Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4475

Appeal PA20-00716

Landlord and Tenant Board

January 12, 2024

**Summary:** A requester made a request under *FIPPA* to the Landlord Tenant Board (the tribunal) seeking adjudicative records (spreadsheets containing certain fields of information from tribunal hearings conducted during a certain timeframe). The Ontario Superior Court held that a tribunal may effectively by-pass *FIPPA* under certain conditions, but the adjudicator in this appeal finds that the tribunal did not do so. She also finds that *FIPPA* applies to the request for these adjudicative records and that the *Dagenais/Muntuck* test is relevant, and that the records qualify as "records" under *FIPPA*. As a result, she orders the tribunal to produce the responsive records and, for a specified period of time, on an ongoing basis.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(iii), 2 (definition of "personal information" and definition of "record"), 21(1), 21(2), 21(3), 24, 52(1), and 65(16); section 2 of Regulation 460; *Canadian Charter of Rights and Freedoms*, section 2(b); *Tribunal Adjudicative Records Act, 2019*, SO 2019, c 7, Sch 60, as amended, section 2.

**Orders Considered:** P-50, PO-4088, MO-2129, MO-3981, and MO-4110.

**Cases Considered:** *Toronto Star v. AG Ontario*, 2018 ONSC 2586 (CanLII); *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76 (CanLII); *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII).

## OVERVIEW:

[1] By way of background, the process for receiving access to adjudicative records has changed in recent years, to comply with the constitutional open court principle. In a court challenge that I will refer to as "the Toronto Star decision,"[1] the Ontario Superior Court ruled that the mandatory personal privacy exemption in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) cannot be used to withhold personal information in adjudicative records of public proceedings because doing so would violate the open court principle. The court also stated that *FIPPA* may be effectively by-passed altogether in some circumstances.

[2] This order resolves an appeal that came to the Information and Privacy Commissioner of Ontario (IPC) after the Landlord Tenant Board (the tribunal) refused access to adjudicative records requested under *FIPPA*.

[3] The request in this appeal was made to the tribunal[2] on June 4, 2019. The request was for tribunal case information records from June 1, 2012 to June 14, 2019; it also includes a request for ongoing daily access after that. In an appendix to the request, the appellant set out the specific data being requested and the format, which is a spreadsheet setting out the case number and certain related data. The data fields requested include the filing date, case type, first name, last name, address, postal code, telephone number, party type (i.e., landlord or tenant), rent charged, payment of arrears, and various fields relating to the termination of the rental (e.g., tenant gave notice, eviction).

[4] This appeal arises out of the tribunal's (eventual) letter to the appellant, refusing to disclose the requested reports.

[5] The appellant appealed the tribunal's decision to the IPC, seeking a determination regarding the tribunal's position that:

- *FIPPA* does not apply to adjudicative records of tribunal proceedings that started before July 1, 2019, the date that a new law started to apply (the *Tribunal adjudicative Records Act, 2019*[3] (*TARA*)), and
- the requested information is otherwise protected from disclosure under *FIPPA*.

[6] On appeal to the IPC, the IPC appointed a mediator to explore resolution. The appellant narrowed the scope of the appeal, having removed reports covering July 1, 2019, and after. However, no further mediation was possible, so the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[7] The adjudicator previously assigned to this appeal began a written inquiry under

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[1] *Toronto Star v. AG Ontario*, 2018 ONSC 2586 (CanLII).
[2] Through Tribunals Ontario.
[3] S.O. 2019, c. 78, Sched. 60.

*FIPPA*, by sending the tribunal a Notice of Inquiry, setting out the facts and issues on appeal. In doing so, she also set out her preliminary views on the issues, based on the information on file and in light of the Toronto Star decision.

[8] The adjudicator previously assigned to this appeal asked the tribunal for written representations in response, and the tribunal provided representations. Those representations were later shared with the appellant, along with a Notice of Inquiry. The adjudicator advised the appellant to carefully review the tribunal's representations and respond to them, as they may change her preliminary views on one or more of the issues. The appellant provided a response, and the tribunal provided a brief reply to the appellant's representations. Representations were shared in accordance with the IPC's *Code of Procedure*.[4]

[9] The file was later transferred to me. On my review of the file, I determined that I did not need to seek further representations.

[10] For the reasons that follow, I do not uphold the tribunal's decision, and I order it to create the remaining responsive records, subject to the *Dagenais/Mentuck* test. In this order, I explain why I find that:

- the tribunal did not effectively by-pass *FIPPA* (considering the Toronto Star decision),
- *FIPPA* applies to the requested records, and
- The tribunal must create the responsive records remaining at issue and release them to the requester (now the appellant), under certain conditions.

## RECORDS:

[11] The records at issue in this appeal are tribunal case information records from June 1, 2012 up to June 30, 2019.

## ISSUES:

Preliminary issue: Does the IPC have the legal authority to adjudicate this appeal?

A. Did the tribunal effectively respond to the appellant's request outside of *FIPPA*?

B. Does *FIPPA* apply? If so, are the requested reports "records" as defined in *FIPPA*?

C. Does the *Dagenais/Mentuck* test apply to information contained in the reports?

[4] More specifically, with *Practice Direction 7*, which deals with the sharing of representations.

D. What remedy is in order?

# DISCUSSION:

## Background information, the preliminary views presented to the parties in the inquiry, and the preliminary issue of the IPC's legal authority to adjudicate this appeal

### *The Toronto Star decision*

[12] The Toronto Star decision resulted from an application brought by the Toronto Star challenging the application of *FIPPA* to the adjudicative records (such as pleadings, transcripts, and evidence) of administrative tribunals. This April 2018 Ontario Superior Court decision considered the application of the "open court principle" – as a facet of freedom of expression protected by the Canadian Constitution, under section 2(b) of the *Canadian Charter of Rights and Freedoms*[5] (the *Charter*) – to adjudicative records containing "personal information," as that term is defined in *FIPPA*.

[13] In the Toronto Star decision, the Court ruled that sections 21(1) to (3) of *FIPPA* violated the open court principle embedded in section 2(b) of the *Charter*, in relation to adjudicative records.[6] As a result, the Court ruled that these sections of *FIPPA* are unconstitutional, and therefore are of no force or effect, in relation to adjudicative records held by administrative tribunals.[7]

[14] However, the Court decision did not interfere with the procedural scheme under *FIPPA*. Therefore, for those tribunals that are subject to *FIPPA*, the decision-making authority of the institution heads and, on appeal, the IPC, remained intact.

[15] The Toronto Star decision also made it clear that the open court principle means that tribunals are free to respond to requests for adjudicative records outside of *FIPPA*, even where the request is framed as a *FIPPA* request, *if* institutions follow the model of tribunals that do so in conformity with the *Charter*'s principles of openness.[8] This model involved tribunals that "fashioned their own method of handling document requests

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[5] Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[6] *Toronto Star*, *supra*, paragraphs 130 and 143.
[7] The Court suspended the declaration of invalidity for 12 months. By order of Justice Morgan dated April 16, 2019, the suspension of the declaration of constitutional invalidity was extended to June 30, 2019.
[8] *Toronto Star*, *supra*, paragraph 133, which says:

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

outside of the *FIPPA* process" which entailed "no delay at all."[9]

[16] The Court then went on to note that the openness that the *Charter* requires includes a consideration of the *Dagenais/Mentuck* test.[10] That test allows a tribunal to withhold information in some circumstances, as discussed further below.

[17] After the Toronto Star decision was issued, the Legislature enacted a new law, which I mentioned earlier: the *Tribunal Adjudicative Records Act*, 2019[11] (*TARA*). Section 2(1) of *TARA* provides that certain tribunals shall make available to the public all adjudicative records that relate to proceedings that started from the date that *TARA* became law in 2019 (July 1, 2019), subject to the tribunal's ability to make confidentiality orders in respect of the records.[12]

[18] *FIPPA* was amended on the same day that *TARA* became law: a new exclusion was added to *FIPPA* [at section 65(16)]. Section 65(16) says that *FIPPA* "does not apply to adjudicative records, within the meaning of [*TARA*], referred to in subsection 2(1) of that Act"[13] – i.e., adjudicative records that relate to proceedings that started on or after July 1, 2019. In other words, this new exclusion removes adjudicative records that are covered by *TARA* from the scope of *FIPPA* altogether (meaning, if *TARA* applies to an adjudicative record, then *FIPPA* does not apply to it).

[19] Since the records remaining at issue relate to hearings that started before *TARA* became law, *TARA* does not apply to them, and neither does the exclusion at section 65(16) of *FIPPA*.

### *The preliminary views presented to the parties in the inquiry*

[20] As noted, the adjudicator previously assigned to this appeal asked the parties to comment on her preliminary views about the issues set out in the Notice of Inquiry. In my view, it is useful to summarize these preliminary views, to better understand the context of the parties' representations, and to have a roadmap of the issues in this appeal and the connection between them.

[21] The adjudicator's preliminary views were that:

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[9] *Toronto Star*, *supra*, paragraph 22.
[10] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76 (CanLII); *Toronto Star*, *supra*, at paragraphs 89-91 and 134-135.
[11] S.O. 2019, c. 78, Sched. 60.
[12] *Ibid*, s. 2.
[13] This new exclusion in *FIPPA* goes further than the *Toronto Star* decision and removes adjudicative records from the *FIPPA* scheme entirely if they relate to proceedings that started on July 1, 2019, or after.

- the reports sought by the appellant are themselves adjudicative records,[14] (that is, the reports are information stored and maintained by the tribunal, and which constitute "case indexes" or "registers of action");

- the tribunal is in error that the appellant must give case file information such that the tribunal can retrieve and provide the appellant with relevant information and provide notice to all affected parties;[15]

- to effectively respond to the appellant's request outside of *FIPPA*, the tribunal should have prepared the reports and provided them to the appellant, with only necessary redactions that are appropriate in view of the *Dagenais/Mentuc*k test; then, if the appellant were to object to any severances, the remedy would be to the court (see Order PO-4088);

- the tribunal's statement to the appellant, that *FIPPA* simply does not apply to adjudicative records, is incorrect;[16]

- if the tribunal did not effectively respond to the appellant's request outside of *FIPPA* as claimed, then both the procedural and substantive provisions of *FIPPA* (with the exception of the section 21 personal privacy exemption) continue to apply to the appellant's request;

- if the tribunal's position is that the reports would be exempt under the personal privacy exemption under *FIPPA*,[17] then that is incorrect as the Toronto Star decision declared sections 21(1) to (3) of *FIPPA* of no force or effect in relation to adjudicative records; and

- an appropriate remedy here would be to order the tribunal to provide the requested information to the appellant, subject only to the redaction of any information in respect of which a confidentiality order was previously made by the tribunal (based on the adjudicator's understanding that registers of proceedings before the tribunal are adjudicative records available to the public and that the tribunal's hearings open to the public, and in light of Court's findings in the Toronto Star decision[18]).

[22] I will address these issues further below in this decision.

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[14] According to the definition of "adjudicative record" set out, in part, in Note 21, below.
[15] By way of letter to the appellant, dated July 7, 2020.
[16] *Ibid*.
[17] *Ibid*, based on the tribunal's statement that assuming it is true that *FIPPA* applies to all records before July 1, 2019, the information requested would be considered personal information under *FIPPA*.
[18] More specifically, paragraphs 68-93 of the Toronto Star decision, which the previously assigned adjudicator had set out in the Notice of Inquiry, before stating her preliminary view on the issue of remedy.

### *Preliminary issue: The IPC's legal authority to adjudicate this appeal*

[23] The tribunal submits that the IPC does not have the legal authority (the jurisdiction) to adjudicate this appeal. The tribunal submits that, to the extent that the appellant disagrees with the process that the tribunal used to respond to its request for records, a review of this process must be made to the Courts, not to the IPC. As I explain below, this position is inconsistent with the Toronto Star decision, and *FIPPA* itself.

[24] The tribunal submits: "Since the Tribunal by-passed *FIPPA* altogether, the IPC has no jurisdiction to assess whether the Tribunal's process is consistent with the open courts principle." In my view, this submission is unpersuasive. It assumes, without reasonably establishing, that the tribunal by-passed *FIPPA* effectively in the first place, and then concludes that as a result of such a by-pass, the IPC no longer has the legal authority to decide matters related to the tribunal's response to the *FIPPA* request.

[25] However, section 1(iii) of *FIPPA* requires that "decisions on the disclosure of government information should be reviewed independently of government." That function is carried out by the IPC, and the Toronto Star decision did not interfere with that. It did not change the procedural scheme under *FIPPA*, so for those tribunals that are subject to *FIPPA* (like the tribunal here), the decision-making authority of the institution heads and, on appeal, the IPC, has remained intact. As a result, after the Toronto Star decision, when other institutions have claimed, that they have by-passed *FIPPA* in their response to a request for adjudicative records made under *FIPPA* (or its municipal equivalent), the IPC has considered whether the institutions have done so appropriately.[19]

[26] Therefore, as the IPC has previously considered the question of whether an institution has effectively by-passed *FIPPA*, I do so as well here. When the IPC has determined that an institution has effectively by-passed *FIPPA*, that has ended the matter and the adjudicator exercised their discretion to discontinue the inquiry.[20] However, as I find below, the tribunal in this case did not effectively respond to the appellant's request outside of *FIPPA*, I will consider the remaining questions arising out of the tribunal's response to the appellant's *FIPPA* request.

### Issue A: Did the tribunal effectively respond to the appellant's request outside of *FIPPA*?

[27] For the following reasons, I find that the tribunal did not effectively respond to the appellant's request outside of *FIPPA*.

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[19] See, for example, Orders MO-3981, PO-4088, and MO-4110.

[20] See Orders PO-4088 and MO-4110. Section 52(1) of *FIPPA* says:

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

### *Undisputed facts*

[28] Based on my review of the parties' representations, a number of important facts are not in dispute:

- the tribunal proceedings described in the request are adjudicative in nature,
- the reports that the appellant seeks are adjudicative records,[21] and
- the tribunal has not provided the appellant with any reports during this time (several years after the request was made in June 2019, and after the tribunal took a few months to consider a post-*Toronto Star* process outside of *FIPPA*).

### *The parties' positions on whether the tribunal effectively by-passed FIPPA*

*The tribunal's position*

[29] The tribunal submits that it "effectively responded to the appellant and asked for file specific information so that adjudicative records themselves could be provided where possible," and that it was entitled to design such a process as it saw fit.

[30] The tribunal says that it is "confident that its process regarding adjudicative records is consistent with the open courts principle." It says that the appellant "is invited to provide file specific information so that it [the tribunal] could provide records where possible." The tribunal also asserts that the appellant "failed to provide the information required to process the request."

[31] The tribunal was also asked to comment on Order MO-3981, an IPC order finding

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[21] The parties' representations are premised on this characterization. See also paragraph 8 of the *Toronto Star* decision, in which Justice Morgan sets out a non-exhaustive list of adjudicative records found in the *Statutory Powers Procedure Act*, and paragraph 9, in which he says:

> *To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council.* That list is accompanied by an advisory, which is equally applicable here, as to a number of items that are not included as Adjudicative Records[.] [Emphasis added.]

Also see the Canadian Judicial Council's document (Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005), referred to by Justice Morgan, which states: "'Court records' include *any information or document* that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes, but is not limited to:

a. case files;
b. dockets;
c. minute books;
d. calendars of hearings;
e. case indexes;
f. registers of actions; and
g. records of the proceedings in any form. [Emphasis added.]

that an institution had not effectively by-passed (the municipal equivalent of) *FIPPA*. By way of background, the appellant in Order MO-3981 requested access to the decisions of the Peel Police disciplinary tribunal, under the municipal equivalent of *FIPPA* (the *Municipal Freedom of Information Act*, or *MFIPPA*). The institution in that appeal had purported to respond to the request outside of *MFIPPA*, in accordance with the open court principle and the Toronto Star decision, but in fact did not provide the requester with any records – four years after the request had been made. The adjudicator in Order MO-3981 found that the institution did not show that they followed the *Charter*-compliant model of other tribunals described in the Toronto Star decision. He found that the institution had not effectively by-passed *MFIPPA* because it had not provided the requester any records in the four years since the request was first made.

[32] The tribunal submits that the reasoning in Order MO-3981 is distinguishable from the circumstances here because Order MO-3981 was about the denial of access to specific tribunal decisions, but this appeal is about "data contained in over 500,000 adjudicative records," and that "[n]o specific adjudicative records were requested in this case."[22]

*The appellant's position*

[33] The appellant agrees with the tribunal that adjudicative tribunals have the authority to fashion their own mechanism for public access to adjudicative records.

[34] However, the appellant submits that these procedures must adhere to the presumption of openness and disclosure and ensure timely access, in order to by-pass *FIPPA* – and argues that the tribunal has no process available to meet such criteria. The appellant submits that the tribunal was "required to prepare or permit access to the information requested, subject only to any redactions that can be justified under the onerous *Dagenais/Mentuck* test."

[35] The appellant submits that the reasoning in Order MO-3981 is relevant here. The appellant highlights that, in that order, the IPC confirmed that a request for adjudicative records cannot be ignored simply because it was made under *FIPPA*, and that effectively by-passing *FIPPA* requires using a "process that entails no delay at all," particularly as regards to a tribunal's decisions.

[36] Therefore, the appellant submits that the tribunal's view about Order MO-3981 "misses the point" because the right of access to adjudicative records remains the same, regardless of the number of records requested.

[37] The appellant submits that the Toronto Star decision and subsequent jurisprudence, including Order MO-3981, clearly set out the requirements to meet if a tribunal seeks to by-pass *FIPPA*. The appellant submits that the tribunal failed to meet

[22] The tribunal also argues that in Order MO-3981, the records were withheld relying on an exclusion in the municipal equivalent of *FIPPA*, so the IPC had jurisdiction, whereas here, it argues that the IPC does not have jurisdiction. However, I have already considered and rejected that argument about jurisdiction.

those requirements, and therefore, failed to effectively by-pass *FIPPA* because the tribunal's proposed process:

1. does not presume disclosure of adjudicative records;

2. requires parties to have case information available to make a request, and that information is not publicly available; and

3. has created unreasonable delay.

[38] I will discuss the appellant's submissions about each of these three points, in turn, below.

The tribunal's process does not presume disclosure of adjudicative records

[39] The appellant argues that a process cannot be considered to presume disclosure when it results in a refusal to disclose records to which the requester is entitled, based solely on the volume and/or scope of the request.

[40] The appellant submits that, at a minimum, a process that presumes disclosure would engage the appellant in considering reasonable alternative proposals advanced by the tribunal, as part of its overarching obligation to be of assistance to the requester.[23]

[41] Furthermore, relying on the Toronto Star decision,[24] the appellant submits that the *Dagenais/Mentuck* test establishes a presumption of openness and disclosure that can only be displaced if there is a serious risk that disclosure will harm the administration of justice or otherwise be contrary to the public interest. Here, in the appellant's view, it would be inappropriate to anonymize names as the tribunal had done in the past because the tribunal ended this practice in 2020, following the Toronto Star decision and the introduction of *TARA*.

The tribunal's process requires parties to provide information that is not publicly available

[42] The appellant also objects to the tribunal's position (in its correspondence with the appellant, and as set out in the tribunal's Access to Records Policy[25]) that specific file

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[23] In support of this, the appellant relies on the IPC guidance document about processing voluminous requests, suggesting ways that an institution may explore alternatives with a requester. This IPC guidance document may be accessed online at the following link: Processing Voluminous Requests A Best Practice for Institutions - IPC.

[24] The appellant cites *Toronto Star, supra*, paragraph 90.

[25] The appellant quotes the following portion of the policy: "Available adjudicative records may be retrieved and provided where sufficient identifying case file information is supplied by the requester. Requests must identify the specific record and related proceeding, and staff cannot conduct research on behalf of requesters. Tribunals are not able to extract, compile or aggregate data from case files. Tribunals Ontario may make caseload information and other tribunal data available in Annual Reports. Tribunal records are subject to archiving and retention schedules and may not be retrievable." The policy may be accessed online at the following link: Tribunals Ontario | Access to Records Policy.

information is required to process an access request for adjudicative records because this specific case file information is only ever publicly available for issued decisions. The appellant says that issued decisions represent a small fraction of the number of applications the tribunal receives.[26]

[43] The appellant submits that without the tribunal publicly releasing this case file information in relation to all adjudicative records, a requester is left in "an impossible situation of not having the specific case file information required to file the access request in the first instance for a large portion of Adjudicative Records." The appellant explains that it has been "unable to locate, and has not been advised of how to acquire specific case file information for the remaining applications."

[44] The appellant argues that these "constraints in the process operate to undermine the presumption of disclosure and [are] untenable both under *FIPPA* and in order to by-pass the *FIPPA* framework." The appellant states that if the tribunal were to post docket lists on its website, that would let a requester access and provide specific case file information, so that, they could at least start the access process described by the tribunal.

The tribunal's process has created unreasonable delay

[45] The appellant states that no reports have been released to it yet, though the request was filed over 35 months before date of the appellant's representations. Relying on Order MO-3891, the appellant submits that this delay is inconsistent with the constitutionally guaranteed right to a regularized system of timely access to adjudicative records, which it argues is required by the Toronto Star decision – a process entailing no delay at all.[27]

[46] The appellant also notes the electronic systems used by the tribunal, including the portal (launched in 2021, which allows applications to be filed, processed and scheduled online) and an e-filing system was already in place for most common tenant and landlord applications since 2015. Given these electronic systems, the appellant submits that "it is unclear what the exact source of delay is – considering the presumption of disclosure and the availability of electronic Adjudicative Records."

*The tribunal's reply*

[47] In response to the appellant's representations, the tribunal briefly states that the appellant did not raise any new issues. The tribunal also reiterates that the information requested is contained in adjudicative records, and that there was no request for specific records. The tribunal asserts that the appellant has failed to demonstrate either delayed

[26] The appellant provided numbers comparing issued decisions on Canlii for 2014 and 2015, and contrasted them with the number of applications the tribunal reported receiving in those years from the tribunal's website. The difference, for 2014, for example, was just under 500 issued decisions versus almost 80,000 applications received.
[27] The appellant cites Order MO-3891, paragraph 139.

processing of the request or failure to provide meaningful access. The tribunal also reiterates its views about IPC jurisdiction.

***Analysis/findings***

[48] For the following reasons, I find that the tribunal did not effectively by-pass *FIPPA* in its response to the appellant's request.

[49] It is agreed, and I find, that the records requested are adjudicative records.

[50] The records remaining at issue relate to pre-*TARA* proceedings. As previously held by the IPC in Order PO-4088, if a tribunal chooses to respond outside of *FIPPA* to a request for adjudicative records relating to pre-*TARA* proceedings, the open court principle and the *Toronto Star* decision are relevant.[28]

[51] In my view, the appellant's position on the issue of effectively by-passing *FIPPA* is far more compelling than the tribunal's. The tribunal's reply to the appellant's representations did not adequately address the appellant's arguments regarding the presumption of disclosure and the inaccessibility of the information that the tribunal was asking the appellant to provide to process the request. Nor did the tribunal address the appellant's submissions on the relevance of the IPC's analysis in Order MO-3891.

[52] I disagree with the tribunal that the reasoning in Order MO-3981 is distinguishable here on the issue of effectively by-passing *FIPPA*. While the appeal in Order MO-3981 dealt with adjudicative records in the form of specific decisions, the appeal still dealt with an unsubstantiated claim that a request for adjudicative records would be dealt with outside of *FIPPA*, in accordance with the Toronto Star decision, but where the institution actually had released no records, years later. Therefore, I am not persuaded that the format of the adjudicative record requested here (that is, one that contains data drawn from many adjudicative records in a spreadsheet similar to ones previously released to the appellant) makes the reasoning in Order MO-3981 distinguishable. I agree with the reasoning in that order, and I adopt it here.

[53] The adjudicator in Order MO-3981 noted that as he read the judge's reasons in the Toronto Star decision, the "minimal requirements" for effectively by-passing *FIPPA* are that the tribunal must fashion a "method of handling document requests" using a "process that entails *no delay at all*" (emphasis mine). That is, the institution must adopt a "*regularized system of timely access* to adjudicative records" (emphasis mine). The adjudicator noted that although "no specific process is mandated, *whatever method is adopted must ensure* that the presumption of disclosure required by section 2(b) of the

[28] See paragraph 28 of Order PO-4088. Also, as stressed in paragraph 29 of Order PO-4088, records other than adjudicative records (for example, administrative records, or documents exchanged in pre-hearing filings but not entered into evidence) are still subject to *FIPPA*. However, this appeal does not relate to such records.

*Charter* is adhered to in responding to requests" (emphasis mine).

[54] In my view, given the tribunal's response to the appellant, this passage from Order MO-3981 is also important to note:

> Significantly, nowhere in his reasons does Justice Morgan suggest that a tribunal may simply ignore a request for adjudicative records because it is made under FIPPA. It may only by-pass FIPPA . . . where it shows that it has followed the Charter compliant model of the other tribunals.

[55] In the circumstances, although the presumption of openness and disclosure required by section 2(b) of the *Charter* is required to effectively by-pass *FIPPA*,[29] I find that that presumption was not effectuated in the tribunal's response to the request. I cannot conclude otherwise when the tribunal's stated process for accessing adjudicative records is restricted to requests where the requester is aware of, or able to easily access, case-specific information, which is not all publicly available. The evidence before me leads me to conclude that the appellant would not be in a position to do so, as there appears to be a large difference between how many case file numbers are publicly available, versus the actual case file numbers (all of which are available to the tribunal). I find that requiring a requester to examine thousands of public documents to come up with a limited list of case file numbers does not reflect a regularized system of access, or one that can reasonably be described as "timely." The inaccessibility of the information that the tribunal requires of a requester is inconsistent with a presumption of disclosure. Since the process the tribunal advances is not set up to presumptively provide access to adjudicative records, it cannot reasonably be said to be a process that effectively by-passed *FIPPA*.

[56] Furthermore, as mentioned, regardless of the tribunal's stated reasons for not providing the records, the fact is that it has not released any to the appellant in the years since the appellant first made the request in 2019. Therefore, the tribunal's response to the request cannot then reasonably be described as one that "entails no delay at all," as described by the Court in the Toronto Star decision. In this regard, the following analysis from Order MO-3981 is also relevant:

> . . . it does not lie in the mouth of the [institution] to claim that they have effectively opted out of MFIPPA, and thereby obviate the access rights, procedures and remedies available to members of the public under MFIPPA, without having taken steps to implement appropriate 'procedures to ensure that the presumption of openness and disclosure required by section 2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records.

[57] In Order MO-3981, the IPC held that the appellant was not obliged to pursue

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[29] *Toronto Star*, *supra*, paragraph 133.

access to adjudicative records outside of the process prescribed by *MFIPPA*, or to effectively abandon his appeal to the IPC, if:

- the institution does not have in place a regularized system of timely access to adjudicative decisions that approximates the model described by Justice Morgan in the Toronto Star decision, and
- the tribunal has taken no steps whatsoever to grant access to the adjudicative records at issue here outside of *MFIPPA*.[30]

[58] I agree with the reasoning in Order MO-3981, and I adopt it in this appeal. Here, the tribunal does not have a regularized system (let alone a timely one) for access to adjudicative records such the reports that the appellant requested here. And as discussed, it has not provided any reports to the appellant, asserting that it has no obligation to do so.

[59] Since the evidence before me is that the tribunal's "opting out" or "by-passing" process does not cover the types of adjudicative records which the appellant seeks here, the tribunal cannot be said to have effectively by-passed *FIPPA*. It has not established a regularized, timely process to do so. This means its chosen method of response to the appellant's request is not an effective by-passing of *FIPPA*.

[60] An effective response outside of *FIPPA* to the request for adjudicative records would have been to have a process as described by the court in the *Toronto Star* decision. At a practical level, this process would have involved preparing the requested reports, providing them to the appellant in a timely fashion (with virtually no delay at all), only withholding names in specific case where appropriate under the *Dagenais/Mentuck* test. If the appellant were to object to any redactions, their remedy would be in the court.[31]

[61] Therefore, in these circumstances, based on my review of the *Toronto Star* decision, Order MO-3981, and the parties' representations, I find that the tribunal did not effectively respond to the appellant's request outside of *FIPPA*.

**Issue B: Does *FIPPA* apply? If so, are the requested reports "records" as defined in *FIPPA*?**

[62] The tribunal submits that *FIPPA* "simply does not apply to adjudicative records." However, this view is inconsistent with the Toronto Star decision, as well as the language of *TARA* and *FIPPA*.

[63] As noted, the Toronto Star decision clearly recognizes that requests for adjudicative records, and their related appeals, can continue to be dealt with procedurally under *FIPPA*, except with respect to the application of sections 21(1) to (3) of *FIPPA*. The

[30] See paragraph 141 of Order MO-3981.
[31] See Order PO-4088.

Court said:

> Requests for Adjudicative Records *can continue to be dealt with procedurally in the way they have been until now*, except that each institution head in the first instance, *and the IPC on appeal*, must make their decisions by applying the *Dagenais/Mentuck* test in whatever modification the particular tribunal in the particular context of a given request requires.[32] [Emphasis mine.]

[64] As the IPC held in Order MO-3981, the Court did not say that *FIPPA* did not apply in its entirety to the adjudicative records of administrative tribunals.[33] Rather, the Court only said that *FIPPA* infringes on section 2(b) of the *Charter* as it relates to adjudicative records held by administrative tribunals, in two ways:

1. substantively, in terms of section 21 of *FIPPA* and related sections that contain the presumption of non-disclosure for producing adjudicative records containing "personal information" as defined in section 2(1); and

2. procedurally, in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make decisions about access to adjudicative records. [34]

[65] The procedural breaches at item 2 were saved under section 1 of the *Charter* by virtue of their minimal interference with the right under section 2(b) of the *Charter*, as described in Order MO-3981:

> The remedy applied by Justice Morgan was to interfere with the legislative scheme as little as possible. He simply made a declaration that the application of sections 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of personal information to adjudicative records infringed section 2(b) of the *Charter* and was not justified under section 1.[35] The effect of his decision in this regard was to leave in place the balance of *FIPPA*, including the right of access, the statute's procedural mechanisms and the reviewing authority of this office [the IPC].[36]

[66] Turning to the wording of *TARA* and of *FIPPA*, the tribunal acknowledges that section 65(16) of *FIPPA* expressly addresses only records covered by TARA.

[67] However, the tribunal still argues that *FIPPA* does not apply to any adjudicative records, even records generated before *TARA* became law. The tribunal points to the

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[32] *Ibid* at para 140.
[33] See Order MO-3981, paragraphs 78 and 79.
[34] Order MO-3981, at paragraph 79. And see *Toronto Star*, *supra* at paragraphs 72, 109, 117, 130.
[35] *Toronto Star*, *supra* at paragraph 143.
[36] Order MO-3981, at paragraph 79.

Court's declaration in Toronto Star that section 21(1) of *FIPPA* is unconstitutional in relation to personal information found in adjudicative records as support for this position. I find this argument to be unpersuasive. The fact that section 21(1) of *FIPPA* is unconstitutional in regard to personal information found in adjudicative records just means that an institution cannot use section 21(1) to withhold personal information in such records. This does not leave a "hollow legislative scheme" for the tribunal, as the tribunal argues. It reflects a legislative choice to create a separate, new system of access to adjudicative records from a certain date onward through *TARA*. The Legislature could have excluded pre-*TARA* adjudicative records from the scope of *FIPPA*, but it chose not to do so. In the absence of such an exclusion, *FIPPA* continues to apply to such records except for sections 21(1) to (3).[37]

[68] In the alternative to arguing that *FIPPA* does not apply to any adjudicative records, the tribunal appears to view the personal information in the reports requested as exempt from disclosure. I refer to its letter to the appellant before the appeal was filed:

> In your [June 4, 2020] letter, you take the position that [*FIPPA*] applies to all records prior to July 1, 2019.
>
> Assuming this is true, the information requested, would be considered personal information under *FIPPA.*

[69] However, that position is clearly at odds with the finding in the Toronto Star decision, that the personal privacy exemption is unconstitutional and of no force and effect when personal information is contained in adjudicative records.

[70] Instead of applying section 21 and related sections of *FIPPA* to adjudicative records held by administrative tribunals, the Court approved the *Dagenais/Mentuck* test[38] as the appropriate mechanism for determining what information may be withheld. I turn to that question, under Issue C.

### *Are the requested reports "records" as defined in FIPPA?*

[71] The tribunal argues that it has no obligation to produce a record in the format requested by the appellant. However, as I have found that *FIPPA* applies to the request, I must consider whether the records requested by the appellant fit within the definition of a "record" in section 2 of *FIPPA* and section 2 of Regulation 460. For the reasons that follow, I find that the tribunal has failed to establish that the requested records are not "records" as defined in *FIPPA*.

[72] *FIPPA* defines "record" as follows:

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[37] *Toronto Star*, paragraph 130.

[38] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76. This test was developed in the context of publication bans in criminal proceedings.

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution[.]

[73] Section 2 of Regulation 460 states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

[74] The adjudicator previously assigned to this appeal invited the tribunal to consider an Ontario Court of Appeal decision[39] that addressed the definition of "record."[40]

[75] The tribunal states that it is committed to the open courts principle but says that the request here is unreasonable. It states that the information requested exists in over 500,000 records. It asserts that the open courts principle does not oblige a tribunal to extract data from adjudicative records in the manner contemplated by the appellant. If that were the case, the adjudicative operations of the tribunal would come to a halt. It says that the purpose of the open courts principle is to make information available where it is in the public interest to do so, not to halt the operations of an institution to provide data to commercial enterprises for profit. With respect, the tribunal has it the other way around. The public availability of adjudicative records is presumptively in the public interest unless there is a reason to withhold them applying the *Dagenais/Mentuck* test.

[76] I am not persuaded that the tribunal has provided sufficient evidence to establish that the reports requested are not "records" within the meaning of *FIPPA*.

[77] The tribunal's representations do not explain what would be involved in producing these reports. The tribunal essentially just asserts that the request is unreasonable, that it involves data that would be drawn from hundreds of thousands of records, and that it

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[39] *Toronto Police Services Board v.* (*Ontario*) *Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII).
[40] *Ibid*, starting at paragraph 36 of that decision.

would grind its operations to a halt. Nowhere in these claims is sufficient evidence regarding what electronic means exist to facilitate the process of producing the reports. The appellant provided a sample of a past report in a spreadsheet format that the tribunal previously released to it. The tribunal's pre-appeal correspondence to the appellant indicates that the reports requested here are similar to those that the tribunal previously released to appellant. From this past practice, it appears that the data extraction process would be electronic, and that the tribunal would be able to extract several pieces of case file information at one time into one place. Therefore, while the data may well be drawn from over 500,000 records, the tribunal does not detail what would be involved in that process and appears to ignore the apparent electronic nature of the exercise.

[78] In addition, I find that one important omission in the tribunal's representations on this issue is its own acknowledgement that the reports requested here are similar to those that it previously produced for the appellant in past years. Based on the evidence before me, it is not apparent why the production of similar reports did not grind the tribunal's operations to a halt in the past but would do so now.

[79] The IPC has recognized that creating a new record may be required in order to discharge an institution's legal obligations under the *Act* (see Orders P-50 and MO-2129). In Order MO-2129, the IPC addressed the obligations of an institution when dealing with a request for information that may not be in the format requested by an appellant:

> ... If the request is for information that currently exists in a recorded format different from the format asked for by the requester, . . . the [institution has] dual obligations.
>
> First, if the requested information falls within paragraph (a) of the definition of a record (e.g., paper records), the [the institution] a duty to identify and advise the requester of the existence of these related records (i.e., the raw material). However, the [institution is] not required to create a record from these records that is in the format asked for by the requester (e.g., a list).
>
> Second, if the requested information falls within paragraph (b) of the definition of a record, the [institution has] a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the [institution]. In such circumstances, the [institution has] a duty to create a record in the format asked for by the requester.
>
> In my view, a reasonable search for records responsive to an access request would include taking steps to comply with these two obligations.

[80] I agree with this reasoning and adopt it here.

[81] To the extent that the tribunal's brief representations about the efforts involved in producing the requested reports amount to a claim that the reports are not a "record" within the meaning of the *Act*, I find on the evidence before me as follows:

1. Firstly, the requested reports are capable of being produced from a machine readable record under the tribunal's control by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the tribunal.

2. Secondly, producing the reports in a spreadsheet would not unreasonably interfere with the tribunal's operations.

Consequently, I find that the reports fall within paragraph (b) of the definition of a "record" and are producible by the tribunal.

[82] I also agree with the Court of Appeal's finding in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*[41] that the technological reality in which government institutions operate weighs against an interpretation of the definition of the term "record" at section 2(1) of the *Act* in a way that would minimize rather than maximize the public's right of access to electronically recorded information.

[83] In the circumstances, and given its past production of similar reports, the tribunal has not persuaded me that the reports are not "records" under *FIPPA*. I find that they are.

**Issue C: Does the *Dagenais/Mentuck* test apply to information contained in the reports?**

[84] Although the tribunal states that the *Dagenais/Mentuck* test was not engaged here because the appellant did not seek specific records, I find that this test is relevant.

[85] The *Dagenais/Mentuck* test allows for information to be withheld, on a case-by-case basis, if:

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

b. the positive effects of the publication ban outweigh the negative effects on the rights and interests of the parties and the public, including the effects on the right

[41] *Ibid*.

> to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[42]

[86] The Court in the Toronto Star decision discussed the balance to be struck:

> What is *clear* from the case law is that it is *the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this balance*. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(b) of the Charter, 'The burden of displacing the general rule of openness lies on the party making the application.' As other courts across the country have stated, publicity is the order of things and 'any exceptions' – including those specifically provided by statute – 'must be substantiated on a case by case basis.' This onus is necessary 'in light of the...Charter principles which inform the [*Dagenais/Mentuck*] test.'[43] [Emphasis mine.]

[87] As noted in an appendix to the request, the appellant requested specific data in the format of a spreadsheet, setting out the case number and several fields of data relating to each case number. The fields include the filing date, case type, first name, last name, address, postal code, telephone number, party type (i.e., landlord or tenant), rent charged, payment of arrears, and various fields relating to the termination of the rental (e.g., tenant gave notice, eviction).

[88] In light of the Toronto Star decision and the type of information requested by the appellant, I find that the *Dagenais/Mentuck* test is the only relevant consideration in determining whether any information may be withheld from the records disclosed to the appellant.

[89] As the tribunal stated that it did not engage with the *Dagenais/Mentuck* test at all, I will order it to do so. If the appellant disagrees with any redactions the tribunal makes to the reports, its remedy lies with the court, not the IPC.

**Issue D: What is the appropriate remedy?**

[90] As discussed, it is agreed that the reports requested are adjudicative records. It is also agreed that hearings before the tribunal are open to the public. In light of this, and the Court's findings in the Toronto Star decision, the next question to consider is what the appropriate remedy would be in this case.

[91] In the Toronto Star decision, the Court discussed the openness principle and the reasons that would justify withholding information. Since the example that the Court used involves the tribunal that is the subject of this appeal (referred to as the LTB), in my view,

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[42] *Toronto Star*, *supra*, paragraph 89.
[43] *Ibid*, paragraph 91.

it is helpful to set out the Court's analysis here, for ease of reference:

> I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and circumstances of the...proceedings." The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of *criminal prosecutions*, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals.
>
> A decision about a revealing a police informant's identity in a record supporting a search warrant will obviously entail *very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing.* The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account. *The particular institution and circumstances of the particular case may require the most stringent application of the Dagenais/Mentuck test or a modified and more relaxed version of the test*. There is no 'one size fits all' application of the openness principle.[44] [Emphasis added, footnotes omitted.]

[92] Although the tribunal was asked to comment on the above, it did not address the appropriate remedy.

[93] In any event, given the type of information requested and the passage from the Court's ruling set out above, I find that the appropriate remedy in this case would be to order the tribunal to provide the requested information to the appellant, subject only to the redaction of any information in respect of which a confidentiality order was previously made by the tribunal.

### ***As part of the remedy, is continuing access available under section 24?***

[94] The appellant's request included a request for "ongoing regular file transfers on a daily basis of the same specified data set." This request raises the possible application of section 24 of the *Act*.

[95] Section 24 imposes certain obligations on requesters and institutions when submitting and responding to requests for continuing access to records. This section states, in part:

> (3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

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[44] *Toronto Star, supra,* at paras 92-93.

> (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
>
> > (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
> >
> > (b) a statement that the applicant may ask the Commissioner to review the schedule.
>
> (5) This Act applies as if a new request were being made on each of the dates shown in the schedule.

[96] The right to request continuing access should be interpreted broadly, and not restricted to records produced "in series."[45]

[97] A possible exception to the application of section 24(3) arises in the case of a request where it is impossible or highly unlikely that further responsive records would come into existence during the continuing access period. In that case, the institution would have the option of refusing the continuing access request or issuing a schedule with very few dates on it.[46]

[98] As stated above, the records at issue are case information reports from June 1,2012 to June 14, 2019. Therefore, the question is whether further responsive records relating to tribunal proceedings that started before July 1, 2019 are likely to come into existence.

[99] The tribunal says that it would have needed to extract the requested data on an ongoing basis (if it had processed the request).[47] I understand this to mean that it is not impossible that further responsive records (that is, records relating to tribunal proceedings that started in the pre-*TARA* timeframe in the request) would come into existence. As a result, the appellant may have access to responsive records for up to a two-year period, treating the date of this order as the date of the request. The tribunal will be ordered to provide the applicant with a schedule in accordance with section 24(4) of *FIPPA*.

[100] In conclusion, for the reasons set out in this order, I do not uphold the tribunal's response to the request, and I will order the tribunal to apply *FIPPA*, in light of the Toronto Star decision, to the adjudicative records requested.

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[45] Order PO-2730.
[46] Order PO-2730.
[47] The appellant says that it would be pleased to provide resources and compensation to the tribunal if that would be helpful in arranging for a system of access to the requested reports. The appellant explains that under past arrangements, its team worked with the tribunal to develop a suitable system of access, and the appellant would welcome the opportunity to work with the tribunal to facilitate access.

## ORDER:

1. I do not uphold the tribunal's access decision.

2. I order the tribunal to issue an access decision (without relying on 21(1) to (3) of *FIPPA*), claiming any applicable exemptions and/or making any redactions in accordance with a proper application of the *Dagenais/Mentuck* test, as set out by Justice Morgan in *Toronto Star*, in accordance with the requirements of sections 26, 28, 29 and 57 of *FIPPA*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.

Original signed by: January 12, 2024

Marian Sami
Adjudicator