal has already exposed this information at a public forum, be rationalized. This is a contradiction. I have requested copies of these hearing dockets which the tribunal could reproduce following the day of the hearing. They are still in the care and control of the institution. I put the tribunal to the test and pose the following questions, 'How does providing the full residential address on the Docket be construed as being 'personal information' after the hearings have taken place, names and full addresses have been called out. [emphasis in original]

In assessing these arguments, it is important to bear in mind that section 21(1)(c) does not provide for blanket disclosure of "public" documents, referring instead to "personal information *collected and maintained specifically for the purpose of creating a record available to the general public*" (emphasis added).

In Order PO-2265, the former Assistant Commissioner addressed similar arguments. He stated:

> The appellant also disagrees with my interpretation of section 21(1)(c) in Order PO-2109, where I found that the Tribunal did not collect the personal information at issue in that appeal specifically for the purpose of creating a record available to the public, but for the purpose of the hearing that will determine the matter before the Tribunal. The appellant submits:
>
> > We agree that the purpose that [the Tribunal] collects the data is for an adjudication process, but by virtue of the *SPPA*, jurisprudence and practice, the adjudication process is a public process and records created by it are public. Thus, in collecting data, [the Tribunal] does create a "record available to the general public", and information generated as part of the adjudication process, including the Docket, tribunal files and order, should be publicly available.
>
> Addressing the concerns raised in Order PO-2109 about the availability of bulk personal data in electronic format, the appellant proposes a "simple solution". It suggests that the Tribunal continue to provide data from its database, including bulk requests, but only if "the purpose of the request is consistent with the rational behind an open judicial system".

In Order PO-2109, I reviewed the Tribunal's decision in response to a request for the production of a weekly list detailing the names, addresses, hearing dates and the location of the hearing of all tenants whose landlords, in the future, file an application to evict with the Tribunal. In that order I reviewed the relevant previous orders and privacy investigations reports dealing with sections 21(1)(c) and 37 of the *Act* and found that it is clear from that line of orders and investigations reports that, for the exemption in section 21(1)(c) 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". If the information is collected and maintain for purposes other than the specific purpose of making records available to the public, then section 21(1)(c) does not apply (P-318, M-170, M-527, M-849, PO-1786-I).

In Order PO-2109 I stated:

> In my view, 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 the 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 ORHT 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 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 ORHT 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 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.

The appellant's argument that the docket is a public document is twofold. Firstly, the appellant argues that the document is publicly displayed by the Tribunal for use by the public in identifying the matters and hearings to be held on a particular day. Secondly, the appellant argues that the docket contains "public information" because the Tribunal will routinely announce the names of parties, address and other information during the hearing, which is open to the general public.

Regarding both of the appellant's arguments I reiterate the former Assistant Commissioner's finding. While the personal information, including the unit number with address, may become available to the public in the context of the hearings, this is a "necessary consequence or outcome of the adjudicative process" but does not mean that the Tribunal has collected and maintained the personal information for the specific purpose of making this information publicly available. Though that is sufficient to dispose of the matter, the idea that the information was collected for the purpose of inclusion on the docket is contradicted by the fact that, at times, the information would never appear there – for example where a matter between a landlord and the tenant settles before the hearing date.

Moreover, as stated above:

> The fact that hearings are held in public and that the procedures followed by the Tribunal are governed by the *Statutory Powers and Procedures Act* [*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 appellant notes in his representations that the docket is still being produced and prominently displayed throughout various district tribunal offices. This leads me to conclude that the Tribunal appreciates the distinction between disclosure under the *Act* and disclosure under its obligations under the *SPPA*.

I find that section 21(1)(c) does not apply to the information at issue.

Section 21(1)(f)

Introduction

Section 21(1)(f) provides an exception to the mandatory exemption at section 21(1) of the *Act* "if disclosure does not constitute an unjustified invasion of personal privacy". Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosing personal information would result in an unjustified invasion of privacy under section 21(1)(f). Section 21(3) lists the types of

information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; section 21(4) lists exceptions to these presumptions; and section 21(2) provides some criteria for an institution to consider in deciding if an unjustified invasion would occur. 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 21(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Analysis

The appellant submits that, "There are no factors that apply under section 21(2)."

In Order PO-2265, the appellant in that case made extensive representations on the application of the factors at section 21(2). After finding that sections 21(3) and 21(4) were not applicable to the record at issue, the former Assistant Commissioner went on to find regarding section 21(2) that:

> I have determined that there are no factors under section 21(2) that favour disclosing the tenant names and unit numbers 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.

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 unit numbers 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 possibly applicable exceptions to the mandatory exemption at section 21(1) apply in this case, I find that the exemption applies and the unit numbers should not be disclosed.

SECTION 63(2)

The appellant also raised the application of section 63(2) of the *Act* to the information at issue in this appeal. Section 63(2) states:

> This Act shall not be applied to preclude access to information *that is not personal information* and to which access by the public was available by custom or practice immediately before this Act comes into force. [emphasis added]

The appellant submits that he and a number of parties had been receiving reports of various kinds from the Tribunal for a number of years prior to Order PO-2109 and Order PO-2265. The appellant states:

> The dockets were also predominantly displayed under the Old Landlord & Tenant Act RSO 1980 which predates F.I.P.P.A. Access by the public was available then in the same fashion. Accordingly, any arguments made by the tribunal to delete a part of a record citing specific sections of F.I.P.P.A. in support, do not apply.

In this case, I have already found that the information at issue, unit numbers for tenants, is personal information. Section 63(2) is clear in stating that it does not apply to personal information, and I find that it does not apply.

RENTAL HISTORY REPORT

As a final matter, the appellant submitted a report from the Tribunal entitled "Rental History Report" as evidence that the Tribunal still continues to disclose tenant names and unit numbers. As well, the appellant wanted to show the inconsistency in the Tribunal's disclosure practices.

This record is not at issue in this appeal. The Tribunal may wish to examine whether disclosure of the personal information on this report is in accordance with the *Act*.

ORDER:

I uphold the Tribunal's decision.

Original Signed By: September 27, 2005
Stephanie Haly
Adjudicator