



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

ORDER 71

Appeal 880266

Public Trustee



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ORDER

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On June 28, 1989, the Ministry of the Attorney General's Freedom of Information and Privacy Co_ordinator received the following request:

In the Public Accounts for the Ministry of the Attorney General for the fiscal year '86_'87, appears an income item of \$1,784,000.00 from escheated estates, which had been administered by the Public Trustee, presumably where the next_of_kin could not be located by that office.

When the Public Trustee applies for administration of an estate, Form #1, a public record, is filed by that office, as required by sect.14 of the regulations under the Public Trustee Act.

I wish to know the details as found on Form #1, for the estates escheated in '86 '87.

The Freedom of Information and Privacy Co_ordinator for the Ministry of the Attorney General also acts as Co_ordinator on behalf of the Public Trustee (the "institution") which is an agency designated as an institution in Ontario Regulation 532/87, as amended, under the Freedom of Information and Protection of Privacy Act, 1987. The Public Trustee is the institution referred to in this order and the Attorney General is the head of the institution for the purposes of this Act.

2. After extending the time limit, the institution responded to the requester by letter dated August 26, 1988, stating that "access is denied under section 67 of the Freedom of Information and Protection of Privacy Act which permits the confidentiality provisions of section 18 of the Public Trustee Act to prevail."

[IPC Order 71/July 7, 1989]

3. By letter dated August 30, 1988, the requester appealed the decision of the head. On September 1, 1988, I gave notice of the appeal to the institution.

4. The institution initially determined that the records in issue were Form 1's which, until August, 1988, were filed by the Public Trustee with the Surrogate Court pursuant to section 14 of Regulation 887 of the Public Trustee Act. A representative sample of this record was provided to this office and examined by the Appeals Officer. Subsequently, it became clear that, in fact, the record in issue is a portion of a computerized list of names indicating: _
 - (a) monies deposited into the Consolidated Revenue Fund;
 - (b) monies transferred from the Consolidated Revenue Fund back to lawful heirs; and,
 - (c) bona vacantia deposits.

This list was reviewed by me and members of my staff. I will further address the confusion surrounding the identification of the record in Issue B.

5. During our effort to mediate this matter, the appellant narrowed his request to the "names only" of escheated estates. Further efforts to resolve the appeal were unsuccessful and both parties requested the resolution of the matter by way of inquiry.

6. By letter dated January 31, 1989, I notified the appellant and the institution that I was conducting an inquiry to

review the decision of the head. Enclosed with this letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals

Officer's Report indicates that the parties need not limit themselves to the questions set out in the report.

7. Both written and oral representations were made by each party. The institution appropriately provided "in the alternative" arguments, citing section 21 and 22 as applying to the record. The appellant was afforded an opportunity to address those exemptions.
8. I have considered all representations in making my Order.

It should be noted at the outset, that the purposes of the Act as set out in subsection 1(a) and (b) are:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public;
 - (ii) necessary exemptions from the right of access should be limited and specific, and...
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head. Where, as here, an institution purports to withhold records from disclosure pursuant to a

confidentiality provision, the onus is on the institution to prove that the confidentiality provision in question operates to bar the application of this Act.

The issues arising in this appeal are as follows:

- A. Whether section 18 of the Public Trustee Act is a confidentiality provision barring the application of the Freedom of Information and Protection of Privacy Act, 1987.
- B. If the answer to Issue A is in the affirmative, whether the record in question falls within the scope of the "confidentiality provision" relied on.
- C. If the answer to Issue B is in the negative, whether the record in question falls within the mandatory section 21 exemption.
- D. If the answer to Issue C is in the affirmative, whether the severability requirements of subsection 10(2) apply to the record in question.
- E. If the answer to Issue C is in the affirmative, whether there is a compelling public interest in disclosure of the record exempted under section 21 that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.
- F. If the answer to Issue C is in the negative, whether the record falls within the discretionary subsection 22(a) exemption.

ISSUE A: Whether section 18 of the Public Trustee Act is a confidentiality provision barring the application of the Freedom of Information and Protection of Privacy Act, 1987.

Subsection 67 of the Act reads as follows:

67.__(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

(a) the repeal of unnecessary or inconsistent provisions; and

(b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

Section 67 does not contain an exemption to the Act's disclosure obligations. Rather, subsection 67(2) provides that the Act overrides "confidentiality provisions" in other legislation, unless the other legislation specifically provides otherwise. However, because subsection 67(3) delays the application of subsection 67(2) until January 1, 1990, a head may be bound or entitled not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date.

In this appeal, the institution has relied on section 18 of the Public Trustee Act, R.S.O. 1980, c.422 as a "confidentiality provision" which prevents the head from disclosing the record in issue. That provision reads as follows:

18. Every person employed in the performance of the duties imposed upon the Public Trustee by this or any other Act or by the Lieutenant Governor in Council shall preserve secrecy with respect to all matters that come to his knowledge in the course of such employment and shall not communicate any such matters to any person other than to a person legally entitled thereto or to his legal counsel except as may be required in connection with the administration of this Act and the regulations under this Act or any proceedings thereunder.

I have considered confidentiality provisions in a number of Orders to date, eg., Order 9 (Appeal Number 880016), Order 15 (Appeal Number 880010), and Order 62 (Appeal Number 880138).

Clearly, section 18 of the Public Trustee Act employs express mandatory language prohibiting disclosure of certain information. Accordingly, I find that section 18 of the Public Trustee Act is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

ISSUE B: If the answer to Issue A is in the affirmative, whether the record in question falls within the scope of the "confidentiality provision" relied on.

Having found that section 18 of the Public Trustee Act operates to bar the application of this Act until January 1, 1990, it is my responsibility to ensure that the information contained in the requested record falls within the scope of the confidentiality provision.

Before making a finding on this issue, I find it appropriate to elaborate on something I touched on earlier, namely, the institution's identification of the record in issue.

While it is the case that the requester sought "...the details as found in Form #1 for the estates escheated in '86_'87", the context of the request is such that it should have been clear to an experienced employee of the institution that the record the requester was seeking was the list, produced by the office of the Public Trustee, containing, among other things, the names of persons who died intestate and whose monies were paid into the Consolidated Revenue Fund.

While, in the end, the proper record has been identified and reviewed by myself and my staff, I cannot emphasize enough the importance of initial clarification and investigation upon receipt of a request. This would assist institutions in searching for and locating records that respond to the request.

Returning to the issue of the scope of the confidentiality provision, the institution made two arguments in support of its position that the record in issue falls within the ambit of section 18. First, they argued that the Public Trustee is required to preserve secrecy and to refrain from communication "except with persons legally entitled to receive information or their counsel and as except as may be required in connection with the administration of the Public Trustee Act and regulations". The institution claimed that section 18 only entitles the person to whom the information relates, and his or her counsel, access to the information, thereby precluding the appellant, who is an "heir tracer", from obtaining access to this information.

Secondly, the institution submitted that "information provided pursuant to the regulations is public information within the surrogate courts system but it is submitted that this information contained in the surrogate court is there as a public record but may not be sought as of right from the Public Trustee pursuant to any statute in existence prior to the Freedom of Information and

Protection of Privacy Act, 1987" and that nothing in the Act legally entitles the requester to receive this type of information.

The appellant submitted that what he is asking for is "...public information which has been filed under section 14 of the regulations under the Public Trustee Act, nothing more."

By way of background, until section 14 of Regulation 887 was revoked in August 1988, the Public Trustee filed a Form 1 with the Surrogate Court so as to administer a deceased person's estate. The revocation of the regulation, however, has not dispensed with the Surrogate Court's requirement that a form be filed. The present form contains essentially the same information as the former Form 1.

The information contained on the Form 1 filed with the Surrogate Court and available to the public is: name, last known address, marital status, occupation, date and place of death, name of surviving next of kin (if known) and dollar value of the whole property.

The record the appellant has requested is a particular synthesis, produced by the Public Trustee, of the publicly available information; namely, a list of names of estates administered by the Public Trustee from which funds have been deposited into the Consolidated Revenue Fund.

I find that the record in issue does not fall within the scope of section 18 of the Public Trustee Act, for two reasons:

The general requirement to preserve secrecy cannot be said to extend to information that is accessible to the public in another form at the Surrogate Court. Further, section 18 includes an exception to the confidentiality provision by providing that secrecy must be preserved "...except as may be required in connection with the administration of this Act or any proceedings thereunder". In order to administer this part of the Public Trustee Act, the Public Trustee is required to proceed through the Surrogate Court, making certain information and records available to the public. For these reasons, I find that the protection of the confidentiality provision is not extended to the record in issue.

ISSUE C: If the answer to Issue B is in the negative, whether the record in question falls within the mandatory section 21 exemption.

In all cases where an institution purports to rely on the mandatory exemption provided by subsection 21(1) of the Act, it is my responsibility before deciding whether the exemption applies, to ensure that the information withheld falls within the definition of "personal information" in subsection 2(1) of the Act.

Subsection 2(1) reads as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In the circumstances of this appeal, I find that the names of deceased persons whose estates escheated to the Crown, and which were ultimately paid into the Consolidated Revenue Fund, are personal information as defined in the Act.

The institution relies on subsection 2(2) which provides as follows:

- (2) Personal information does not include information about an individual who has been dead for more than thirty years.

The institution submits that subsection 2(2) "keeps information about a deceased person private and protected for a period of thirty years from the deceased person's death".

Subsection 2(2) must be viewed in conjunction with section 21. While section 21 is a mandatory exemption, it does not totally prohibit the release of personal information. Rather, it prohibits the release of personal information except in a number of circumstances, one of them being "if the disclosure does not constitute an unjustified invasion of personal privacy" (ss.21(1)(f)). A more proper reading of subsection 2(2), then, would be that if the release of personal information constitutes an unjustified invasion of personal privacy, the protection of section 21 extends to a deceased person's personal information for a 30 year period from the date of his or her death.

Subsection 21(2) of the Act provides some of the criteria which the head shall consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Pursuant to this subsection, the institution made a claim under 21(2)(f) and stated that "a tracing of the names of persons whose estates are transferred to the escheats account would lead to or could lead to unjustified invasions of personal privacy either of the deceased himself or of his relations because the information is capable of being highly sensitive..."

The institution made a further argument, pursuant to subsections 21(3)(a) and (f) of the Act, that unjustified invasions could or would occur because "...psychiatric history may be inferred therefrom and a person's net worth, assets and finances may be disclosed in whole or in part".

Leaving aside the issue of whether the Act can extend to protect the privacy of a person to whom the information is not even about, such as relatives of a deceased, the institution's arguments are partly based on the potential damage which, in its view, could result from "heir tracing" services:

An heir tracer in searching for lawful heirs has to have certain financial information and information relevant to employment, racial or ethnic origin, for the purposes of distinguishing one John Smith from another John Smith. The Public Trustee submits that such information is protected and any information which would lead someone to discover such information must also be protected except to the extent that it has been made public property by virtue of the surrogate court system.

Heir tracers, and indeed all members of the public, have access to the type of information referred to above by the Public Trustee. The harms attributed by the Public Trustee to this information being publicly available are not logically connected to the list of names requested. I cannot see that this particular list of names is highly sensitive, nor relating to psychiatric history or finances.

I find that while the record in issue contains personal information, it meets the exception to the exemption found in subsection 21(1)(f) and, subject to my finding on the institution's claim under subsection 22(a), cannot be withheld.

Having answered Issue C in the negative, there is no need for me to consider Issues D or E.

ISSUE F: If the answer to Issue C is in the negative, whether the record falls within the discretionary subsection 22(a) exemption.

Subsection 22(a) reads as follows:

22. A head may refuse to disclose a record where,
 - (a) the record or the information contained in the record has been published or is currently available to the public.

The institution submits that "...the Form 1 requested by the requestor (sic) is already a form of record in the surrogate courts system available to the public. Further, the fact that the Public

Trustee is administering any particular estate may be ascertained from the offices of the surrogate court of Ontario and reference to notices to creditors and death notices appearing in newspapers currently published or previously published which may be obtained through the public library system gives the names of deceased persons whose estates are administered by the Public Trustee."

It has already been established that the record in issue is a particular list of names and that only the Public Trustee has custody of this record. Accordingly, I reject the institution's arguments on this issue and find that the subsection 22(a) discretionary exemption does not apply to the record in issue.

In summary, I order the head to release to the appellant the list of names of estates, administered by the Public Trustee, from which funds have been transferred to the Consolidated Revenue Fund, for the years 1986 and 1987.

I order the head to release this list within twenty (20) days of the date of this Order, and to advise me of the date of release within five (5) days of the date of release.

Original signed by: _____
Sidney B. Linden
Commissioner

July 7, 1989
Date