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

ORDER PO-2420

Appeal PA-040323-1

Ontario Rental Housing Tribunal

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 Ontario Rental Housing Tribunal (ORHT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all documents, notes and correspondence relating to a case in which the requester was involved, and which also resulted in the requester complaining about the actions of two tribunal members. The requester specified that he was seeking access to records relating to two named tribunal members, as well as the Chair and Vice-Chair, and all documents and minutes related to Tribunal meetings from January 2004 to September 2004.

The ORHT responded to the request by granting partial access to the responsive records, and identifying that certain other records were not in its custody or control.

Furthermore, the ORHT granted partial access to the records relating to the requester's complaints about the actions of two tribunal members. Full access was given to a number of records including copies of the requester's complaints, copies of the letters sent by the Chair to the tribunal members relating to the complaints, and copies of the Chair's letters to the requester responding to the complaints after reviewing the matters. However, the ORHT denied access to the two letters written directly to the Chair by the tribunal members (one written by the tribunal member who heard the case initially, and the other written by the tribunal member who heard the review of the order) relating to complaints made by the requester about them. The ORHT denied access to these letters, in their entirety, based on the exemption found in section 21(1) (invasion of privacy) of the *Act*, in conjunction with the presumption in section 21(3)(d) (employment history of an individual).

With regard to the documents relating to tribunal meetings, the ORHT granted access to a number of records, and denied access to a portion of one of the records on the basis that it is exempt under section 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the decision.

During the mediation stage of this appeal, a number of issues were resolved. The sole issue remaining is whether the appellant is entitled to have access to the two letters written by tribunal members to the Chair. As this issue could not be resolved, the file was transferred to the inquiry stage of the process.

I sent a Notice of Inquiry to the ORHT, initially. Furthermore, I noted that since the two letters at issue may contain the personal information of the appellant, the exemption in section 49(b) may apply in the circumstances of this appeal. I invited the ORHT to address that issue, as well as the possible application of the exclusionary provision in section 65(6) of the *Act* to the records at issue.

In response to the Notice of Inquiry, the ORHT provided representations. I then sent the Notice of Inquiry, along with a copy of the ORHT's representations, to the appellant, who also provided representations in response.

RECORDS:

The records at issue are two letters sent by two ORHT members to the Chair of the ORHT.

DISCUSSION:

PRELIMINARY ISSUE

This appeal raises a preliminary jurisdictional issue concerning whether the exclusion in section 65(6) applies such that the requested records are excluded from the ambit of the *Act*. The parties provided representations on this issue, and the fundamental question this raises is whether an employer-employee relationship exists between the ORHT and the tribunal members. The ORHT argued that the records are excluded from the *Act* because the tribunal members, who are Order-in-Council (OIC) appointees, are considered employees for the purpose of section 65(6); the appellant took the position that they are not considered employees for the purpose of that section.

No previous orders directly address the issue of whether OIC appointees are considered employees for the purpose of section 65(6). A number of previous orders have found that section 65(6) does not apply outside the employment context (see, for example, Orders P-1545, P-1563 and P-1564). Other orders determined that, although an employer-employee relationship as defined by the common law did not strictly exist, the relationship at issue could be considered about "employment-related matters" for the purpose of section 65(6), depending on the wording of the relevant statute (See Order M-899, but see also Order MO-1249). Furthermore, the Ontario Court of Appeal commented on the wording of section 65(6) in *Ontario (Minister of Health and Long-Term Care v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123, Tor. Doc. C39677 (C.A.), reversing [2002] O.J. No. 4769, 166 O.A.C. 183, Tor. Doc. 784/99 (Div. Ct.), and overturned Order PO-1721 which dealt with the issue of whether physicians were employees of the Ministry of Health for the purpose of section 65(6) of the *Act*.

The issue of whether or not section 65(6) of the *Act* applies is a complex one, and would require further representations from the parties on the nature of the relationship between the ORHT and its members, the possible indicia of employment that may exist, the nature of the records at issue and whether the contents of the records impact upon "employment-related matters", as well as the impact of the earlier orders of this office and the decisions of the Divisional Court and the Ontario Court of Appeal referred to above. However, in the circumstances of this appeal, and in light of the finding set out below that the records are in any event exempt under section 49(b) of the *Act*, it is not necessary to decide whether section 65(6) applies, and I decline to do so.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined 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, PO-2225]. However, 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].

The ORHT takes the position that the records contain the personal information of the members who wrote those letters. The ORHT states:

> … while a member is acting in a professional capacity when they are making decisions on applications before the Tribunal, when they are responding to allegations of misconduct, the information contained in the response is "about" the member as an individual, and reveals something of a personal nature about the individual. The appellant's complaints of misconduct included allegations of a personal nature, and the members' responses to those allegations should likewise be determined to be "about" them as individuals.

The appellant disputes the ORHT's position. He states that the records do not contain the "personal information" of the members, and states:

> The complaint regarding the behavior and conduct of the members was limited to their performance as members of the ORHT, and did not comment on them as individuals.

Elsewhere in his representations, however, the appellant refers to the records in this appeal as resulting from the investigation of "misconduct" by the members.

The appellant also refers to Orders P-1117 and M-1053 in support of his position. I have reviewed those orders, and find that they do not support the appellant's arguments that the records do not contain the personal information of the members. In Order P-1117, the records at issue concerned complaints about the actions of four identified coroners. Senior Adjudicator John Higgins stated:

> With regard to the four coroners, in my view, the fact that these records pertain to a complaint against them removes the information about them in the records from the usual "professional" context and I find that such information constitutes their personal information.

Similarly, in Order M-1053, the request was for access to dockets listing police officers charged under the *Police Services Act*. Former Assistant Commissioner Mitchinson determined that these records constituted the personal information of the police officers who were charged as they pertained to allegations of wrongdoing on their part.

In my view, both of these orders support the view that records relating to complaints about individuals removes them from the realm of their "professional" capacity and constitutes their personal information.

I have reviewed the records at issue, and find that they relate directly to complaints about the two tribunal members. Accordingly, I am satisfied that these records contain the personal information of those members. In addition, the records refer to the appellant by name, and

identify the complaints the appellant made. Therefore, I am also satisfied that the records contain the personal information of the appellant within the meaning of that term in section 2(1).

INVASION OF PRIVACY

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from disclosure that limit this general right.

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the ORHT to exercise its discretion in this regard by balancing the appellants' right of access to their own personal information against other individuals' right to the protection of their privacy.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The ORHT relies on section 49(b), taken in conjunction with section 21(1), to support its denial of access to the records. More specifically, the ORHT relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(d) and the factors favouring privacy protection at sections 21(2)(f) and (h). The appellant disputes the ORHT's position that those sections apply, and takes the position that the factor weighing in favour of disclosure of the information at section 21(2)(a) applies. These sections read:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> 21 (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;

Section 21(3)(d): presumed unjustified invasion – employment history

With respect to the section 21(3)(d) presumption, the ORHT submits:

> ... 21(3)(d) applies to the documents in question, as the documents relate to the employment history of the two Tribunal members. … the documents were submitted as a part of the former Chair's investigation into the appellant's allegations of misconduct on the part of the two members.

The appellant again relies on Orders P-1117 and M-1053, this time in support of the position that the records do not contain information which can be considered the "employment history" of the members. He notes the reference in P-1117 by Senior Adjudicator Higgins that "investigations of alleged improper work-related behaviour are not part of the employment history because they fall outside the normal scope of employment duties".

I agree with the position taken by the appellant. The records in this appeal relate to allegations of improper conduct on the part of the members and I find that, following the decisions in Orders P-1117 and M-1053, this information does not constitute the "employment history" of the members in section 21(3)(d) of the *Act* because it falls "outside the normal scope of employment duties" of the members.

Section 21(2): factors weighing in favour of or against disclosure

Introduction

In order to determine whether disclosure would constitute an unjustified invasion of privacy, I must consider whether any of the factors under section 21(2) apply.

The ORHT argues that two section 21(2) factors (paragraphs (f) and (h)) weighing against disclosure apply; while none of the section 21(2) factors favouring disclosure are relevant. The appellant takes the position that sections 21(2)(f) and (h) do not apply, but that the factor in section 21(2)(a) weighing in favour of disclosure is a relevant consideration.

Section 21(2)(a): public scrutiny

The appellant takes the position that this factor applies in favour of disclosure, as the disclosure of the information "is desirable to scrutinize the internal complaint mechanism of the ORHT". He states that the disclosure would allow for transparency regarding the complaint process, and also refers to the public trust and impartiality which are important to the ORHT and that, in the course of his dealings with the ORHT, this trust had been violated. He also states that he has been involved with other entities, including media and government agencies, regarding this situation, although he does not specifically identify which entities he has contacted.

The ORHT takes the position that the appellant is asking for these documents for his own purposes only. The ORHT also states that there has been no public demand to scrutinize this aspect of the ORHT's processes, that it is the first such request it has received, and that the factor in section 21(2)(a) is not relevant in this case.

In order for section 21(2)(a) to apply, it must be established that disclosure of the personal information found in these records is desirable for the purpose of subjecting the activities of the institution to public scrutiny (see Order P-828). Although the appellant is clearly interested in access to the records, and refers generally to other entities, I have not been provided with sufficient evidence to support the view that this factor is relevant in the circumstances. The appellant clearly has a personal interest in obtaining the records, but I do not find that the disclosure of the personal information found in these records is desirable for the purpose of subjecting the activities of the ORHT to *public* scrutiny.

In my view, section 21(2)(a) is not a relevant factor favouring disclosure in these circumstances.

Section 21(2)(f): highly sensitive

The ORHT takes the position that allegations of misconduct are by nature distressing to the individuals against whom the allegations are made. As a result, the ORHT submits that the responses to these allegations, made in confidence to the Chair reviewing the allegations, constitutes "highly sensitive" information of the members. The ORHT also refers to the nature

of the allegations made by the appellant in support of its position that the information is highly sensitive.

The appellant argues that, because the complaints made about the members reflected the appellant's own personal account of the conduct of the members, and merely reflect his observations, any responses to those "observations" made by the members would simply reflect their "observations" and would not be highly sensitive. The appellant also takes the position that the ORHT has failed to establish sufficient evidence to support its position that the release of the information would cause "excessive personal distress" to the members.

The appellant is correct in identifying that, in order for personal information to be considered highly sensitive, it must be found that its disclosure could reasonably be expected to cause excessive personal distress to the subject individuals (see Orders M-1053, P-1681 and PO-1736). However, in the circumstances of this appeal, and based on the information contained in the records, I am satisfied that section 21(2)(f) is a relevant factor favouring non-disclosure. Previous orders have determined that disclosure of information relating to allegations of professional misconduct would cause excessive personal stress to the individuals involved, and that this information is properly characterized as highly sensitive (see Orders MO-1053, P-1117, P-1727). In this appeal, the appellant is already aware of the allegations made against the individuals, as they were made by him. However, I am satisfied that the information contained in the records which responds to those allegations can be considered to be "highly sensitive" information of the members.

Accordingly, section 21(2)(f) is a relevant factor favouring non-disclosure.

Section 21(2)(h): supplied by the individual in confidence

The ORHT takes the position that members can expect that communications made by them to the Chair regarding allegations of misconduct will not be disclosed, and will be kept confidential. The appellant disputes this position by stating that, in the correspondence from the Chair to the members, no assurances of confidentiality were given. The appellant states that, therefore, the members could not have assumed confidentiality.

I have not been provided with specific evidence that assurances of confidentiality were given to the members who responded to the Chair's request for information; however, in the circumstances, I am satisfied that the members did provide the information to the Chair with an expectation of confidentiality. I make this finding based on the very nature of the personal information contained in the records, and the circumstances surrounding the creation of these records: that these records were created in response to a request by the Chair to respond to allegations of professional misconduct made against the members.

Analysis of factors

With respect to the application of the factors in section 21(2), I have not found that any listed section 21(2) factors which favour disclosure of the information apply, and that two of the listed

factors (that the information is highly sensitive and that it was supplied in confidence) favouring non-disclosure apply. Accordingly, in the circumstances of this appeal, I am satisfied that the disclosure of the information would constitute an unjustified invasion of privacy.

The ORHT's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the discretionary exemptions found in the *Act*. Because section 49(b) is a discretionary exemption, I must also review the ORHT's exercise of discretion in deciding to deny access to the record.

The ORHT's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. It indicates that it exercised its discretion to disclose a number of the responsive records, but not the two records at issue, in the interests of protecting the privacy of the two members who authored the two records. It also identified that it considered the overall principles of the *Act* and, in particular, its privacy protection purpose in deciding to exercise its discretion not to disclose the records to the appellant. These reasons were shared with the appellant.

The appellant takes the position that the ORHT improperly exercised its discretion not to disclose two letters to him. He states that, because the ORHT's initial reliance on certain sections of the *Act* as the basis for denying access has changed, the ORHT erred when taking these other factors into consideration, and that the ORHT's claim is made in bad faith.

I have carefully reviewed the ORHT's representations respecting the exercise of its discretion. The ORHT states that, when it originally made the decision to deny access to the records, it did take into account the relevant factors in making that decision, and that those factors were referred to in the decision letter and reflected in the decision to disclose some records to the appellant and deny access to others. Based on the ORHT's representations and the circumstances of this appeal, particularly its decision to disclose certain records and not the two at issue, I am satisfied that the ORHT properly exercised its discretion in refusing to disclose the remaining records under section 49(b).

ORDER:

I uphold the ORHT's decision to deny access to the records.

Original Signed By: October 12, 2005
Frank DeVries
Adjudicator