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

ORDER PO-1717

Appeal PA-990029-1

Office of the Public Guardian and Trustee

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BACKGROUND:

The Estates and Corporations Unit of the Office of the Public Guardian and Trustee deals with the estates of individuals who, while residents of Ontario, die testate or intestate without next-of-kin able or willing to administer their estates. The Public Guardian and Trustee becomes the court-appointed estate trustee and searches for beneficiaries or next-of-kin who could be heirs entitled to all or part of the assets of the estate. If lawful heirs cannot be found, the estate escheats to the Crown. Although no further interest is paid on the liquidated assets after the deceased has been dead for ten years, an individual can prove entitlement at any time and receive his or her lawful share.

Certain individuals and organizations are in the business of identifying and locating heirs of estates that have not been claimed or have escheated to the Crown (heir tracers). They do so, in part, by seeking information held by the Office of the Public Guardian and Trustee (the PGT).

NATURE OF THE APPEAL:

The PGT received a request under the Freedom of Information and Protection of Privacy Act (the Act) from an heir tracer who wanted access to a record which would substantiate whether the estate of a named individual who died on or about February 1, 1976 remained solvent or had already been paid out to the heirs.

The PGT identified a one-page computer printout as the only responsive record. Entries on this printout relate to the administration of the funds of this estate, and indicate whether or not heirs have been paid. Access to the records was denied pursuant to section 21(1) of the Act.

The requester (now the appellant) appealed the PGT's decision. In his letter of appeal he states:

> Please note that I have enclosed a copy of a "Status Letter" ... that contains the same [type of] information that we presently seek. Such letters are provided to us to a limit of three per month, as we have been advised by [a named employee of the PGT] that this is the maximum number of requests that she can handle given her daily workload. Because the volume of our requests exceeds this level [the named employee] suggested that we pursue any additional requests under the (FOI) Act. We have complied with this suggestion and quite frankly are surprised at the refusal of [the PGT] to respond to our requests.
>
> Please also note that some time ago we purchased a list of escheated estates, that we were able to obtain as a result of [the Commissioner's Office]'s help. We began working on a number of these files and found that although all of them had escheated, many of them had already been claimed. By working on files that had already been claimed we wasted a significant amount of our time and money, as well as the time and resources of various offices of the [Ministry of the Attorney General]. In addition, a number of other Ministry Offices that we deal with also expended their scarce resources in their efforts to assist us with cases that had already been claimed. We wish to avoid duplication of everyone's

> efforts and to help the beneficiaries of these escheated assets recover what is rightfully payable to them.

During mediation, the appellant clarified that he is not seeking any financial information about the estate, and only wants to know whether the estate has been claimed, is in the process of being claimed, or remains unclaimed. Consequently, the portion of the record containing details of the financial value of the estate was removed from the scope of the appeal.

In addition to the name and Social Insurance Number of the deceased individual, the printout contains transaction entries which reflect activity on the file over the course of administering her estate. One transaction entry contains information which would confirm whether or not the estate is solvent. No financial details contained in the record are at issue in this appeal.

During mediation, the appellant claimed that there is a compelling public interest in disclosure of the record under section 23 of the Act.

Mediation was not successful, and I sent a Notice of Inquiry to the appellant and the PGT. Both parties submitted representations in response to the Notice.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

Section 2(2) provides that:

> Personal information does not include information about an individual who has been dead for more than thirty years.

The deceased individual in this case died in 1976, which is less than thirty years ago.

The appellant submits that the "information regarding the estate of an individual is not information about the individual per se but is information relating to the estate of the individual which in a sense is an abstract entity unto itself".

The record at issue in this appeal contains information which confirms whether the named individual's estate has been claimed by heirs and is or is not solvent. In my view, this is information "about" the deceased person, and qualifies as her personal information. Because she has been dead for less than 30 years, section 2(2) makes it clear that the information is still considered her personal information for the purposes of the Act.

PERSONAL REPRESENTATIVE

Section 66(a) of the Act provides:

> Any right or power conferred on an individual by this Act may be exercised,
>
> where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

As stated earlier, the PGT acts as the court-appointed estate trustee in certain circumstances following the death of a resident of Ontario. The PGT has been appointed the estate trustee for the estate of the deceased person named in the appellant's request. As such, the Public Guardian and Trustee is the "personal representative" of this estate, as the term is used in section 66(a).

As estate trustee, the Public Guardian and Trustee is responsible for the administration of the estate, and has discretion to determine what actions must be undertaken in order to complete the administration. The PGT explains in its representations:

> At one time, the Office of the Public Guardian and Trustee responded to both oral and written requests regarding the solvency of an estate which had been administered or was still under administration by that Office without disclosing financial information. However, more recently, it has been felt that in view of the serious concern with the protection of privacy expressed in the Act, and the fact that the requests were not under subsection 66(a), the "thirty-year rule" ... should be a bar to further such disclosures. ...
> ...
>
> The Public Guardian and Trustee always seeks Court appointment prior to administering any estate. The Act allows discretion on the part of the Public Guardian and Trustee where estate administration is concerned.
>
> The approximate value of the estate would be provided to possible next-of-kin who come forward and disclose their names where there is good reason to believe that relationships can be established, as well as to actual claimants. Such limited disclosure allows these persons to decide if they wish to expend money for the genealogical research, documents and affidavits necessary to prove their claims. The Public Guardian and Trustee believes that this is a reasonable use of her discretion in the circumstances of estate administration. The appellant is not the deceased individual's next-of-kin.

The PGT acknowledges the informal arrangement that had been in place with the appellant to deal with his requests for information regarding the status of estates, but goes on to state:

> [The PGT] has now decided in the exercise of her discretion under subsection 66(a) of the Act, that such information will be released only to possible next-of-kin who disclose their names (or to their legal representatives) where there is good reason to believe that relationship can be established, as well as to actual claimants who have proved their entitlement. Of course, the exercise of the power to release information must relate to the administration of the deceased individual's estate and not arise from a general enquiry concerning its value or stage of administration. The policy of the Office of the Public Guardian and Trustee is now one of non-disclosure of personal information gleaned from estate files either orally or in writing to anyone save actual or potential heirs and next-of-kin who have been in contact with the Public Guardian and Trustee and have identified themselves.

The appellant submits that until his request was made under the Act, the Ministry had always provided him with the type of information at issue in this appeal. He reiterates the comments made in his letter of appeal, quoted earlier in this order.

The PGT and the appellant both identify the possible relevance of section 63(2) of the Act, which states:

> This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

The appellant points to this section in support of his position that the information he is seeking was public information prior to the creation of the Act; and the PGT identifies the section to support its decision not to provide access to personal information that may have previously been disclosed.

The purpose of section 63(2) is to make it clear that any practice of routinely or informally disclosing information by government institutions prior to the Act coming into force should not be encumbered by the creation of the new statutory scheme. Exemption claims, with few exceptions, are discretionary in nature, and this section recognizes that information can continue to be disclosed even if it would qualify under one of the discretionary exemption claims. However, section 63(2) also makes it clear that disclosure practices relating to personal information fall outside the scope of this section and must be governed by the formal access procedures and privacy protection provisions of the Act.

The appellant cannot rely on disclosure practices which pre-date the Act as the basis for requesting access to personal information, and the PGT is correct in its position that it must discontinue any disclosure practices involving personal information that are not in compliance with the Act. That being said, the Act has been in force since January 1, 1988, and I would have expected changes in personal information management practices required to comply with the Act to be well established by the PGT by this point, almost 12 years after its enactment.

The PGT has decided to take a different approach in exercising its discretion to provide information relating to the administration of estates under its authority. The PGT has statutory responsibilities and expertise in the area of estates administration, and the authority to exercise discretion regarding what information can and should be disclosed in order to discharge its duties. Although the change in practice recently implemented by the PGT may impact on the ability of heir tracers and others to obtain information on an informal basis, in my view, it is within the PGT's authority to make this change, and the actions of the PGT do not conflict with the operation of section 66(a) of the Act.

INVASION OF PRIVACY

Once it has been determined that a record contains the personal information of individuals other than the appellant, section 21(1) of the Act applies. This provision prohibits the disclosure of this information except in certain circumstances.

The appellant claims that the exceptions set out in sections 21(1)(c), (e) and (f) of the Act apply in the circumstances of this appeal.

Section 21(1)(c)

Section 21(1)(c) of the Act states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > personal information collected and maintained specifically for the purpose of creating a record available to the general public;

As stated earlier, the individual who is subject of the appellant's request died in 1976. The statutory scheme in place at that time allowed the Public Trustee to file a "Form 1" with the Surrogate Court as part of its application to administer the estate. This form contained information about the estate, and is a public document. I am advised that similar information is currently available to the public on a form entitled "Application for Certificate of Appointment of Estate Trustee Without a Will", for a fee, from a court office in the district where the individual's estate is located.

The appellant provided a copy of the "Form 1" relating to the deceased's estate, and submits that the form:

> ... lists any known relatives or the fact that, in this case, there were none found. We submit that it is only a logical extension to learn from [the PGT] that the factors listed in this document still apply: namely that no known heirs have been located and/or that the estate is still solvent (not paid out to the heirs).

The PGT submits that:

> Generally speaking, personal information is not collected by the Office of the Public Guardian and Trustee for the purpose of creating a record available to the general public, but, in the case of estates of deceased individuals, for the purposes of administering those estates and distributing their net assets, if any, in the most efficient and economical manner to those lawfully entitled to those assets.

I accept the PGT's position. The one-page printout is not created under any specific statutory authority, as was the case with the "Form 1" records, or as is the case for death records collected and maintained by the Ministry of Consumer and Commercial Relations under the Vital Statistics Act. In my view, the PGT maintains information regarding the status of a particular estate, including the record at issue in this appeal, for the purpose of administering its responsibilities as an estate trustee, and I find that the information contained in this record was not "collected and maintained specifically for the purpose of creating a record available to the general public" as required by section 21(1)(c).

Section 21(1)(e)

Section 21(1)(e) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations;

The appellant submits that "Our firm conducts research for a number of clients as well as for ourselves. We feel strongly that [section 21(1)(e)] of the act applies."

The PGT submits that there "has never been any agreement submitted to the Office of the Public Guardian and Trustee by the appellant as required by regulation made under the Act and contemplated by the provisions of the third element of clause 21(1)(e)".

I accept the PGT's position on this point. The appellant has not provided any evidence to establish that he has signed a research agreement with the PGT as required by section 10(1) of Regulation 460 of the Act. This is necessary in order to meet the requirement of part (iii) of section 21(1)(e) and, in its absence, I find that the exception provided by section 21(1)(e) does not apply.

Section 21(1)(f)

Section 21(1)(f) of the Act states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(3) sets out circumstances in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, it can be overcome if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) ((John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)).

If none of the presumptions in section 21(3) apply, the PGT must consider the application of the factors in section 21(2), as well as all other relevant circumstances.

The PGT relies on the presumption contained in section 21(3)(f), which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The PGT submits that:

> In the context of this inquiry, the record requested would at least describe the individual's net worth and, perhaps more indirectly, finances and assets. It is submitted that information as to the solvency or otherwise of an estate under administration and as to whether or not it has been distributed to beneficiaries, in circumstances where the person whose estate is being administered has been dead for less than thirty years is indeed personal information and presumed to constitute an unjustified invasion of personal privacy if released.

As stated earlier, the portion of the record that remains at issue in this appeal contains no financial information. The record in severed form simply indicates whether or not the estate is solvent or has already been claimed by heirs. I do not accept the PGT's position that this information falls within the scope of the section 21(3)(f) presumption. It does not **describe** the deceased individual's finances, net worth or assets. Although it might be argued that if an escheated estate is still solvent, disclosure of information that would confirm this status would indirectly disclose the net worth of the estate, this is not an argument I would accept. The net worth of the estate has grown through the addition of interest accrued over the first ten years following the death of the deceased, and the value of the estate in 1976 is not the same as its value at the time it escheated to the Crown. Therefore, I find that disclosure of the status information requested by the appellant would not directly or indirectly describe the deceased's finances, income, assets or net worth, and the section 21(3)(f) presumption does not apply.

If none of the presumptions in section 21(3) apply, the PGT must consider the application of the factors in section 21(2), as well as all other circumstances that are relevant in the circumstances of the case.

The appellant submits that disclosure of the information would not constitute an unjustified invasion of personal privacy, and points to the factors which favour disclosure in sections 21(2)(a), (b) and (c) in support of his position. These sections state:

> A head, in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;

Section 21(2)(a)

The appellant submits that:

> Disclosure of such information assists third parties in determining the efficiency of the Ministry of the Attorney General as one of their functions is to locate unknown heirs and distribute such funds to the same. If the Ministry is successful in keeping this information from public scrutiny then it becomes more difficult for the public to assess the performance of the Ministry.

The PGT disputes any connection between disclosure of the record and public scrutiny.

I agree with the PGT. The appellant carries on the business of heir tracing, and has made this request in the ordinary course of his business activity. The appellant's representations on this issue do not persuade me that a public scrutiny concern exists, nor how disclosure of the particular record at issue in this appeal is desirable for the purpose of subjecting the Office of the Public Guardian and Trustee to public scrutiny. Accordingly, I find that section 21(2)(a) is not a relevant consideration.

Section 21(2)(b)

The appellant contends that there is a connection between health and income. He submits that if he obtains access to the record he will promote public health by distributing wealth to the heirs. In my view, the linkage between access to the record and improved public health is too remote to satisfy the requirements of section 21(2)(b), and I find that it is not a relevant consideration.

Section 21(2)(c)

The appellant submits that by obtaining access to the information, "... our firm and the clients that engage our services will be able to make more informed choices in the purchase of related goods and services that are required to effect the recovery of their portions of such estates (ie legal services, vital statistic documents etc.)".

Again, I do not accept the appellant's position. I do accept that disclosure of the information might enable the appellant to more efficiently conduct his heir tracing business, but I am not persuaded that this in and of itself would "promote informed choice", as the appellant appears to argue. In my view, section 21(2)(c) is not a relevant consideration in the circumstances of this appeal.

Other section 21(2) listed factors

The PGT does not identify the relevance of any factors listed under section 21(2) that favour privacy protection. I have reviewed these factors, and find that none of them is relevant in the circumstances. Information concerning the status of the deceased's estate is not highly sensitive or unlikely to be accurate or reliable. It was clearly not provided in confidence and its disclosure would not unfairly damage the reputation of any individual or expose anyone unfairly to pecuniary or other harm.

Unlisted factors

The factors listed in section 21(2) of the Act are not exhaustive. Unlisted factors may also be relevant, depending on the particular circumstances of an appeal. One such factor that has been recognized in past orders is a diminished privacy interest after death (Order M-50). The appellant identifies this as a factor favouring disclosure in the present appeal.

I agree with the statement made by former Commissioner Tom Wright in Order M-50, that:

> Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

A decision to consider this factor, and the assessment of the weight to be given to it in a particular appeal, must be made in the context of section 2(2). In that section, the legislature makes it clear that information about an individual remains his or her personal information until thirty years after death, signalling a strong intention to protect the privacy rights of deceased persons.

The deceased individual in this case has been dead for 23 years, which is a relatively long period of time. Although the PGT may be in possession of a considerable amount of personal information concerning the deceased, very little personal information is contained in the record at issue in this appeal. At the time of death, information concerning the existence of heirs and the overall value of the estate was made available to the public through the statutory registration requirements in force at that time. The information at issue in this appeal would simply confirm that status, without disclosing or re-disclosing any financial information. In my view, all of these considerations lessen the privacy interest of the deceased individual and support the appellant's position that the record should be disclosed.

The appellant identifies another unlisted factor. He submits that disclosure of the requested information pertaining to the deceased's estate will help unknown heirs recover funds that they would otherwise be unlikely to receive. I considered this factor in Order P-1493, involving a request by an heir tracer to the Ministry of Consumer and Commercial Relations for access to marriage and death records. In Order P-1493 I stated:

> In the appellant's view, disclosure of the records would serve to benefit individuals who would otherwise never know and never be able to prove their entitlement under an estate. Although not directly related to any of the section 21(2) considerations, I find that this is an unlisted factor favouring disclosure.

Similarly, I find that this unlisted factor is a relevant consideration in the present appeal.

The weight given to this factor varies depending on circumstances. In Order P-1493, I found that the weight given to this unlisted factor, which was the only factor favouring disclosure in that case, was not sufficient to outweigh privacy interests in those circumstances. I will now consider the particular circumstances of the present appeal in order to determine the appropriate weight to be given to this factor.

Two previous orders of this agency have found that disclosure of information relating to escheated estates would not constitute an unjustified invasion of personal privacy.

In Order 71 former Commissioner Sidney B. Linden considered a request made by an heir tracer to the [then] Public Trustee for access to estates which had escheated to the Crown in 1986 and 1987. The request was narrowed on appeal to the names of these estates, and Commissioner Linden concluded in his order that:

> ... 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 findings on the institution's claim under subsection 22(a), cannot be withheld.

Commissioner Linden went on to find that section 22(a) did not apply, and ordered the Public Trustee to disclose the list of escheated estate names.

Former Adjudicator Donald Hale dealt with a similar case in Order P-1187. The request in that appeal involved the names and dollar amounts for all escheated estates over a specified time period that were valued at more than $10,000. Adjudicator Hale applied the reasoning set out in Order 71, and found that disclosure of the names (but not the dollar values) of the escheated estates would not constitute an unjustified invasion of the personal privacy of the deceased persons, and ordered disclosure of the estate names.

The record at issue in this appeal contains less personal information than the records at issue in Orders 71 and P-1187. In this case, the name of the deceased is known to the appellant, and no other individuals would be identified through disclosure of the record. The nature of the information at issue - the status of the escheated estate - and the minimal amount of personal information that would be disclosed, in my view, lessens the privacy interest of the deceased individual and supports the appellant's position that the record should be disclosed. It is also relevant to note that less information would be released through the disclosure of the severed record at issue in this appeal than was disclosed by the PGT in compliance with previous orders of this Office involving similar records. This also supports the appellant's position that the record should be disclosed.

Although I have found no specific listed or unlisted factors favouring privacy protection under section 21(2), there are significant privacy interests inherent in section 21(1). However, the legislature recognized in its design of the personal information exemption claim that privacy rights are not absolute. It introduced a number of exceptions in section 21(1), and a scheme for balancing privacy interests with other competing access interests in determining whether disclosure would constitute an unjustified invasion of privacy under section 21(1)(f). The rationale for this balancing exercise can be traced to discussions of the Commission on Freedom of Information and Individual Privacy/1980 (the Williams Commission) (see vol. 2, p. 325); and has also been discussed in previous orders of this Office (eg. Order M-619).

In the circumstances of the present appeal, the inherent privacy interests of the deceased individual must be balanced against the two significant unlisted factors which I have found lessen the weight of any privacy interests and favour disclosure. In weighing these competing interests and considering previous similar orders of this Office involving access to information regarding escheated estates, I have concluded that the factors favouring disclosure are stronger. Therefore, I find that disclosure of the remaining portions of the record, with the exception of the deceased's social insurance number which appears at the top of the page, would not constitute an unjustified invasion of privacy, and the exception in section 21(1)(f) applies.

It is important to state that this finding is specific to the particular type of record at issue in this appeal. It does not apply to other records within the custody and control of the PGT relating to the estate of the deceased which may contain different types of personal information and/or personal information of individuals other than the deceased; nor to other different records created and maintained by the PGT in the course of administering its mandate.

Because of my findings it is not necessary for me to address the possible application of section 23 of the Act.

ORDER:

1. I order the PGT to disclose the record to the appellant, subject to the severance of the deceased person's Social Insurance Number and any financial information contained in the record, by sending him a copy by **October 15, 1999**. I have attached a highlighted version of the record with the copy of this order sent to the PGT's Freedom of Information and Privacy Co-ordinator which identifies the portions that should **not** be disclosed.

2. In order for me verify compliance with this order, I reserve the right to require the PGT to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: September 24, 1999
Tom Mitchinson
Assistant Commissioner