

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## PRIVACY COMPLAINT REPORT

PRIVACY COMPLAINT PC18-12

Human Rights Tribunal of Ontario

August 13, 2021

**Summary:** The Office of the Information and Privacy Commissioner of Ontario received a privacy complaint involving the Human Rights Tribunal of Ontario (HRTO). The complaint was that the HRTO had inappropriately disclosed personal information in a Case Assessment Direction (CAD). The complainant believed that the disclosure had breached his privacy under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

This report finds that a CAD is an HRTO decision and that, in accordance with section 37 of the *Act*, the provisions for the protection of individual privacy found in Part III of the *Act* do not apply to it.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended, sections 2(1), 37 and 65(16); *Human Rights Code*, R.S.O. 1990, c. H.19, sections 41, 42(1) and 43(1); *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22, sections 25.0.1, 25.1(1); and *Tribunal Adjudicative Records Act*, 2019, S.O. 2019, c. 78, s. 60, section 2(1); and Ontario Regulation 211/19.

**Orders and Investigation Reports Considered:** Order 11, P230, PO-1880 upheld on judicial review in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300 (C.A.), PO-3862, PO-4050, PO-4088 and PO-4102; and Privacy Complaint Reports MC09-56, PC- 980049-1, PC17-9 and PC17-15

**Cases Considered:** *Toronto Star v AG Ontario*, 2018 ONSC 2586.

### BACKGROUND:

[1] The Human Rights Tribunal of Ontario (HRTO) is an administrative tribunal

established under the Ontario *Human Rights Code* (the *Code*).<sup>1</sup> Under the *Code*, the HRTO has the authorization to resolve claims of discrimination and harassment brought under the *Code*.<sup>2</sup>

[2] Parties involved with an application filed with the HRTO can settle these claims through mediation. Where the parties do not agree to mediation or mediation does not resolve the application, the HRTO will hold a hearing.<sup>3</sup> After the hearing, the adjudicator for the application, will make a decision that is published on the Canadian Legal Information Institute website.<sup>4</sup>

[3] In this matter, in 2015 and in 2016, the complainant filed an application with the HRTO. A hearing for both applications was scheduled for 2017, but it was rescheduled to 2018. Before the hearing took place, a case management conference call was scheduled with the parties. However, the complainant requested an adjournment of the call due to the condition of his health. In support of his request, the complainant's physician sent a doctor's note to the HRTO Registrar.

[4] In a Case Assessment Direction (CAD) issued to the parties before the hearing, the adjudicator for the complainant's HRTO applications stated:

On January 15, 2018, the day before the scheduled case management call, the applicant asked that the call be adjourned and rescheduled to a future date because he was dealing with personal health issues. The applicant's doctor emailed the Tribunal on the same date to say that the applicant was "experiencing some health challenges that are affecting his ability to work and participate in other activities."

[5] The complainant raised privacy concerns about the CAD because he believed that it inappropriately disclosed his personal health information to the other parties.

[6] In response to these concerns, in the HRTO's final decision regarding the applications, the adjudicator explained that the complainant's personal health information was not inappropriately disclosed because CADs are only distributed to the parties and not published. Further, the adjudicator explained that the references to the complainant's health issues in the CAD were general and vague, and that she followed the HRTO's practice of not including any more detail than is necessary in it and the decision.

## **The Complaint**

[7] The complainant was not satisfied with the adjudicator's response to his concerns. The complainant believed that the HRTO had breached his privacy under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by disclosing his information in the CAD and, therefore, he filed a privacy complaint with the Office of the Information and Privacy Commissioner of Ontario (the IPC or this office).

[8] During the Intake Stage of the IPC's complaint process, the complainant advised

---

<sup>1</sup> R.S.O. 1990, c. H. 19, as amended.

<sup>2</sup> Retrieved from <http://www.sjto.gov.on.ca/hrto/what-we-do/>.

<sup>3</sup> Ibid.

<sup>4</sup> Retrieved from: <https://tribunalsontario.ca/hrto/application-and-hearing-process/#step8>.

that, in his view, there was no legitimate or lawful reason for the HRTO to disclose his information to the other parties involved in his applications where his physician directly provided it to the HRTO Registrar as part of the HRTO's process.

[9] In response, the HRTO advised that, in its view, the complaint was outside of the IPC's jurisdiction to review and a collateral attack on an adjudicative decision of the HRTO. The HRTO took the position that including the complainant's information, as evidence in the decision, was not a breach of the *Act*.

[10] The matter moved from the Intake Stage to the Investigation Stage of the IPC's complaint process and was assigned to me as the Investigator. As part of the investigation, this office requested and received representations, discussed below, from the HRTO and the complainant.

### **The HRTO's Representations**

[11] The HRTO advised that, in its view, the complaint relates to the disclosure of an adjudicative record and, more specifically an adjudicative decision. Therefore, the HRTO took the position that the complaint was outside of the scope of the IPC's jurisdiction.

[12] In support of its position, the HRTO cited the following from *Toronto Star v. AG Ontario (Toronto Star)*<sup>5</sup>:

It is certainly the case that [adjudicative tribunals'] ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within *the power of those adjudicative institutions to control their own processes*. [emphasis added by the HRTO]

...the fact that a given tribunal ignores FIPPA in making such a decision on its own raises no larger issue.

[13] As an administrative tribunal specifically named in *Toronto Star*, the HRTO advised that in choosing to publish its decisions, and what to put in them, the HRTO has chosen to bypass the *Act's* regime.

[14] Further, the HRTO advised that it takes the position that where an administrative tribunal chooses to bypass the *Act's* regime with respect to adjudicative records, as it has done in this matter, those records fall outside the scope of the *Act* and are, therefore, outside the jurisdiction of the IPC.

[15] Moreover, the HRTO advised that it relies on Privacy Complaint Reports PC17-9 and PC17-15. In these reports, Investigator Alanna Maloney found that, in accordance with section 37 of the *Act*, the provisions for the protection of individual privacy found in Part III of the *Act* do not apply to the personal information in HRTO decisions.

[16] As the HRTO did not object to the IPC sharing its representations with the complainant, this office provided him with a copy of them for his comment.

---

<sup>5</sup> 2018 ONSC 2586. See paras. 49-50.

## **The Complainant's Representations**

[17] In response to the HRTO's representations, the complainant advised that, in his view, the complaint is within the scope of the IPC's jurisdiction.

[18] The complainant explained that, unlike the circumstances in Privacy Complaint Reports PC17-9 and PC17-15, the record at issue in this matter, that is, the CAD, was not made available by the HRTO to the general public.

[19] Further, the complainant advised that, in his view, the complaint did not involve "Adjudicative Records", as defined in *Toronto Star*, or an adjudicative decision.

[20] Therefore, the complainant took the position that, unlike Investigator Maloney's findings in PC17-9 and PC17-15, section 37 of the *Act* did not apply to the CAD.

[21] Accordingly, the complainant believed that his information in the CAD was protected under Part III of the *Act* and, therefore, this office could make a determination as to whether the HRTO had breached his privacy.

## **ISSUES:**

[22] I identified the following issues as arising from this investigation:

1. Is the information at issue "personal information" as defined by section 2(1) of the *Act*?
2. Does section 37 of the *Act* apply to the personal information?
3. If section 37 of the *Act* does not apply, was the personal information disclosed in accordance with section 42 of the *Act*?

## **DISCUSSION:**

### **Issue 1: Is the information at issue "personal information" as defined by section 2(1) of the Act?**

[23] In this matter, the information at issue was disclosed in a CAD that an HRTO adjudicator issued to the parties involved in the complainant's HRTO applications.

[24] The CAD identified the complainant by name as the applicant. It also informed the parties that the complainant had asked for the adjournment and rescheduling of their scheduled case management conference call "because he was dealing with personal health issues."

[25] Further, the CAD informed the parties that the complainant's doctor had told the HRTO that he "was 'experiencing some health challenges that are affecting his ability to work and participate in other activities.'"

[26] Under section 2(1) of the *Act*, "personal information", in part, means:

“personal information” means recorded information about an identifiable individual, including,

...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(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;

[27] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>6</sup>

[28] The determination of what is “personal information” is based on the information itself and the context in which it appears.<sup>7</sup> Further, the test to determine whether a given record contains personal information is whether it is reasonable to expect that an individual may be identified if the information is disclosed.<sup>8</sup>

[29] The CAD identifies the complainant by name as the applicant in his two HRTO applications and the information at issue, also in the CAD, relates to his medical and employment history.

[30] Accordingly, in my view, it reasonable to expect that the complainant may be identified if his name appearing with the information at issue is disclosed. Further, there is no dispute about whether the information is “personal information” within the meaning of section 2(1).

[31] For these reasons, I find that the information at issue is “personal information” as defined in section 2(1) of the *Act*.

## **Issue 2: Does section 37 of the *Act* apply to the personal information?**

[32] Section 37 of the *Act* states:

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

[33] “This Part” refers to Part III of the *Act* in which the provisions for the protection of individual privacy are found. If section 37 applies to the record, then these provisions do not apply to personal information contained in the record, as the entire record would fall

---

<sup>6</sup> Order 11.

<sup>7</sup> IPC Order PO-4050.

<sup>8</sup> P-230, MC09-56, Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

outside of Part III.

[34] To satisfy the requirements of section 37, it must be established that the information is “personal information”, the personal information is being maintained by the institution (in this matter, the HRTO) and that the purpose of maintaining the personal information is to create a record that is available to the general public.<sup>9</sup>

[35] Above, I found that the information at issue is “personal information” within the meaning of section 2(1) of the *Act*. Therefore, I must determine whether the information is being maintained by the HRTO and, if so, whether it is for the purpose of creating a record that is available to the general public.

[36] There is no dispute that the HRTO can make rules governing its practice and procedures for dealing with applications that it receives,<sup>10</sup> the *Statutory Powers Procedures Act* (the *SPPA*)<sup>11</sup> applies to a proceeding before the HRTO<sup>12</sup> and the *SPPA* allows the HRTO to determine its own practices and procedures, as well as establish rules governing any such practices and procedures.<sup>13</sup>

[37] Further, there is no dispute that the HRTO has established practices, procedures and rules that relate to deciding applications that it receives that have been brought under the *Code*.

### **Privacy Complaint Reports PC17-9 and PC17-15**

[38] In Privacy Complaint Reports PC17-9 and in PC17-15, Investigator Maloney considered, respectively, whether the HRTO had breached the privacy of an applicant’s sibling and of an applicant under the *Act* by disclosing their personal information in decisions that it made available to the general public.

[39] In both reports, she found that section 37 applied to the HRTO’s decisions and, therefore, the personal information in them was outside the scope of Part III of the *Act* as follows:

I find that the Tribunal is an administrative tribunal that is given the authority from the *Code* and the *SPPA* to develop its own processes, procedures and rules in deciding applications brought under the *Code*. The Tribunal’s processes, procedures and rules provide that the decisions of the Tribunal will be made public unless the adjudicator decides otherwise. The publication of decisions is an aspect of the Tribunal’s control over its own process and the information that is included in the Tribunal’s decisions is within the adjudicator’s discretion in providing reasons for those decisions.

The Tribunal’s decision on a matter and its interpretation of the *Code* are of vital interest to parties, party representatives and members of the public who are considering filing an application, but also to the general community

---

<sup>9</sup> PC-980049-1.

<sup>10</sup> Section 43(1) of the *Code*.

<sup>11</sup> R.S.O. 1990, c. S.22.

<sup>12</sup> Section 42(1) of the *Code*.

<sup>13</sup> Sections 25.0.1 and 25.1(1) of the *SPPA*.

who wish to understand how the Tribunal does its work. The publication of its decisions supports public confidence in the justice system, serves an educational purpose, promotes accountability by the Tribunal for its decision-making, and ensures that the public has the information necessary to exercise the Charter right to freedom of expression.

In this context, I find that Tribunal decisions are maintained both in order to provide the parties with the outcome of the decision, and for the purpose of publication.

In light of the above, I find that section 37 is applicable to Tribunal decisions. The personal information in those decisions is maintained for the purpose of creating a record that is available to the general public. Since section 37 applies, the Tribunal's decisions are excluded from the privacy provisions of Part III of the *Act*.<sup>14</sup>

[40] I accept and adopt the findings in these reports, because in my view, they are applicable to the matter before me. In brief, the findings in these reports relate to an HRTO adjudicator's discretion with respect to the information that they decide to include in an HRTO decision, the HRTO's ability to control its processes relating to the publication of its decisions and the significance of publishing HRTO decisions.

[41] However, below, I consider whether the findings in these reports, which relate to personal information in published HRTO decisions, are applicable to information in a CAD which has not been "published" and "only distributed to the parties."

## **CADs**

[42] Regarding CADs, Rule 18 of the HRTO's Rules of Procedure (the HRTO's Rules)<sup>15</sup> states:

18.1 The Tribunal may prepare and send the parties a Case Assessment Direction where it considers it appropriate. The Case Assessment Direction may address any matter that, in the opinion of the Tribunal, will facilitate the fair, just and expeditious resolution of the Application and may include directions made in accordance with any of its powers in Rule 1.6 and 1.7.

18.2 At the hearing parties must be prepared to respond to any issues identified in the Case Assessment Direction and to proceed in accordance with the directions set out in the Case Assessment Direction.

[43] Further, the HRTO's "Guide to Preparing for a Hearing before the Human Rights Tribunal of Ontario" (the HRTO Guide)<sup>16</sup> states:

---

<sup>14</sup> PC17-9. See paras. 65 to 68.

<sup>15</sup>

Retrieved from: <https://tribunalsontario.ca/documents/hrto/Practice%20Directions/HRTO%20Rules%20of%20Procedu re.html#18>.

<sup>16</sup> Retrieved from: <https://tribunalsontario.ca/documents/hrto/Guides/Guide%20to%20Preparing.html>.

*A Case Assessment Direction is a decision of the HRTO.* The parties must always be prepared to address any issues identified in the Case Assessment Direction at the hearing.

A Case Assessment Direction does not mean the adjudicator has made a decision about the outcome of the application before listening to the parties. It is intended to help the parties proceed in a way that is fair, just and expeditious. [emphasis added]

[44] As indicated above, the HRTO has the legislative authority to determine its own practices, procedures and rules for deciding applications that it receives under the *Code*. It is an adjudicative tribunal to which the following passage from The *Toronto Star* decision applies:

It is certainly the case that [adjudicative tribunals'] ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within the power of those adjudicative institutions to control their own processes.

[45] I find that the CAD is an "adjudicative record" within the meaning of the court's decision. As the HRTO Guide makes clear, a CAD is a decision of the HRTO. The *Toronto Star* decision described "adjudicative records" by reference to the *Statutory Powers Procedures Act* list of records for the purposes of hearings, which includes "any interlocutory orders made by the tribunal". I find that a CAD makes interlocutory orders, in that it may provide procedural directions to the parties to an HRTO application.

[46] The complainant emphasized the following passage from the *Toronto Star* decision:

I would also clarify that Adjudicative Records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings.

[47] I do not find this passage from the court's decision to support the complainant's arguments. The CAD is not a document exchanged between the parties to a hearing. Rather, it is a decision of the HRTO, issued to the parties during the pre-hearing stage of proceedings.

[48] In this matter, the HRTO has chosen not to "publish" this CAD on CanLII or other legal publishing platforms. This is a decision it may make under its power to control its own processes. However, the fact that the HRTO did not publish the CAD does not lead to the conclusion that the personal information in it is not "maintained for the purpose of creating a record that is available to the general public" within the meaning of section 37 of the *Act*.

[49] Rule 18 of the HRTO's Rules, the HRTO Guide and the HRTO Webpage provide that, in a CAD, an adjudicator may decide issues relating to the hearing and/or the application. In this document, an adjudicator may also identify issues requiring a response from the parties at the hearing. In my view and in accordance with Investigator Maloney's findings in PC17-9 and PC17-15, a CAD may contain information such as submissions and



findings, that is, evidence, which will be considered by an HRTO adjudicator in reaching their decisions, whether procedural, interlocutory or final.<sup>17</sup>

[50] While the HRTO has chosen, under its power to control its own processes, to publish the final decision but not to publish the CAD, this does not detract from the conclusion that the personal information in the CAD has been maintained by the HRTO for the purpose of creating a record that is available to the general public. Like other information filed by the parties to an HRTO application, it is maintained for the purpose of the adjudicator's determinations and, ultimately, a final published decision.

[51] Therefore, I find that section 37 of the *Act* applies to a CAD because the personal information in it is maintained for the purpose of creating a record that is available to the general public.

[52] Since section 37 applies, a CAD is excluded from the provisions for the protection of individual privacy found in Part III of the *Act*. Therefore, sections 39 to 43 of the *Act* are not applicable to the circumstances of the complaint.

[53] Given this, I do not need to consider whether the personal information was disclosed in accordance with section 42 of the *Act*. As a result, I will not comment on the complainant's concerns that the disclosure of his personal information in the CAD by the HRTO was unnecessary. However, I would encourage the HRTO to continue its "practice of not including any more detail than is necessary in its decisions and CADs."

[54] In reaching my finding that section 37 applies to a CAD, I note that after *Toronto Star* was issued, the *Tribunal Adjudicative Records Act, 2019, (TARA)*<sup>18</sup> came into force on June 30, 2019. *TARA* applies to the tribunals listed in Schedule 1 of the Ontario Regulation 211/19, including the HRTO.

[55] Moreover, on the same date, a new exclusion found in section 65(16) of the *Act* came into effect. This section states:

This Act does not apply to adjudicative records, within the meaning of the *Tribunal Adjudicative Records Act, 2019*, referred to in subsection 2 (1) of that Act.

[56] This legislative amendment goes further than *Toronto Star* and removes adjudicative records from the *Act's* scheme entirely, provided they relate to proceedings commenced after the amendment came into effect.<sup>19</sup>

[57] In this matter, the adjudicative record at issue, that is, the CAD, relates to applications filed in 2015 and 2016 with the HRTO. The proceeding for these applications concluded in 2018.

[58] The HRTO has not claimed that the section 65(16) exclusion applies retroactively in

---

<sup>17</sup> See Practice Direction on Hearings before the Human Rights Tribunal of Ontario. Retrieved from: <https://tribunalsontario.ca/documents/hrto/Practice%20Directions/Hearings%20before%20the%20HRTO.html>.

<sup>18</sup> S.O. 2019, c. 78, Sched. 60.

<sup>19</sup> Order PO-4088 at para. 27.

this matter. Further, unless there is a clear indication in the *Act* or *TARA* that section 65(16) is meant to apply retroactively or retrospectively, there is a strong presumption that this section is not intended to have a retroactive or retrospective application.<sup>20</sup> Such indication is not present here.

[59] Therefore, while the CAD is an “adjudicative record” which, under *TARA* is excluded from the *Act*, the section 65(16) exclusion is not relevant in this matter because the complainant’s HRTO proceeding commenced and concluded before June 30, 2019.

## **CONCLUSION:**

Based on the results of my investigation, I have reached the following conclusions:

1. The information at issue is “personal information” as defined by section 2(1) of the *Act*.
2. A CAD is an HRTO decision to which section 37 of the *Act* applies. As a result, the HRTO’s collection, use and disclosure of the personal information in the CAD is outside the scope of the provisions for the protection of individual privacy in Part III of the *Act*.

Original signed by: \_\_\_\_\_  
John Gayle  
Investigator

August 13, 2021 \_\_\_\_\_

---

<sup>20</sup> Orders PO-4102 and PO-3862.