



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1761

Appeal PA-990170-1

Public Guardian and Trustee



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NATURE OF THE APPEAL:

The Public Guardian and Trustee (the PGT) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to “the handling” of the estate of a named individual (the deceased). The requester stated:

I am requesting to view “all passing of accounts” and I understand there are more than one. Essentially, I would like to see all monetary and asset transactions and their description going in and out of the estate, from day one to-date.

In response, the PGT stated that the request “does not provide sufficient detail to enable us to determine responsive records.” The PGT stated:

The passing of accounts is a particular court proceeding during which a number of documents are filed with the Court including statement of accounts and the Application Record.

The PGT then asked the requester to provide more detail about the nature of the information sought. The PGT also stated that the information the requester sought may be available through court offices. In reply, the requester stated that she wanted to view “all documentation in the file excluding the documents filed with [the court], the Objection Against Compensation, filed by the [PGT] and the Executor’s Submission re Compensation [requester’s emphasis].” The requester added that she would like “to review all disbursements out of [a named company] that was included in the Executor’s response.”

The PGT identified approximately 177 pages of records responsive to the clarified request, relating to a company wholly owned by the deceased’s estate (the company). The PGT then wrote to the requester advising that the request for access was being denied in full:

Access to the record (approximately 177 pages) is denied under section 21 of the Act as disclosure would constitute an unjustified invasion of another individual’s personal privacy
...

The exempt material consists of financial records including the statement of accounts (capital and revenue disbursements), statements of earnings, statements of loss and a calculation of compensation.

The requester, now the appellant, appealed the PGT’s decision to this office. In her letter of appeal, the appellant stated:

I requested information under [the Act] as the concerns expressed by the [PGT] included in the Notice of Objection to Accounts filed at the [court] in the estate of [the deceased] were of the same nature as raised by some citizens. I requested documentation from the [PGT] to confirm that the concerns addressed by the [PGT] had been satisfied appropriately.

During the mediation stage of the appeal, the scope of the records at issue in this appeal was narrowed to include only nine pages of records. In addition, the appellant raised the possible application of the “public interest override” at section 23 of the Act.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant and the PGT, and received representations from both parties.

RECORDS:

The nine pages of records at issue in this appeal consist of nine one-page Statements of Loss/Earnings for the company for the years 1987 to 1995.

DISCUSSION:

PERSONAL INFORMATION

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

The PGT submits:

... the information being requested is personal information as defined under the Act. Clause 2(1)(b) defines Personal information in part, to mean “recorded information about an identifiable individual, including ... any identifying number, symbol or other particular assigned to the individual ...”

The Office of the Information and Privacy Commissioner (the “Commissioner”) has interpreted the term “identifiable individual” as referring to a natural person, not to other business entities such as corporations, partnerships, sole proprietorships or business organizations (Order P-300). However, the Commissioner has also recognized that some information relating to a business entity may, in certain circumstances, be so closely related to the personal affairs of an identifiable individual as to constitute that individual’s personal information (Orders 113, P-364, M-138, Reconsideration Order R-980015).

In Reconsideration Order R-980015 Adjudicator Donald Hale reviewed Orders in which the Commissioner had found information related to business entities to be personal information. Following a brief description of each Order, Adjudicator Hale stated:

In all of these latter cases, the information at issue either fell within a specifically enumerated category under the definition of personal

information or had some other personal, as opposed to professional or representative, quality about it such that it could be said to be "about" the identifiable individual in each case.

The [Commissioner] has found information relating to business entities to constitute personal information of the person or persons who own the business entity in a number of circumstances ...].

... information relating to the finances of a corporation or business entity owned by one individual, particularly information pertaining to the earnings and/or value of the business entity, is information that can easily be attributed to the owner of a business entity ... [Orders P-364, P-705, M-277] demonstrate that in the case of sole shareholder business entities, the [Commissioner] has consistently found information relating to the earnings and value of the business to be the personal information of the owner of the business entity [T]his approach is consistent with the statements of Adjudicator Donald Hale in Reconsideration Order R-980015 because of the earnings and value of a sole shareholder corporation is information which relates to the sole shareholder in his or her personal capacity.

The records at issue are pages from [the company's] annual financial statements that were provided to the [PGT] by the executor at the same time that the Notice of Application to Pass the Accounts of the estate was served on our office ... [T]he company's financial statements were intended to be voucher material on the Passing of the estate Accounts which would provide evidence of 1) the value of [the company] as an asset of the estate and as a component of the Deceased's net worth, 2) the payment of the bequest of residue to charitable organizations to be selected in the discretion of the executor and 3) to confirm the proper administration of the estate.

... [T]he annual earnings or losses of a business corporation is an important component or indicator of its value. Disclosing [the company's] income, expenses and annual net earnings or loss provides information about the corporations value. Reviewing [the company's] annual income and expenses and annual net earnings or loss allows one to form expectations as to the company's future earnings and the riskiness of those future earnings. This information is a key element of the corporation's value.

... [R]eleasing information about [the company's] value will disclose information about the assets and net worth of the Deceased since [the company] was solely the Deceased's asset.

[The company's] net earnings reflect the amount of income generated by the corporation for its sole shareholder and the earnings reveal information about [the company's] value. The corporation's net earnings are the shareholder's income. Since [the company] was
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wholly owned by the Deceased, information about the earnings and/or value of [the company] is information “about” the Deceased. Therefore, ... the records at issue contain personal information of the Deceased, who is an identifiable individual.

The appellant submits:

I am of the opinion that section 21(1) does not apply to this situation as the documentation requested pertains to a corporation and not an individual.

In Order P-364, involving a request for a report about a cattle farming operation owned by a husband and wife, Assistant Commissioner Tom Mitchinson stated:

The record relates to the affected parties’ cattle farming operation and, as such, contains information related to a business. The question of whether information about a business can be considered personal information has been canvassed in previous orders. In Order 16, former Commissioner Sidney B. Linden made the following general statement:

The use of the term ‘individual’ in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended ‘identifiable individual’ to include a sole proprietorship, partnership, unincorporated association or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

Having reviewed the record and the representations provided by the various parties, I feel that this appeal represents the type of exceptional circumstance envisioned by Commissioner Linden in Order 113. The affected parties in this appeal are a couple who own the cattle farming operation which is described in the record. They are in the business of buying and selling cattle, and their livelihood depends to a large extent on the health and condition of their herd. The record contains detailed information about the history, management and health of their cattle, including a description of all purchases and sales made over a two year period. In my view, there is a sufficient nexus between the affected parties’ personal finances and the contents of the report to properly consider the information contained in the record to be the personal information of the affected persons.

Therefore, I find that the record qualifies as the personal information of the affected persons under section 2(1) of the Act, in the particular circumstances of this appeal.

In this case, I accept the PGT's submission that the information in the records qualifies as the deceased's personal information. While the information is clearly about the company, it is also about the deceased individual, in the sense that disclosure of the records would reveal detailed information about a business wholly owned by her. I am satisfied in the circumstances that, as in Order P-364, there is a sufficient nexus between the contents of the records and the deceased's personal finances to bring the information within the scope of the definition of "personal information".

Although the subject of the personal information is deceased, she passed away less than 30 years ago, and therefore the "personal information" definition applies [section 2(2)].

INVASION OF PRIVACY

Where a requester seeks personal information of other individuals, section 21(1) of the Act prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, the only exception which could apply is section 21(1)(f) which reads:

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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) states that despite section 21(3), a disclosure does not constitute an unjustified invasion of personal privacy if the information falls within one of three categories set out in paragraphs (a) through (c). 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].

In this case, the PGT takes the position that the presumption in 21(3)(f) (individual's finances) applies to the records. That section reads:

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 appellant makes no specific submissions on the application of section 21(3)(f) or on any portion of section 21.

In the circumstances, consistent with my findings above under "personal information", I am satisfied that disclosure of the record would reveal information describing the deceased's finances, income, assets, liabilities, net worth or financial history or activities. Although this information technically relates to the company, it also reveals information of this nature about the deceased, since she was the sole shareholder of the company. Therefore, I find that the presumption under section 21(3)(f) has been established.

Based on the application of section 21(3)(f), I conclude that the information in the records is exempt under section 21(1) of the Act.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act reads:

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

In order for the section 23 "public interest override" to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner), (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398, cited above].

The appellant submits:

... [S]hould your office find that section 21(1) does apply, it is my opinion that section 23 allows for an exemption due to the compelling public interest in this matter, as the residue of the Estate was to go to Registered Canadian Charities.

The issues and questions raised by the [PGT], via the Notice of Objection re Executor's Submission re Compensation, filed with the Ontario Court are the same in nature as raised by many citizens. The [PGT] withdrew the objection. We are satisfied with the questions raised by the [PGT]. However, were the questions satisfied prior to withdrawing the objection?

The questions that remain unanswered:

- Did the [PGT] get answers to the questions they raised in the court document prior to withdrawing the objection?
- Did the [PGT] verify the answers?
- Did the [PGT] exercise due diligence to ensure the public's interests were protected?

Due to the large value of the estate ... and that the residual of the estate ([representing] a very large portion of the estate) was to go to Registered Canadian Charities, there is a compelling public interest in the disclosure of these records.

The PGT submits:

The [appellant] has not asserted any public interest. Although the [appellant] states that she and others have the same concerns as the [PGT], the [PGT] has the role to protect charity's interests. All other persons with a financial interest in the estate would have been entitled to participate in the Application to Pass Accounts and would have been entitled to information about the administration of the estate in that proceeding.

The only public interest that the [PGT] is aware of in this matter is the public's interest in the gift of residue to charity contained in the Deceased's will, being paid to charity as intended by the Deceased. This is the very interest the [PGT] was protecting in this case ... [S]ince the [PGT] protected the public interest in the Application to Pass Accounts there is no compelling public interest in further disclosing the records that were received in the Application and that are the personal information of the Deceased.

In Order P-1331, involving a request for information relating to the PGT's role in addressing a concern about the disbursement of charitable funds, Adjudicator Mumtaz Jiwan stated:

The appellant submits that a substantial amount of money was raised publicly for a charitable purpose and a portion of the funds has yet to be accounted for. He argues that a public interest exists in that the people who contributed to the fund have a right to know how these monies were disbursed.

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I have carefully reviewed all the representations, as well as the record at issue in this appeal. In so doing, I am aware that as a result of concerns similar to those raised by the appellant, the [PGT] became involved in the investigation and the eventual resolution of this matter. In my view, any public interest that may have existed has already been served by the involvement of the [PGT]. Therefore, I am not convinced that there is a compelling public interest in the disclosure of the record at issue sufficient to outweigh the purpose of the exemption under section 21. Accordingly, I find that section 23 of the Act does not apply in the circumstances of this appeal.

Adjudicator Jiwan's statements are relevant in the circumstances of this appeal. While I accept that there is a public interest in this matter, to the extent that it involves payments of large amounts of money to charity, any public interest that may have existed in how the estate was administered have been addressed by the PGT's involvement in the passing of accounts process. I am not persuaded based on the material before me that there is a compelling public interest in scrutinizing the conduct of the PGT through disclosure of the records in this case. As a result, I find that section 23 does not apply in the circumstances.

Therefore, I conclude that the information is exempt under section 21 of the Act.

ORDER:

I uphold the PGT's decision to withhold the records at issue.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ February 29, 2000