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

ORDER PO-2511

Appeal PA-060035-1

Ontario Rental Housing Tribunal

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BACKGROUND:

In Order PO-2109, former Assistant Commissioner Tom Mitchinson reviewed a decision issued by the Ontario Rental Housing Tribunal (the Tribunal) in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the production of a weekly list consisting of "... all names, addresses, hearing dates and the location of the hearing of tenants whose landlords, in the future, file an application to evict with the Tribunal."

During the course of that appeal, it was brought to his attention that the Tribunal had a practice of disclosing "custom reports" to commercial clients outside of the *Act*. The reports were frequently disclosed under terms outlined in Memoranda of Understanding between the Tribunal and the individual requesters but were also disclosed in response to individual requests for select information contained in various application files. These reports were provided to a number of requesters on a regular basis.

The reports reviewed by former Assistant Commissioner Mitchinson during the course of the appeal appeared to contain the personal information of individuals (names, addresses, dates and locations of eviction proceedings) other than the requesters. After conducting an inquiry, the former Assistant Commissioner found that the information at issue qualified as "personal information" as that term is defined in section 2(1) of the *Act*, and that none of the exceptions to the mandatory section 21 exemption dealing with this type of information were present. Accordingly, the Tribunal was ordered to withhold access and as a postscript to Order PO-2109, the former Assistant Commissioner stated:

> Although disclosures of this nature have apparently been governed by the terms of a Memorandum of Understanding entered into by the [Tribunal] 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 [the Tribunal] 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*.

In response to Order PO-2109, the Tribunal rescinded its outstanding Memoranda of Understanding for "custom reports" and denied subsequent requests under the *Act* for personal information contained in Tribunal application files and Orders.

NATURE OF THE APPEAL:

The Tribunal received a request under the *Act* for "a copy of the Order rendered by the Ontario Rental Housing Tribunal in [specified file number]."

The Tribunal granted partial access to the requested Order and also provided the requester with a severed copy of the notice of termination included in the specified file. The Tribunal withheld the tenant's name, unit number and references to the amounts of rent charges paid and owed, on the basis that the withheld information is exempt under the mandatory exemption found at section 21(1) of the *Act* (personal privacy). The Tribunal disclosed the remainder of the information in the records, including the street address of the property (without the unit number).

The Tribunal's decision letter explains its decision as follows:

> The [Office of the Information and Privacy Commissioner (the Commissioner)] has previously found (for example, in PO-2109, PO-2265, etc) that information related to Tribunal proceedings, such as tenant names and unit numbers is not collected and maintained **specifically** for the purpose of making the information publicly available. As such, the exception in clause 21(1)(c) does not apply.
>
> …
>
> The [Commissioner] has also previously found that disclosure of personal information from Tribunal files related to tenants **would** constitute an unjustified invasion of personal privacy. In Order PO-2372, the Tribunal was required to disclose information from the Tribunal subject to the appeal with personal information about tenants severed. The documents which the Tribunal was required to sever included copies of Tribunal orders. The severed information included tenant names, unit numbers and financial information. Therefore, the exception in clause 21(1)(f) does not permit the disclosure of the information that was severed in order TSL-76867 or in the notice of termination included in file TSL-76867.
>
> [Emphasis in Original]

The requester (now the appellant), by his counsel, appealed the Tribunal's decision to this office. The appellant's appeal letter states:

> … I believe that there is a compelling public interest in the disclosure of the full Order relating to [specified file] in that the case determined that even though a last [month's] rent deposit was claimed in an N4 Notice of Termination, the Tribunal nonetheless agreed that the N4 was not void.
>
> This is an important decision with respect to the precedent values of such case law in that in many cases Tribunal Members will dismiss an Application on the basis that a Landlord puts anything other than arrears of rent in a Form N4.

> Based on this precedent, and based on the fact that other Orders can be and are generally persuasive on other Members, although not binding same should be released on the basis of a compelling public interest of the disclosure of the full Order.

The appellant's letter of appeal argues that, if the exemption at section 21(1) applies, there is a public interest in disclosure of Tribunal orders. This raises the issue of whether the "public interest override" at section 23 of the *Act* applies.

Typically, the first stage of an appeal in this office is mediation. However, I decided that this appeal should proceed directly to the adjudication stage because it appeared that the issues at dispute in this appeal are similar to the issues raised by appellant in Appeal PA-040126-1 which was already before me. Order PO-2510, disposing of Appeal PA-040126-1, is being issued concurrently with this order.

I sought representations from the Tribunal and affected person, initially. The affected person provided brief representations indicating that personal information relating to her should remain confidential. The Tribunal's representations were shared with the appellant, who had an opportunity to make representations, which he did. In his representations, the appellant asked that I also consider his representations in Appeal PA-040126-1, which I have done.

RECORDS:

The records at issue are the undisclosed portions of an Order by the Tribunal dated November 7, 2005, and a Notice to Terminate Early for Nonpayment of Rent (Form N4), dated October 7, 2005.

DISCUSSION:

PERSONAL INFORMATION

Introduction

The Tribunal submits that the information severed from the records disclosed to the appellant include the tenant's name, unit number and references to the amounts of rent charges, paid and owed. 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,

> (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,
>
> (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;

To qualify as personal information, the information must be about the individual in a personal capacity. It must also be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.)].

The Tribunal's representations state:

> Obviously, the individual can be identified by their name. The information the Tribunal withheld also included the affected party's unit number. Even if the Tribunal were to withhold the affected party's name, it is conceivable that this individual could be identified by the unit number. This is consistent with the decision made in PO-2265.
>
> If the Tribunal were to withhold both the name and the unit number, but disclosed the financial (rent) information it is not likely that the affected party could be identified. On the other hand, Order PO-2372 required the Tribunal to sever financial information along with the tenants names and unit numbers. If the decisions on this appeal is that Tribunal orders can be release with personal information severed, it would be helpful to know whether it is acceptable in the future to disclose the financial information related to the tenants as long as names and units are severed.

The appellant did not submit representations as to whether the withheld portions of the responsive records contain personal information related to an identifiable individual.

Analysis and Findings

In Order PO-2265, the former Assistant Commissioner Tom Mitchinson made the following finding with respect to whether an individual could be identified by the disclosure of the unit number related to their address:

> 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.
>
> That being said, if unit numbers are removed, I find that the street address, city and postal code on their own do not provide sufficient information to reasonably identify a specific resident of a unit within a residential rental accommodation. The vast majority of rental units in the province are contained in multi-unit buildings and, in the absence of any other associated field of information that would itself constitute a tenant's "personal information", disclosing address-related information with the unit number removed would render identifiable information non-identifiable, thereby removing it from the scope of the definition of "personal information". Accordingly, the address-related information, with unit numbers severed, should be provided to the appellant.

In Order PO-2265, the former Assistant Commissioner concluded that the only information requested by the appellant that fell within the scope of the definition of "personal information" in section 2(1) was the tenant name and the unit number component of the address listed on the records. As noted, the street address of the property (without the unit number) has already been disclosed. I agree with and adopt the approach taken in Order PO-2265, and I find that the withheld information relating to the tenant's name and unit number qualifies as "personal information" as defined in paragraphs (d) and (h) of the definition.

The remaining information at issue is the withheld financial information contained in the records. This issue has been previously considered in Order PO-2372, where the requester, a former tenant, sought access to seven application files, each one relating to a separate application involving the landlord and other tenants. Adjudicator Stephanie Haly reviewed the application files and found that information relating to the rent paid and owed, and other expenses that the tenant may have incurred in relating to rental property, qualified as personal information under paragraph (b) of the definition of "personal information" in section 2(1). Adjudicator Haly ultimately upheld the Tribunal's decision to withhold financial information

relating to tenants along with the name and address of the tenant. A significant issue, identified by the Tribunal, is whether the financial information is about an "identifiable individual" if the tenant's name and unit number are removed.

In some instances, the street address of a property may be sufficient to identify an individual tenant where for example, there are no units in the building, or where other factors may serve to identify which unit is involved. In this case, the Tribunal has already disclosed the street address of the building but severed the unit number, consistent with earlier orders. While it would be prudent to err on the side of caution in undertaking this analysis, I agree with the Tribunal that in the circumstances of this case, it is unlikely that the financial information relates to an identifiable individual if the tenant's name and unit number are withheld (see Order PO-1880, cited above). On the other hand, if the name and/or unit number are disclosed, the financial information *would* be about an identifiable individual, and in that circumstance, would qualify as personal information.

Given my conclusion, below, that the tenant's name and unit number are exempt under section 21(1), I find that the financial information in the records is not about an identifiable individual under these circumstances and it is therefore not the tenant's personal information. Because only personal information can be exempt under section 21(1), and no other exemption has been claimed, I will order disclosure of the financial information in the records.

To conclude, I find that the tenant's name and the unit number constitute the personal information of the affected person in the circumstances of this appeal.

PERSONAL PRIVACY

Section 21(1) of the *Act* prohibits the Tribunal from releasing "personal information" unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The appellant submits that disclosure of the withheld information would not be an unjustified invasion of personal privacy under section 21(1)(f).

The appellant does not argue that any of the other exceptions in section 21(1) apply, and I find that none of them does. The question, therefore, is whether the exception at section 21(1)(f) applies. In order for this exception to apply, it must be established that disclosure would *not* constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 21(2), (3) and (4) help in making this determination. Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some criteria for the Tribunal to consider in making this determination; and section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

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). A section 21(3) presumption can be overcome, however, if the personal information at issue is subject to 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 (Div. Ct.)].

The Tribunal takes the position that none of the provisions of section 21(4) apply to the information at issue and disclosure of the withheld information would constitute a presumed unjustified invasion of privacy under section 21(3)(f) of the *Act*. The Tribunal also refers to the factors listed at sections 21(2)(a), 21(2)(d), 21(2)(e), 21(2)(f), and 21(2)(i). Section 21(2) and 21(3), read, in part:

> (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;
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> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
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> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
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> (f) the personal information is highly sensitive;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

With respect to the possible application of the presumption at section 21(3)(f) of the *Act*, the Tribunal refers to Order PO-2372 and submits that information about the amount of rent paid and owed by tenants is presumed to constitute an unjustified invasion of privacy. The

appellant's representations question the likelihood of the type of information identified in section 21(3) being contained in Tribunal orders.

In my view, however, the information I have found to be personal information in the records (*i.e.*, the tenant's name and unit number) do not disclose this information and the presumption in section 21(3)(f) does not apply. I also find that none of the other presumptions in section 21(3) apply to the tenant's name and unit number.

As regards section 21(2), the Tribunal submits as follows:

- section 21(2)(a), regarding public scrutiny, might apply in relation to making Tribunal orders available in a general sense, but does not apply to withheld information in this case;

- section 21(2)(d), relating to a fair determination of a requester's rights, may similarly apply to Tribunal orders generally, but not to the withheld information in this case.

The appellant submits that both of these provisions apply, and notes the importance of consistency in Tribunal decisions. Former Assistant Commissioner Tom Mitchinson considered the possible application of these two factors to tenant names and unit numbers in Order PO-2265.

With respect to section 21(2)(a), he stated:

> I accept that one reason proceedings before administrative tribunals are generally open is to ensure that the public has an ability to witness the operation of the tribunal and to prevent what could be characterized as "secret law". In my view, including most administrative tribunals (including the Tribunal) under the scope of the [*Statutory Powers Procedure Act* (the *SPPA*)] is strong evidence of a public expectation that these bodies would operate in a transparent fashion. However, it does not necessarily follow that the names of tenants and the unit numbers of apartment buildings where they reside, which is the only information under consideration here, must be made available to an individual who is not a party to those proceeding in order to meet this expectation.
>
> The Tribunal is an "institution" covered by the *Act* and is bound by its provisions, including the mandatory section 21 privacy exemption. When a request has been made under the *Act* for access to Tribunal records, even records that relate directly to files that proceed to a public hearing, the request must be tested under the access provisions in the *Act* when considered outside the context of the Tribunal's proceedings. In the case of information that qualifies as "personal information" under the *Act*, there is a strong assumption against disclosure, although the balancing process under section 21(2) recognizes that, in certain circumstances, factors favouring disclosure will be sufficient to outweigh those favouring privacy

> protection. While the *SPPA* addresses public scrutiny considerations in the context of hearings, in my view, it does not necessarily follow that personal information must be accessible outside the context of these proceedings in order to ensure that the Tribunal is operating in an open and transparent manner.
>
> The accessibility of "personal information" is governed by the *Act*. I do not accept the appellant's position that providing access to the tenant names and unit numbers of apartments subject to various Tribunal applications is either necessary in order to meet public scrutiny concerns or effective in subjecting the Tribunal's activities to public scrutiny, as required by section 21(2)(a).
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> Accordingly, I find that section 21(2)(a) is not a relevant factor as it relates to the disclosure of tenant names and apartment unit numbers contained in the records.

I see no reason to reach a different conclusion here. I find that section 21(2)(a) is not established with respect to the tenant's name and unit number. Disclosure of this information would not add to public scrutiny of the Tribunal.

As noted, the former Assistant Commissioner also considered whether section 21(2)(d) applied with respect to tenant names and unit numbers in Order PO-2265. In that regard, he stated:

> As the wording of section 21(2)(d) makes clear, this factor only comes into play when the personal information "is relevant to a fair determination of rights affecting *the person who made the request*". That is not the situation here. Although the appellant represents tenants on applications before the Tribunal, its request under the *Act* was not made in the capacity of an agent or counsel for any identified client. The appellant is not involved in any dispute in which its rights are at issue, and any role the appellant may play in representing other unidentified individuals in exercising rights is simply not relevant in the context of section 21(2)(d), which speaks to the rights of requesters or their agents or counsel.
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> Accordingly, I find that section 21(2)(d) is not a relevant factor as it relates to the disclosure of tenant names and apartment unit numbers contained in the records.

As with section 21(2)(a), I see no reason to reach a different conclusion in this case, and find that section 21(2)(d) is not established.

I also find that no other section 21(2) factors favouring disclosure are established. As well, none of the provisions of section 21(4), which identify information whose disclosure is not an unjustified invasion of personal privacy, are applicable in the circumstances of this case. Therefore, the section 21(1)(f) exception to the exemption is not established. The tenant's name and unit number are therefore exempt under section 21(1).

Although that is sufficient to conclude the matter, I also find that the factor favouring non-disclosure in section 21(2)(f) applies, as argued by the Tribunal. In my view, information about evictions is, by its very nature, highly sensitive. In this case, the application involved arrears of rent, and it is reasonable to expect that disclosure of the tenant's involvement would cause embarrassment and significant personal distress. On this basis, I am satisfied that disclosure of the tenant's name and unit number *would* constitute an unjustified invasion of privacy, providing a further reason for concluding that the exception at section 21(1)(f) is not established.

PUBLIC INTEREST OVERRIDE

As stated above, the appellant has raised the application of the section 23 "public interest override" as a basis for requiring full disclosure of orders of the Tribunal, including information found to be exempt under section 21(1). I note that the appellant's arguments in this regard pertain to orders of the Tribunal, and not the notice of termination. However, in my view, the conclusions reached below are equally applicable to that record.

The Tribunal addressed the public interest issue in its initial representations, to which the appellant responded in his representations. The majority of the appellant's submissions on this subject are contained in his representations on Appeal PA-040126-1, which he expressly incorporates by reference in the representations he has provided in relation to this appeal. A further incorporation by reference is found in the appellant's representations on Appeal PA-040126-1, in which he expressly adopts the arguments in his appeal letter regarding that matter. I have considered all of these representations in my analysis and decision concerning this issue.

Section 23 of the *Act* states:

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

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, I made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In order for me to find a compelling public interest in the disclosure of the records, the information contained in the records, if they exist, must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

In his representations on Appeal PA-040126-1, the appellant states:

> In addition to determining general issues and appeals, the [Commissioner] may also give general policy advice. In this case, we submit that the [Commissioner] ought to review the effect of its previous decisions relating to requests made of the Tribunal and further refine its position to allow greater disclosure of information based on the compelling public interest in the disclosure of Orders clearly outweighing the purpose of the exemption which could be the disclosure of personal information.

I note that the appellant's arguments on the public interest in this appeal address the public interest in disclosure of the Tribunal's orders in general, rather than the particular order requested in this appeal. While the *Act* authorizes the Commissioner to comment on the privacy implications of proposed legislative schemes or government programs and to conduct public education (in this regard, sections 59(a) and (e)), it does not authorize rule-making or the creation of general guidelines in connection with the disclosure of personal information in the manner suggested by the appellant. The Commissioner must therefore adjudicate the records and issues in each appeal, based on the applicable facts, and I am only able to deal with the records before me, and the facts as they present themselves in this particular case.

The appellant submits that there is a compelling public interest in disclosure of orders of the Tribunal that clearly outweighs the purpose of the personal privacy exemption, especially in respect of decisions that may be used as precedents. The appellant also submits that the Tribunal, like its predecessor the Ontario Superior Court of Justice, relies on precedents in making decisions regarding landlord tenant matters. In support of his position, the appellant

provided this office with copies of orders of the Tribunal in which the decision-maker referred to other orders. The appellant's representations state:

> At the current time, the law is only available to the select few. The law and decisions of the Tribunal at the current time are generally protected and not subject to public scrutiny or informing the citizenry about the activities of the Tribunal in making aware to the public decisions of the Tribunal so that the public would be able to express themselves within the context of supporting or not supporting particular candidates for public office, in deciding whether or not to organize, to express political opinion in a group or otherwise.
>
> The failure of the Tribunal to generally disclose Orders of the Tribunal puts the Tribunal in the position of having its Orders generally secret, not subject to public scrutiny and preventing individual citizens to determine a course of action based on what would otherwise, and should be, the public disclosure of the law of Landlord and Tenant. This is perhaps the highest compelling public interest and clearly outweighs the purpose of any exemption in the *Act*.

The appellant makes a similar argument in his appeal letter in Appeal PA-040126-1:

> To deny the public the ongoing case law of decisions and determinations made by the Tribunal which guide Landlords and Tenants in the Province of Ontario is clearly in breach of the public interest and is contrary to section 23 of the Act. It is suggested that Orders specifically should be exempted from any prohibitions and that Orders even if they contain personal information ought to be disclosed in the public interest.

In its initial representations in this appeal, the Tribunal makes the following submissions that pertain to the foregoing discussion:

> The issue of whether or not there is a compelling public interest in accessing Tribunal information that includes personal information related to tenants has been considered by Assistant Commissioner Mitchinson in PO-2265. In that case, the appellant sought access to tenant names and unit numbers contained in a hearing docket. The Assistant Commissioner made the following decision:
>
> > While I am prepared to accept that the issues raised by the appellant and others raise compelling matters of public interest, in my view, that is not sufficient to meet the requirements of the first part of section 23. There must be a compelling public interest *in disclosure of the information protected by the exemption claim*, which in this case is restricted to the names of tenants and the unit numbers contained on the various application forms. I am unable to conclude that there is.

> In this case the source for the tenant name and unit number (and, in addition, information related to rent) is a Tribunal order. The issue, therefore, is whether or not the decision about disclosing the information should be different because the source is different. Is the public interest in having access to intact copies of Tribunal orders more compelling than the public interest in having access to intact hearing dockets? The appellant, and many others in the legal community, would likely argue that the public interest is more compelling when the document in question is the Tribunal's final decision on an application that it adjudicated. However, the problem is that the outcome of disclosure is the same in either case – the public obtains access to personal information related to tenants.

As noted by the Tribunal, former Assistant Commissioner Mitchinson addressed the question of the public interest in disclosure of tenant's names and unit numbers in Order PO-2265, in which the requester was identified as the Tenant Duty Counsel Program. The public interest argument in that case related to "… ensuring that individuals have access to legal advice before appearing before the Tribunal …", which is similar to the public interest the appellant seeks to put forward in this appeal. In my view, the following more complete version of the findings of the former Assistant Commissioner Mitchinson should be considered:

> … what is important for me to state and for the appellant to recognize is that my capacity to address any such perceived inequities is restricted to the context of the *Act* and the powers and duties given to me by the legislative assembly in that regard. The appellant has made a request under the *Act* for access to information contained in records held by the Tribunal, and will be provided with the vast majority of this information as a result of my findings in this order. The only withheld information is the names of tenants and the unit number component of the address of residences housing tenants who are the subject of various Tribunal applications. Having found that this information qualifies under the mandatory section 21 privacy exemption, it is now my responsibility to determine whether there is a compelling public interest in disclosing *this specific information* in the context of this appeal.
>
> While I am prepared to accept that the issues raised by the appellant and others raise compelling matters of public interest, in my view, that is not sufficient to meet the requirements of the first part of section 23. There must be a compelling public interest *in disclosure of the information protected by the exemption claim*, which in this case is restricted to the names of tenants and the unit numbers contained on the various application forms. I am unable to conclude that there is. The *Tenant Protection Act* is the current law governing landlord-tenant relationships. It was passed by the legislature following public debate. The appellant may feel that the statutory provisions and the procedures enacted by the Tribunal to adjudicate disputes do not adequately balance the public interest considerations relating to landlord-tenant disputes. I make no finding and offer

> no opinion on this because, quite simply, I have no jurisdiction to do so. My only comment in that regard is that there are other channels available to the appellant and others to advance their positions and to effect change, but the *Act* is quite limited in that regard. My only role here is to determine whether there is a compelling public interest in disclosing the tenant names and unit numbers contained in the records, and I find that there is not.
>
> While the appellant's representations may demonstrate a "rousing strong interest or attention" in the landlord-tenant dispute resolution scheme under the *Tenant Protection Act*, the appellant has not convinced me that there is a "rousing strong interest or attention" in disclosing the tenant names and unit numbers of residential apartments housing tenants involved in various landlord-tenant disputes, as required in order to satisfy the requirements of the first part of the section 23 test.

In my view, these comments provide assistance in this appeal despite the fact that the former Assistant Commissioner was assessing whether there is a compelling public interest in the disclosure of tenant names and addresses that originated in a case roster, instead of a Tribunal order. As noted above, the public interest issue in Order PO-2265 also pertained to the provision of legal advice to parties involved in matters before the Tribunal. As well, the former Assistant Commissioner's comments about the restricted nature of his authority provide further support for my assessment of the appellant's submission about the provision of policy direction by this office.

In my view, it is significant that, in this appeal, the order requested by the appellant was disclosed in full at the request stage, subject only to the severance of the tenant's name and unit number, as well as certain financial information. I have found, above, that the financial information is not exempt under section 21(1), so the information to which the appellant seeks to apply the public interest override is the name and unit number of the tenant. The appellant's arguments concerning the public interest in disclosure of orders of the Tribunal is significantly undermined by the fact that the Tribunal has already disclosed the requested order with only minor severances. Like former Assistant Commissioner Mitchinson, I am not persuaded by the appellant's arguments, reproduced above, that public interest identified by the appellant requires the disclosure of the tenant's name and unit number. Rather, I have concluded that the interest identified in these arguments is met by the disclosure of the requested order that has already taken place, and the further disclosure mandated by this Order.

However, the appellant has put forward a number of other arguments to support his public interest argument. As I have already noted, the representations of the appellant direct me to his appeal letter in relation to Appeal PA-040126-1. Among other things, this letter refers to section 184(1) of the *Tenant Protection Act* (the *TPA*) which provides that the *Statutory Powers Procedure Act* (the *SPPA*) applies to all proceedings before the Tribunal, with limited exceptions. The appellant submits that the *SPPA* supports his position that the public interest override applies, and refers me to sections 9, 9(1.1), 19 and 20 of the *SPPA*, which state, in part:

Hearings to be public, exceptions

9(1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, in which case the tribunal may hold the hearing in the absence of the public.

Written hearings

(1.1) In a written hearing, members of the public are entitled to reasonable access to the documents submitted, unless the tribunal is of the opinion that clause (1) (a) or (b) applies.

Enforcement of orders

19(1) A certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such.

Record of proceeding

20 A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

(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 therefore, where reasons have been given.

With respect to the application of these sections of the *SPPA*, the appellant submits:

> Section 9 of the SPPA provides that an oral hearing shall be opened to the public, except in certain instances when the Tribunal may hold the hearing in the absence of the public.
>
> Section 9(1.1) of the SPPA provides that in a written hearing, members of the public are entitled to reasonable access to the documents submitted unless the public exclusion rules apply.
>
> Section 20 of the SPPA provides that a Tribunal shall compile a record of any proceeding in which a hearing has been held and shall include certain documents including a copy of the decision for the Tribunal and reasons if reasons have been given.
>
> It is clear from the scheme of the Act that public access to the information and documentation and specifically Orders is central to the SPPA. Specifically, Section 19 of the SPPA provides that a certified copy of a Tribunal decision or Order and a proceeding may be filed in the Superior Court of Justice by the Tribunal or by a party and on filing shall be deemed to be an Order of that Court and is enforceable as such, It is clear that any party could make an Order that otherwise would not be disclosable by a Tribunal to be a document readily accessible by members of the public.
>
> Accordingly, the SPPA clearly contemplates the disclosure of Orders to members of the public and clearly provided that in written hearings, there is express access to the file.

In its initial representations in this appeal, the Tribunal makes the following submissions on this point:

> Does it make a difference that an order is issued by an administrative tribunal under the *Statutory Powers Procedure Act*? That Act sets out that hearings shall be opened to the public. However, it does not set out that orders issued by an administrative tribunal shall be available to the public. The [Commissioner] has

> already set out that the requirement of the SPPA to hold hearings in public does not imply that personal information should be freely and broadly available to the public (PO-2109). Does this reasoning change when the request is for a copy of the order the Tribunal has issued with respect to a matter it adjudicated at a public hearing? I examined previous decisions about access to information under the Act, and I did not find that any suggested that reasoning would change.
>
> The Tribunal released the order the appellant requested, with the personal information related to the tenant severed. In doing so, we have attempted to satisfy the public interest in obtaining copies of our decisions while still protecting the privacy rights of tenants.

The discussion of the public nature of hearings of the Tribunal in Order PO-2265 provides helpful guidance, despite the fact that it was in the context of whether the section 21(1)(c) exception to the personal privacy exemption at section 21(1) of the *Act* for "personal information collected and maintained for the purpose of creating a record available to the general public" applied, rather than the public interest override:

> 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.

As noted by the Tribunal, similar views were expressed in Order PO-2109.

In my view, the fact that tenant names and unit numbers may have been available during a public hearing does not, in and of itself, mean that there is a public interest in their disclosure in an order issued by the Tribunal. It does not alter my conclusion, above, that the identified public interest has been met by the disclosure that has taken place, and the further disclosure mandated by this Order.

The appellant's representations also refer to sections 84 and 183(1) of the *TPA*, which state, in part:

> 84(1) Upon an application for an order evicting a tenant or subtenant, the Tribunal may, despite any other provision of this Act or the tenancy agreement,
>
> (a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or

(b) order that the enforcement of the order of eviction be postponed for a period of time.

183(1) The Tribunal may dismiss an application without holding a hearing or refuse to allow an application to be filed if, in the opinion of the Tribunal, the matter is frivolous or vexatious, has not been initiated in good faith or discloses no reasonable cause of action.

With respect to these sections of the *TPA*, the appellant submits:

> As the Tribunal has the right to dismiss an Application that is frivolous and vexatious, and as generally a party is entitled to show that a Tenant has commenced numerous Applications for frivolous or vexatious reasons against other parties, and as the TPA applies if there is a conflict with the provision of another *Act*, it is submitted that the scheme of the TPA would permit a party where an Application has been commenced against it to make an inquiry of the Tribunal and receive from the Tribunal copies of any and all Orders or copies of any and all Applications relating to a case where the Tenant has commenced an Application against a previous Landlord(s) in an effort and in order to exercise any rights that it might have under the TPA including the right to request that the Tribunal dismiss an Application on the basis that the matter is frivolous or vexatious or has not been initiated in good faith. It is relevant and material if a Tenant were involved in multiple proceedings against various Landlords for the same cause of action to determine that an Application was commenced by a Tenant in bad faith or that the matter is frivolous and vexatious having regard to the pattern of behavior, even though personal information could be disclosed in the answer to such a request. It is submitted that the compelling public interest in the disclosure if the record being the right of the Landlord to fully defend an Application brought [by] a Tenant clearly outweighs the purpose of the exemption. The scheme of the TPA clearly envisions that the TPA would take priority in relation to the *Act* in this regard.
>
> Further, as every Tenant has the right to request relief under Section 84 [of] TPA, a Landlord should have the right to request in every instance where it has commenced an Application to the Tribunal for arrears of rent against a Tenant a copy of any and all Order and/or any and all confirmation of determination of any Applications involving the Tenant on the basis that having regard to all the circumstances (the language of Section 84 of the TPA) that the failure by the tenant on an ongoing basis to pay rent to other Landlords is a relevant factor as to whether or not, or to what extent, the Tribunal might wish to exercise relief under Section 84.

As discussed previously, the issue before me is whether there is a public interest in disclosure of otherwise exempt information, namely the tenant's name and unit number, on the facts of

this case. The appellant does not argue that there is any issue relating to a frivolous or vexatious application or to section 84 of the *TPA* in the circumstances of this appeal. Therefore, in my view, this argument does not support a finding that there is a compelling public interest in disclosure. In addition, I am of the view that the appellant's position in this regard advances a purely private interest as it is the individual landlord, not the public, who would benefit from such disclosures.

In his appeal letter in Appeal PA-040126-1, the appellant also makes arguments that arise from the fact that, under section 157(2) of the *TPA*, the Tribunal is given "exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred upon it." The appellant argues, on this basis, that the Tribunal is a "tribunal of record" and renders decisions in writing. The appellant continues by referring to *Reference re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554 (S.C.C.) (the "1981 Reference"), arguing that the Tribunal exercises powers analogous to those of superior courts whose justices are appointed pursuant to section 96 of the *Constitution Act, 1867*. Although the appellant couches this argument in terms of the public interest override, it is, in my view, an attempt to argue that, to the extent that the *Act* restricts the disclosure of personal information in orders of the Tribunal, it is constitutionally inoperative. In my view, this argument could not succeed without a Notice of Constitutional Question as required under section 109 of the *Courts of Justice Act*. No such notice has been served in this case.

Even if such a notice had been served, I would not find that this argument has merit. To begin with, I note that the decision referred to by the appellant was not in relation to the Tribunal, but to the former Residential Tenancy Commission established under the *Residential Tenancies Act, 1979*. It is clear from the subsequent decision in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 that, when viewed from a broader perspective than the limited powers considered in the 1981 reference, and having regard to the broader subject matter of the legislation, it is permissible for a provincial legislature to enact a comprehensive scheme in relation to landlord and tenant disputes. In my view, this is what the Ontario legislature has done in the *TPA*, which creates the Tribunal and has not been struck down as unconstitutional. As analysed previously in this order, the provisions of the *TPA* pointed to by the appellant do not support his argument that there is a public interest in disclosing tenant names and unit numbers when orders of the Tribunal are made public, nor is there any basis for finding a constitutional requirement that this be done, given that the statute does not require it, and since it has not been struck down, it enjoys the presumption of constitutionality. For these reasons, I would not find that the provisions of the *Act* prohibiting the disclosure of the tenant's name and unit number are constitutionally inoperative.

To conclude, I find that the appellant has failed to establish a public interest in the disclosure of the tenant name and address in the order that is at issue in this case. It is therefore not necessary for me to determine whether any such public interest is "compelling", or whether it outweighs the purpose of the section 21(1) exemption.

ORDER:

1. I order the Tribunal to disclose to the appellant those portions of the record containing financial information by **November 14, 2006** but not before **November 9, 2006**

2. I uphold the decision of the Tribunal not to disclose the other withheld portions of the record.

POSTSCRIPT:

The issue of disclosure of personal information in tribunal decisions generally is addressed in *Freedom of Information, Privacy and Adjudicative Agencies in Ontario: Unresolved Issues and Emerging Concerns* (2006) 31 The Advocates' Quarterly 125 (Volume 31, Number 2), by Chris Berzins:

> The issue that may pose the greatest challenge for administrative agencies is the inclusion of personal information in adjudicative decisions. Several questions arise in this regard. The first is whether adjudicative decisions that will be made public, regardless of format, should contain personal information about identifiable individuals. Closely related to this is whether decisions concerning personal information should be made publicly available in electronic format. Although the courts are very much involved in the second matter, administrative agencies and even privacy commissioners have generally speaking, paid little attention to either question.
>
> With respect to the first issue, the roots of the problem go back to the Williams Commission [*Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (Toronto: Queen's Printer, 1980]. The commission did touch on the matter, recommending that sensitive information be severed from adjudicative decisions "where practicable", but no guidance was provided with respect to what might constitute sensitive information, and there was no discussion of the circumstances that might make severing impractical. This was unfortunate given that the commission was strongly recommending that agencies make their adjudicative decisions publicly available. If agencies were expected to break with past practice, more direction was needed.
>
> It was also unfortunate that the Williams Commission did not discuss those instances in which personal information was already being included in adjudicative decisions. Clearly there were agencies that had an established practice of making adjudicative decisions containing personal information publicly available, but nothing was said about whether practices should change in this regard. Given the lack of guidance on the sensitivity question and the

> commissioner's "where practicable" caveat with respect to severing, there was probably little incentive for these agencies to change course.
>
> The issue of whether to make decisions containing personal information available electronically has largely overtaken the first questions, which is problematic given that there has not been adequate consideration of the extent to which adjudicative decisions ought to include personal information regardless of the format in which they are made publicly available. The potential concerns about the inclusion of personal information in adjudicative decisions in the pre-Internet era were reduced to a significant extent of not be "practical obscurity" at least by the fact that some degree of effort was needed to extract sensitive information from those decisions. That has all changed. It is now possible by doing a simple name search on the Internet to pull up adjudicative decisions that refer not just to the principal parties but also to witnesses. And needless to say, some of this information is particularly sensitive.
>
> As noted already, the courts are clearly recognizing the need to deal with the extent to which court records will be publicly available in electronic format. This includes a consideration of how decisions could be placed on websites while ensuring that legitimate privacy concerns are protected. But there is relatively little indication that this same discussion is occurring within the community of administrative agencies.

Taking into consideration Mr. Berzin's comments, I urge the Tribunal to consider adopting the practice of many administrative tribunals, including this office, of drafting its Orders in a manner which removes personal information and identifiers to better facilitate the public's access to its body of case law.

Original signed by: October 6, 2006
John Higgins
Senior Adjudicator