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

ORDER PO-2109

Appeal PA-020194-1

Ontario Rental Housing Tribunal

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NATURE OF THE APPEAL:

The Ontario Rental Housing Tribunal (ORHT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "… the names and addresses of all tenants whose landlords have filed an application to evict with the Ontario Rental Housing Tribunal in the months of May and June 2002", as well as the relevant hearing dates and locations. The requester also wanted this information to be provided to him on a weekly basis.

ORHT responded to the request as follows:

> You have requested that [ORHT] create a custom weekly report setting out the names and addresses of all tenants whose landlords have filed an application for eviction with [ORHT], and the hearing dates and hearing locations for those applications. In the past, we have created custom reports for commercial clients without requiring a request [under the *Act*]. However, the programming and continuing production of these reports places a very large burden on [ORHT's] limited system resources. Therefore, as we have indicated in previous discussions, [ORHT] is currently reviewing its process for responding to requests of this nature.
>
> As a result of this review, it is likely that [ORHT] will publish standard reports containing information such as that which you have requested. Therefore, pursuant to section 22 of [the *Act*], which allows an institution to refuse to disclose a record on the grounds that there is a reasonable expectation that the record will be published within 90 days, I am denying your request.

The requester, now the appellant, appealed OHRT's decision.

During the mediation stage of the appeal, an issue arose concerning ORHT's practice of disclosing the "custom reports" referred to in its decision letter. Having reviewed a sample report, the Mediator identified that it contains what appears to be the personal information of tenants (ie. names, addresses, and the fact that they may be arrears of rent). Accordingly, the Mediator raised the possible application of the mandatory exemption in section 21 of the *Act* (invasion of privacy) to the type of information ORHT intended to disclose to the appellant.

Mediation did not resolve the appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to ORHT, initially, asking for written representations on the application of the exemptions in section 21 and 22 of the *Act*. ORHT submitted representations, which were in turn shared with the appellant, along with the Notice of Inquiry. The appellant chose not to provide representations.

RECORDS:

There is no existing record at issue in this appeal. As noted, OHRT advised the appellant that it intended to create a responsive record within 90 days of the request, and described the contents of this record in general terms. The sample custom report provided to this office is similar in nature to the type of record requested by the appellant. This report contains the following categories of information: case number, filing date, case type, first name, last name, address,

postal code, telephone number, party type (i.e., landlord or tenant), and amount of arrears. The appellant's request identifies a number of these categories of information (eg. names and addresses of tenants) and, although my decisions in this order could potentially have general application to other categories of information contained in the various custom reports produced by ORHT (eg. telephone number, amount of arrears), I will restrict my findings in this appeal to the categories of information identified by the appellant in his request.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2 of the *Act*, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> ….
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> ….
>
> (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 requested record would contain the names and addresses of individual tenants who are the subject of applications before ORHT, and would also reveal the fact that they are alleged to be in arrears of rent.

OHRT submits that this information falls within the scope of the definition of "personal information" in section 2(1) of the *Act*, and I find that it clearly does.

INVASION OF PRIVACY

Once it has been determined that a record contains personal information, section 21 of the *Act* prohibits the disclosure of this information unless one of the exceptions identified in section 21(1) applies.

ORHT relies on the exception in section 21(1)(c), which reads:

> 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;

ORHT submits:

> In making information contained in [ORHT] applications available to the public, [ORHT] relies on section 9 of the *Statutory Powers Procedures Act* (the *SPPA*), which sets out that tribunal hearings shall be open to the public. Based on this provision of the *SPPA*, senior management of the Ministry of Municipal Affairs and Housing decided, when planning the implementation of the *Tenant Protection Act* (*TPA*), that the public should be allowed full access to tribunal files. They also considered that similar information was available to the public under the *Rent Control Act*, and through the courts under the *Landlord and Tenant Act* (the two pieces of legislation that applied to landlord and tenant disputes prior to the introduction of the *TPA*).
>
> The personal information that is contained in the reports referred to above is obtained from applications filed under the *TPA*. [ORHT] application forms include a notice under subsection 39(2) of the *Act*, and inform the applicant that the information may become public.
>
> Based on the above, when requests were made by clients to develop custom reports of tribunal data, [ORHT] determined that information contained in those reports could be disclosed pursuant to clause 21(1)(c) of the *Act*. Clients were not required to make a request under the *Act*. Clients were required, however, to enter a Memorandum of Understanding with [ORHT] which set out the terms and conditions under which the Tribunal could provide the data. Clients paid a fee of $100.00 for the computer programming required to develop the reports, and a further $100.00 for each report sent.

OHRT provided me with a sample Memorandum of Understanding.

This office has issued a number of orders and privacy investigation reports dealing with section 21(1)(c) and section 37 of the *Act* that are useful in determining whether OHRT has properly applied the section 21(1)(c) exception in the context of this appeal. Other relevant decisions apply the equivalent provisions in the *Municipal Freedom of Information and Protection of Privacy Act* (sections 14(1)(c) and 27).

Section 21(1)(c) is quoted above. Section 37 is contained in Part III of the *Act*, which provides rules governing the collection, use and disclosure of personal information. Section 37 states:

> This Part [Part III] does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

In Order PO-1736, Senior Adjudicator David Goodis considered section 21(1)(c) in the context of a request for a list of estates being administered by the Public Guardian and Trustee that contained certain information that had been supplied to the Court when making a particular Application for Certificate of Appointment of Estate Trustee under the *Rules of Civil Procedure*. In finding that section 21(1)(c) did not apply, Senior Adjudicator Goodis stated:

> In previous orders this office has stated that in order to satisfy the requirements of section 21(1)(c), the information must have been collected and maintained specifically for the purpose of creating a record available to the general public (for example, Order P-318). Section 21(1)(c) has been found to be applicable where, for example, a person files a form with an institution as required by a statute, and where that statute provides any member of the public with an express right of access to the form (Order P-318, regarding a Form 1 under the *Corporations Information Act*)….

Senior Adjudicator Goodis went on to quote from two other orders addressing section 21(1)(c) as follows:

> … in Order M-170, former Commissioner Tom Wright stated the following with respect to records in the custody of a police force:
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> > The various witness statements and the officer's statement were prepared and obtained as part of a police investigation into a possible violation of law. In my view, the specific purpose for the collection of the personal information was to assist the Police in determining whether a violation of law had occurred and, if so, to assist them in identifying and apprehending a suspect. The records are not currently maintained in a publicly available form, and it is my view that section 14(1)(c) [the municipal equivalent to section 21(1)(c) of the *Act*] does not apply.

Similarly, in Order M-527, former Adjudicator Holly Big Canoe stated:

> In my view, while some of the same personal information may be available elsewhere, the specific purpose for collecting and maintaining this personal information was to investigate the accident, not to create a record available to the general public, and section 14(1)(c) does not apply.

I applied a similar line of reasoning in Order PO-1786-I.

Sections 21(1)(c)/14(1)(c) have also been considered in orders dealing with police daily arrest sheets (Order M-849), dockets listing daily matters being heard under the *Police Services Act* (Order M-1053, upheld on judicial review in *Duncanson v. Toronto (Metropolitan) Police Services Board* (1999), 175 D.L.R. (4th) 340 (Ont. Div. Ct.)), a list of all doctors registered with the College of Physicians and Surgeons of Ontario (Order P-1635), and a list of the names and addresses of all persons licensed to drive in the province of Ontario (Order P-1144). In each case, the records at issue did not satisfy the requirements of the "public record" exception.

For example, in Order M-849 the appellant sought access to computerized databases of arrest sheets, paper versions of which were available to the public on request. In deciding that section 14(1)(c) of the municipal *Act* did not apply, I stated:

> The appellant submits that the Police release paper versions of the Arrest Sheets on a daily basis to various news media outlets. In his view, the Police have created records available to the general public, and he is simply asking for a computerized version of these records.
>
> The Police, on the other hand, submit that the records are created for internal information purposes, and are made available at Police Headquarters for the media and the public, upon request. The Police submit that any media or public access is secondary to the specific reasons why the records are created.
>
> In my view, even though the Police have a practice of providing paper versions of the Arrest Sheets to the public, it does not necessarily follow that the personal information contained in these records was "collected and maintained **specifically** for the purpose of creating a record available to the general public", as required by section 14(1)(c). The Police contend that the Arrest Sheets are created using personal information originally collected for other purposes, and that these records are maintained for internal purposes. I accept the position of the Police on this issue. It is clear that the names, addresses and other identifying information about an arrested person were collected for the purpose of prosecuting a crime, not for the purpose of creating Arrest Sheets and making them available to the general public. Although these records may be released to

> the public on occasion, in my view, this is a secondary use which does not satisfy the requirements of section 14(1)(c). Therefore, I find that section 14(1)(c) of the *Act* does not apply to the circumstances of this appeal.

Section 37 of the *Act* uses similar language to section 21(1)(c). This section was discussed in privacy Investigation Report I94-011P as follows:

> It is our view that, if applicable, section 37 excludes personal information from the privacy provisions of Part III of [the provincial *Act* - Part II of the municipal *Act*] only if the information in question is held by the institution maintaining it for the express purpose of creating a record available to the general public…. In our view, this interpretation is not only reasonable, but also in keeping with one of the fundamental goals of the *Act*, namely "to protect the privacy of individuals with respect to personal information about themselves held by institutions."

Commissioner Ann Cavoukian interpreted section 37 in a similar manner in privacy investigation PC-980049-1, which involved bulk electronic disclosure of personal information.

It is clear from this line of orders and investigation reports that, in order for the exception 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 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.

In my view, OHRT 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 OHRT for the purpose of the hearing that will consider the allegation and make a determination under the authority provided to OHRT under the *Tenant Protection Act*. The fact that hearings are held in public and that the procedures followed by OHRT 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 39(2) of the *Act* contained on the bottom of the various OHRT 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 OHRT 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.

Therefore, I find that the exception in section 21(1)(c) has not been established. OHRT does not identify any of the other exceptions in section 21(1), and I find that none are relevant in the circumstances of this appeal. Accordingly, I find that the information responsive to the appellant's request falls within the scope of the mandatory section 21 exemption and must not be disclosed.

INFORMATION PUBLISHED OR CURRENTLY AVAILABLE

Section 22(b) of the *Act* reads:

> A head may refuse to disclose a record where,
>
> > the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

OHRT originally relied on section 22(b) as the basis for denying access to the appellant's request. The reasons for doing so are outlined in the decision letter, quoted earlier in this order.

However, once the matter reached the appeal stage and section 21 was identified as a potential issue, OHRT decided to wait for the outcome of the appeal before proceeding with its plan to prepare standard reports that would be made available to the appellant and other interested parties.

In my view, the purpose of the section 22(b) exemption, like section 22(a) relates to questions of convenience (Order 170). Where the record will be published and made publicly available within a relatively short time after a request has been made under the *Act*, the balance of convenience in the circumstances favours the institution and the record can be properly withheld. The exemption is not available to deny access to records that may be made available at some unascertained date through an alternate access mechanism (See Order M-467).

Having found that the information responsive to the appellant's request qualifies under the mandatory section 21 exemption, section 22(b) cannot apply. Clearly, the section 22(b) exemption is only available in circumstances where records or information are accessible under

the *Act*. In the case of mandatory exemptions, such as section 21 and 17 (third party commercial information), an institution is precluded from disclosing records or information that qualifies for exemption. In my view, the underlying purpose of section 22(b) is not relevant in this context, and I find that this exemption is not available to the OHRT in the circumstances of this appeal.

ORDER:

The information responsive to the appellant's request falls within the scope of section 21 of the *Act*, and must not be disclosed by OHRT.

Original Signed By: February 7, 2003
Tom Mitchinson
Assistant Commissioner

POSTSCRIPT

Although this order deals narrowly with the specific information covered by the appellant's request, it is clear that other requesters have been receiving similar information from OHRT outside the *Act*, on the assumption that section 21(1)(c) permits the disclosure of personal information in this context. Although disclosures of this nature have apparently been governed by the terms of a Memorandum of Understanding entered into by the OHRT with the individual requesters, an agreement of this nature cannot take precedence over the *Act* in circumstances where the personal information at issue qualifies under the mandatory section 21 exemption claim. I was provided with a copy of a sample Memorandum of Understanding in the context of this appeal, and it is significant to note that it does not address the permitted uses of the personal information or regulate subsequent disclosures, establish retention periods, etc.

I would strongly urge OHRT to review its policy of providing personal information of tenants, and to take whatever steps are required to ensure that any such disclosures are in accordance with the *Act*.