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

Reconsideration Order PO-1790-R

Appeals PA-990087-1 and PA-990088-1

Order PO-1736

Public Guardian and Trustee

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BACKGROUND:

This order sets out my decision on the reconsideration of PO-1736 issued December 1, 1999.

The Public Guardian and Trustee (the PGT) 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 PGT 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 PGT.

The PGT received two requests under the Freedom of Information and Protection of Privacy Act (the Act) from an heir tracer for access to a list of all estates being administered by the PGT which came to its attention between September 1, 1996 and October 31, 1997 (first request) and November 1, 1997 and July 31, 1998 (second request). In his requests, the heir tracer explained that the lists should contain the same information supplied to the court when making an Application for Certificate of Appointment of Estate Trustee without a Will.

In responding to the heir tracer, the PGT created a sample record responsive to each of the two requests. The sample records consist of two charts, each of which contains information relating to four estates administered by the PGT. This information is organized under the following 11 headings:

- Client Account Number;
- Client Name;
- Client Address;
- Last Occupation;
- Place of Death;
- Date of Death;
- Value of Personal Property;
- Value of Real Property;
- Total Value of Estate;

- Inheritors; and
- Setup Date.

In its decisions, the PGT explained that the sample records contain the requested categories of information for several estates administered by the PGT whose files were opened during the period specified in the requests. The PGT denied access to the information responsive to both requests on the basis of section 21(1) of the Act, the exemption for personal information.

The heir tracer, now the appellant, appealed the PGT's decisions to this office.

During the mediation stage of the appeals, 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 these appeals to the PGT and the appellant. I received representations from both parties.

After reviewing the parties' representations, I issued Order PO-1736. I found that all of the information at issue qualifies as "personal information" under section 2(1) of the Act. I further found that all of the information was exempt under section 21(1), with the exception of the Client Name, Client Address, Last Occupation, Place of Death and Date of Death information. Finally, I concluded that the section 23 "public interest override" does not apply to the information found exempt under section 21.

REQUEST FOR RECONSIDERATION:

After I issued Order PO-1736, I received a letter from the PGT asking me to reconsider my decision on the basis that there had been a fundamental defect in the adjudication process. The PGT submitted that I erred in not taking into consideration the fact that disclosure of the information at issue may result in potential heirs paying substantial heir tracer fees which they may not have had to pay had the PGT located them first. The PGT also submitted that I erred in giving the "benefit to unknown heirs" factor too much weight in the circumstances. The PGT made detailed submissions in support of these points.

In response, I wrote to the PGT indicating that, in my view, the PGT had established a prima facie case for reconsideration. I also stated that before I made a final decision, I would invite the appellant to make submissions on both the issue of whether or not I should reconsider, as well as on the substantive issues raised by the PGT's request. I also advised the PGT that I would provide the appellant with the PGT's reconsideration letter. Finally, I indicated that the PGT would be provided with a copy of the appellant's submissions, and given an opportunity to reply.

In accordance with the above I received submissions from the appellant and reply submissions from the PGT.

DISCUSSION:

SHOULD ORDER PO-1736 BE RECONSIDERED?

The Information and Privacy Commissioner has developed a policy which sets out the grounds upon which a decision-maker may reconsider a decision. The policy states:

> A decision-maker may reconsider a decision where it is established that:
>
> (a) there is a fundamental defect in the adjudication process;
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> (b) there is some other jurisdictional defect in the decision; or
>
> (c) there is a clerical error, accidental error or omission or other similar error in the decision.
>
> A decision-maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

The appellant made no specific submissions on this issue.

In my view, the PGT has established that my findings under section 21 should be reconsidered. In the usual case, as stated in the policy, a decision-maker will not reconsider a decision simply on the basis that new evidence is provided. It is arguable that some or all of the points raised by the PGT could be considered "new evidence." However, this case is not the usual case, since the interests of affected persons (deceased individuals and potential heirs) are affected by the appeal and the issues raised in the PGT's reconsideration request, yet in the circumstances these individuals cannot be notified. As a result, I find that I should reconsider my section 21 findings, in order to take into account any further arguments with respect to the interests of the affected persons.

INVASION OF PRIVACY

Introduction

In my Order PO-1736, I found that the factor at section 21(2)(e) ("pecuniary or other harm") weighing against disclosure did not apply to the information at issue, and that the unlisted factor referred to as "benefit to unknown heirs" weighing in favour of disclosure did apply. I stated:

Section 21(2)(e) - pecuniary or other harm

The appellant submits that the individuals about whom the information is requested will not be exposed to pecuniary or other harm because they are deceased. Based on the material before me I accept that this factor is not applicable to the information remaining at issue, either with respect to the deceased individuals or the listed inheritors.

. . . . .

Unlisted factor - benefit to unknown heirs

. . . . .

I agree with the approach taken by the Assistant Commissioner in [Order PO-1717] and similarly find that the potential for disclosure of the information at issue to lead to individuals proving their entitlement to assets of estates which they may not have been able to otherwise is a significant factor favouring disclosure.

This factor applies to varying degrees to the eight remaining categories of information. The appellant has provided me with representations on the extent to which these types of information are useful in his efforts to locate heirs. The appellant explains that the Client Name and Date of Death are absolutely necessary for him to carry out his task, since without this information he cannot be sure of the identity of the deceased. He further submits that the Client Address, Last Occupation and Place of Death are very important to determine or confirm the identity of the deceased, especially where the deceased's name is relatively common. The appellant states that the Inheritors' names can be useful in some circumstances, but that generally speaking this information does not assist him. Finally, the appellant states that the Client Account Number and Setup Date information are of no use to him.

In the circumstances, I find that this unlisted factor applies to a high degree to the Client Name and Date of Death, and to a moderate to high degree to the Client Address, Last Occupation and Place of Death information. I further find that this factor applies to a low degree to the Inheritors' names, but does not apply at all to the Client Account Number and Setup Date information.

In my letter to the parties seeking representations on the substantive issues raised by the PGT's reconsideration request, I asked the following questions:

(a) does the factor at section 21(2)(e) apply in the sense that affected persons (potential heirs) might suffer pecuniary harm through disclosure of the information at issue by being subjected to an heir tracer fee which might not be the case if the information was not disclosed, or disclosed at a later time?

(b) if the answer to (a) is "yes," how would this impact on the balancing of factors, both listed and unlisted, under section 21(1)(f)?

(c) should my findings on the application of the unlisted factor referred to as "benefit to unknown heirs" change in light of the PGT's submissions in its reconsideration application?

(d) if the answer to (c) is "yes," to how would this impact on the balancing of factors, both listed and unlisted, under section 21(1)(f)?

(e) what is the appropriate remedy should the timing of disclosure be found to be a critical factor in the decision under section 21(1)(f)?

I will address these questions in my analysis below.

Pecuniary harm to unknown heirs

The PGT submits that "... the release of the information as provided in Order PO-1736 would cause potential heirs to suffer pecuniary harm through an heir tracer fee, which may not be the case when the information is disclosed at a later time, e.g., in an application to the court."

The PGT submits that in a 1992 Provincial Auditor report, it had been "severely criticized" for its lack of effectiveness in carrying out searches for heirs to the estates it administers, and that since 1995, "fundamental improvements have been made" in its capacity to conduct these searches. The PGT states that the "vast majority of estates opened within the past 5 years, and for which searches were initiated, are being distributed directly to heirs and not to heir tracers."

The PGT argues that if information about estates is released to heir tracers in accordance with requests under the Act, "there is a strong likelihood of heir tracer fees being charged to the next-of-kin." Further:

> ... The heir tracers do not disclose the source of the funds or the actual value of their interest, until after the next-of-kin have signed an irrevocable agreement to pay a fee. The fee is generally in the range of 24% to 40% of the individual interest in the estate. Usually the next-of-kin have no idea as to the source of the estate as they were not in contact with their deceased relative.

The PGT submits that even where its searches are unsuccessful, it will file an application to the court, whereby information about the estate becomes publically available, where:

- searches have proven fruitless after a reasonable period of time and expense;
- the estate is too small to justify the cost of a full search;
- a certificate is required quickly in order to safeguard properly the deceased's assets; or
- the delay is no longer justified in relation to the need to administer the estate.

The PGT states:

> In the last two situations, the [PGT's] research will continue and indeed, there are many estates where the heirs are in fact located by the [PGT] within months of filing the applications. However, there have also been a number of large estates in such situations where heir tracers have located and "recruited" the heirs in a matter of days or hours ahead of contact by the [PGT]. While we do not have complete information about the methods used by heir tracers, we are advised by our industry sources that when an application for a large estate is filed at the court, heir tracers will learn of it on the same day. They will literally drop all other cases and devote all their staff resources, day and night, to be the first to contact the next-of-kin. We are also informed by friends of the deceased, and frequently by the heirs themselves, that the heir tracers mislead them into a belief that they are working for the [PGT] or a law firm.
>
> **Nevertheless, because the [PGT] has legitimate access to the personal papers of the deceased and to various sources of pertinent information, we are in most cases able to locate the heirs and assist them with their documentation, far more quickly than would an heir tracer.** Under this process to date, no court applications have been required to finalize the distribution to the heirs, which demonstrates the quality of information now being obtained by the PGT.
>
> Where the [PGT] will administer an estate (as opposed to transferring the matter to the responsibility of the newly-located family members), the information requested by the Appellant is disclosed in a public record - the court file - within a reasonable time.
>
> Virtually all the estates opened in the periods covered by the current Appeal have been the subject of either an application to the court or a transfer to the administration by the next-of-kin located by the [PGT]. Therefore the risk of pecuniary loss to potential heirs is limited to a very small number in the actual case of this Appeal. However a greater risk lies in the precedent value of this Order, to potential heirs in a subsequent request for the same information in relation to a much larger number of more recent estates.
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> . . . . .

> For cases opened by the [PGT] since 1996, much greater attention has been paid to searching for the legal heirs. Our success in doing so was noted in the November 1999 report of the Provincial Auditor.
>
> Our skills and ability to search have greatly increased even in the past two years, as more databases became available through the Internet, and as our staff's knowledge and expertise in searching grew. We have developed a network of reliable [genealogists] who charge their time on a strict hourly rate, as opposed to a percentage of the value of the estate. The network now extends to allow for effective searches not only anywhere in Canada and the US, but also South America, Australia, New Zealand, all of Western Europe and an increasing number of countries in the former East Bloc.
> The Appellant argues that it is insufficient for the [PGT] to locate an heir and that the [PGT] makes no effort to assist in proving the claim in accordance with the [PGT's] requirements ... [emphasis added]

The PGT goes on to explain why it disagrees with the appellant's submission in this regard, and submits that the PGT in fact provides "considerable assistance to ... heirs."

The PGT submits that the fees it charges for heir searches can reach $5000, but "rarely exceed $1000." The PGT also states that the search cost, relative to the value of an average estate, is very low by comparison to a "25% to 40% heir tracer fee."

The appellant submits that disclosure pursuant to Order PO-1736 would not lead to any pecuniary harm to potential heirs. The appellant submits that "whether or not the PGT is able to locate a potential heir, it is clear that the PGT does not prove the heirs' claim. The truth is that the potential heirs are required to prove their own claims to the satisfaction of the PGT in accordance with the PGT's strict requirements." The appellant states:

> The fact is that the level of proof required by a next of kin to establish a claim is such that without the Appellant's work the next of kin may have never known and may never have been able to prove their claims.
>
> With respect to the Appellant's fee, the Appellant is fairly paid for the level of work which he performs and the beneficiaries for whom he acts are <u>not</u> "subjected" to a fee as is incorrectly characterized by the PGT. Before signing a retainer agreement, the potential heirs are advised to consult a lawyer and in all cases at an early stage of the investigation of the claim, the potential heirs have independent legal representation to authorize the Appellant to conduct all necessary investigations and to recover their share. The potential heirs enter into agreements with the Appellant freely and voluntarily and at all times before retaining the Appellant have the choice not to retain the Appellant. The Appellant works

> entirely out of his own pocket and is paid a commission, which covers his services and his disbursements. The Appellant is paid only if he is successful in proving the next of kin's claim and only if he has been retained by the next-of-kin. If the Appellant is unsuccessful in proving the claim of the next of kin then the beneficiary has no obligation to pay the Appellant anything. There is no liability and there is no pecuniary harm if the Appellant is unsuccessful in proving the potential heirs' claims. If the Appellant is successful in proving and in recovering the next of kin's share, there is an obvious financial benefit to the heirs in recovering their entitlement. To the best of [the Appellant's] knowledge no beneficiary who has benefited from [his] work and has recovered his or her entitlement to the estate has ever questioned the Appellant's fee for his services rendered.
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> . . . . .
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> The PGT itself charges to the estate its costs as administrator for as long as the PGT is administering the estate as well as its costs in responding to a Court application to determine heirship.
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> The PGT's own policies, its acknowledgement of the costs in complying with the policies and the costs which the PGT [charges] against the estate make the PGT's allegations of costs an irrelevant consideration to the issue in this appeal which is disclosure and the information about estates being administered by the PGT ...

In my view, the PGT has not established that disclosure in accordance with my Order PO-1736 will cause pecuniary or other harm to potential heirs for the purpose of section 21(2)(e) or otherwise under section 21. The PGT admits that "because the [PGT] has legitimate access to the personal papers of the deceased and to various sources of pertinent information, we are in most cases able to locate the heirs and assist them with their documentation, far more quickly than would an heir tracer." This statement undermines the PGT's submission that if the information is disclosed in accordance with the order, heir tracers such as the appellant will be able to locate potential heirs sooner than the PGT would, thus resulting in the heirs being charged a greater fee. Further, the PGT indicates that while it had difficulties in the past locating heirs, its "skills and ability to search [for potential heirs] have greatly increased even in the past two years ..." I am not persuaded based on the material before me that there is a serious risk of Order PO-1736 resulting in a substantial number of heirs being located by heir tracers who otherwise might have been located first by the PGT.

In addition, the PGT has not satisfied me that the circumstance of an heir tracer locating and seeking a contractual arrangement with a potential heir would constitute pecuniary or other harm. I accept the appellant's submission that potential heirs are free to either reach an agreement with an heir tracer, or not. While it may be that in some cases heir tracers have been known to mislead potential heirs during the course of contractual discussions, I do not have sufficient material before me on which to reach a conclusion that this is a significant risk. In any event, potential heirs who contract with heir tracers based on, for example, duress or misrepresentation, may seek remedies in the courts based on contract law.

Benefit to unknown heirs

The PGT relies on its representations on the "pecuniary harm to unknown heirs" issue and further states:

> ... Since the information will be disclosed within a reasonable time in our Application to the court, the benefit to the heirs in being located by the [PGT] ahead of heir tracers, and assisted in completing their documentation, far exceeds the likely cost to them of being found by heir tracers.

The appellant submits:

> The answer [to question (c)] is No. The Senior Adjudicator's findings on the application of the unlisted factor alleged by the PGT should not change the findings on the "benefits to unknown heirs."

The PGT has not persuaded me that my decision should change with respect to the "benefit to unknown heirs" factor. It may be the case that the PGT routinely discloses the information at issue through filing materials in support of court applications (although the appellant disputes this submission). In any event, the issue under this heading is whether or not there is a benefit to unknown heirs in the information being disclosed to the public. I found that there was, based on the fact that disclosure could "lead to individuals proving their entitlement to assets of estates which they may not have been able to otherwise ..." The fact that the information at issue may or may not be disclosed at another time, through another mechanism, does not impact significantly on this analysis, one way or the other, within the framework of a request under the Act. In addition, I have already considered and disposed of the PGT's argument that disclosure prior to a court filing would cause harm to potential heirs.

Although the PGT has indicated that in recent years it has achieved a higher level of success in locating potential heirs, I am satisfied that there is still a benefit to having additional resources, outside the PGT, directed towards locating these individuals, particularly in the more difficult cases. The 1999 Report of the Provincial Auditor indicated a need for the PGT to improve its searches for files set up prior to 1996, and that even in the more recent cases, despite improvements, heirs are not located in over 30% of cases.

Even if this factor were to be reduced to some extent, I am not persuaded that it would be outweighed by the "low" or "moderate" privacy interests in the information at issue.

CONCLUSION:

Having considered the representations of the parties on the reconsideration, and in all of the circumstances, I find that my Order PO-1736 should not be altered and I confirm my decision in that order.

ORDER:

1. I order the PGT to comply with provision 1 of Order PO-1736 no later than **June 21, 2000**.

2. I uphold the PGT's decision as described in provision 2 of Order PO-1736.

3. In order to verify compliance with provision 1 of Order PO-1736, I reserve the right to require the PGT to provide me with a copy of the material sent to the appellant.

Original signed by: May 31, 2000
David Goodis
Senior Adjudicator