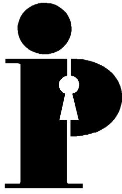

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1822

Appeal PA-990347-1

Office of the Public Guardian and Trustee

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NATURE OF THE APPEAL:

This appeal is brought by an individual (the "appellant") who is seeking access to all records held by the Office of the Public Guardian and Trustee (the "Public Guardian") in regards to his deceased father and to himself. The appellant's request for information is somewhat imprecise but makes reference to the estate of his father and to himself as executor of his father's estate.

In response to the appellant's request for records, the Ministry released 457 pages of documents to him but, in a series of three decisions, withheld an estimated 541 pages of documents responsive to his request. The withheld records, contained in three packages of documents forwarded to this Office, included correspondence, internal memoranda and notes, administrative forms, assessment forms, computer data screens, lawyers' billing reports, draft court documents, fax cover sheets and transmittal sheets, as well as a 1998 income tax return, records of cash disbursements and two indentures registered on the legal title of property.

In this decision, I identify the records with reference to one of the three packages forwarded to this Office. This is necessary because the records in each package were numbered beginning from one. The total number of pages forwarded to this Office was 538, not 541 as estimated in decision letters. This number is consistent with the indices to the three packages of materials. The following pages were duplicates of other records provided and have not been considered separately: in package one: 47-1 to 6; 60; 61; 61-2; 72; 85-5 to 7; in package two: 62-1 to 3 ; 72-4.

In withholding 538 pages of records, the Public Guardian relied on a number of statutory exemptions to the fundamental right of access to information established in the Freedom of Information and the Protection of Privacy Act (the "Act") including:

- unjustified invasion of personal privacy - section 21(1) and section 49(b)
- solicitor-client privilege - section 19
- the discretion to refuse to disclose a requester's own information - section 49(a)
- the discretionary exemptions applying to the advice of a public servant and to reports of law enforcement agencies - section 13(1) and 14(2)(a).

The appellant has challenged the decision to withhold documents and has also questioned the adequacy of the Public Guardian's search for responsive records. The appellant raised the possibility that further records exist which have not been referred to by the Public Guardian.

This Office sent a Notice of Inquiry to the Public Guardian, to the appellant's mother as an affected party, and to the appellant, summarizing the facts and issues in dispute and seeking representations. Representations were received from the Public Guardian. No representations were received from appellant or from his mother.

There are a number of issues raised by this appeal, including the adequacy of the record search, the status of the appellant in relation to his father's estate, the disclosure of personal information of individuals other

than the appellant, the appellant's right of access to his own personal information, the scope of solicitor-client privilege and the status of the Public Guardian as a law enforcement agency. Before dealing with each of these issues, I will provide a brief summary of the factual background to this appeal.

BACKGROUND:

The events giving rise to this appeal begin in 1997. The appellant's parents had been facing a forced sale of their farm for some years due to an unsatisfied debt. The appellant sought legal assistance for his parents. One of the lawyers who interviewed the parents came to the conclusion that either or both might lack the capacity to retain and instruct counsel. That lawyer contacted the Public Guardian and informed the son of this referral. The Public Guardian then met with each of the parents, reviewed their medical and financial circumstances and determined that this was an appropriate case for the intervention of the Public Guardian to protect the financial interests of either or both parents. Some of the undisclosed documents at issue in this appeal were created in the course of this assessment of the needs and circumstances of the appellant's parents. On January 16, 1998, the Public Guardian brought an application in the Ontario Court of Justice (General Division)[now the Superior Court of Justice] for an Order of temporary guardianship of the property of the appellant's father. The Order was granted.

Unfortunately, the father died a short while later, on March 8, 1998. Given that the appellant's mother had been found to be capable of managing her own financial affairs, this brought to an end the involvement of the Public Trustee with this family. However, there were a number of expenses incurred during the assessment process which the Public Guardian has claimed against the account of the deceased father. Some of the undisclosed materials in this file are records of disbursements made out of the account of the father.

With this background, I will proceed to discuss the issues in this appeal.

REASONABLE SEARCH

During the mediation stage of this appeal, the appellant indicated that he believes that there are additional records responsive to his request which have not been identified by the Public Guardian. His reason for this belief is that he was advised by a policy analyst at the Public Guardian that there were two or three boxes of records. On this basis, the reasonableness of the search was added to the issues to be considered in this appeal.

In its Notice of Appeal, this Office asked the Public Guardian to provide a written summary of the steps which it took to identify all the records requested by the appellant. In response, the Public Guardian provided particulars of three separate searches: in the Toronto office of the Public Guardian; in the London office of the Public Guardian; and in the Toronto office of the Finance Department of the Public Guardian. A total of 998 pages of documents were identified as responsive to the request. The Public Guardian identified the title or position of the employees who conducted the search and set out the basis for their knowledge of the related files.

The Public Guardian stated in its representations that none of the records sought by the appellant would have been destroyed as the practice of the Public Guardian is to retain such records for 99 years. However, the Public Guardian also noted that the file was at one point larger than it is at the present time

because duplicates of documents were destroyed in the course of reviewing the file in response to the appellant's request.

Where a requester provides sufficient details about the records being sought and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The Act does not require an institution to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the Act, an institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

I have considered the information submitted by the Public Guardian in its representations, as well as the appellant's basis for raising the adequacy of the search as an issue. The Public Guardian has searched in every location in which it is reasonable to expect that records might be located. The explanation that some documents were duplicates and have been destroyed appears to be both reasonable and likely given the involvement of three different offices and several lawyers. I am satisfied that the Public Guardian's search for responsive records was reasonable in the circumstances of this appeal.

ACCESS BY A PERSONAL REPRESENTATIVE

Section 66(a) of the Act states:

> 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.

Under section 66(a), the appellant would be able to exercise the deceased's right to request access to the deceased's personal information if he is able to demonstrate that:

1. he is the "personal representative" of the deceased; and

2. his request for access relates to the administration of the deceased's estate.

Section 66(a) provides that particular individuals may exercise the rights of others under the Act in certain situations. In a request for the personal information of a deceased person, if section 66(a) applies, it means that the institution applies the standards used where an individual is requesting his or her own personal information. If the section does not apply, the institution receiving the request must apply the standards used where an individual requests another individual's information. For a discussion on this point, see Order M-927.

Accordingly, in order to bring himself within section 66(a), the appellant must establish first of all that he qualifies as a "personal representative". The term "personal representative" in section 66(a) of the Act has been held to mean an executor, an administrator, or an administrator with will annexed with the power and

authority to administer the deceased's estate: *Adams v. Ontario* (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.), quashing Order P-1027.

The appellant has provided the Public Guardian with two pieces of documentary evidence to support his claim that he should be considered a "personal representative" for the purposes of section 66(a) of the Act. The first appears to be a photocopy of a handwritten endorsement, dated November 20, 1998, on the last page of a Court application record. I understand from the endorsement that the appellant applied to the then Ontario Court of Justice (General Division) to have the ordered sale of the family farm stayed. The endorsement gives the appellant 7 days to bring proceedings to set aside the ordered sale of land and appoints him litigation administrator of the estate of his father for that purpose.

The appellant has also provided the Public Guardian with an excerpt from a document apparently signed by his father, appointing him executor of his estate. There is no date on the portion of the document which the appellant filed; it consists of part of a single line in the middle of a blank page and an illegible signature. The typed words read: "son [name of appellant] [space] and I appoint him sole executor of this my Will."

The Public Guardian submits that the appellant has not established that he is a personal representative within the meaning of section 66(a). I agree. The appellant has not filed evidence to establish that he has been legally recognised as executor of his father's estate, or as administrator with will annexed, for the purpose of settling the estate of his father. The photocopy which he provided of what is alleged to be an excerpt from his father's will is not identifiable as such and is of no assistance. There is no evidence of any steps taken by him to settle the estate of his father. Further, there is no evidence before me to indicate that the appellant took any legal action in his capacity as litigation administrator, within the 7 day time period set by the Court or otherwise, or that there is now or has ever been any litigation commenced by the appellant in respect of the property or estate of the father. The situation in this case can be contrasted with the circumstances under consideration in Order P-919, in which an appellant, appointed as litigation administrator, was found to be a personal representative in part on the basis of her role in defending on-going litigation affecting the assets in the estate of the deceased.

I conclude that there is no sufficient basis upon which I could hold the appellant to be a personal representative of his father for purposes of section 66(a). Accordingly, it is unnecessary for me to discuss the second component of a determination under section 66(a), namely the issue of whether or not the request in this case relates to the administration of the estate of his father.

I will now consider those records at issue in this appeal which contain the personal information of persons other than the appellant, including his father, and which do not contain personal information of the appellant. Given my determination that the appellant is not a personal representative under section 66(a), in considering his request for records containing only the personal information of his father, I must apply the standards in the legislation which apply where an individual requests another person's information.

PERSONAL INFORMATION

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

I have reviewed the records at issue in this appeal. I find that a significant number of the records contain no personal information of the appellant, but rather, contain personal information of the appellant's father and, to a lesser extent, his mother. I note that the appellant's mother has not consented to the disclosure of her personal information contained in the records at issue.

Among the records with personal information of the parents are reports, notes, memos and correspondence created during the Public Guardian's investigation of the medical and financial circumstances of the parents. Also included in this group are the financial records, memos and correspondence created after the Public Guardian obtained the order of temporary guardianship in respect of the property of the father. These records identify the father and pertain to the management of his finances and property by the Public Guardian.

I will first consider the application of the Act to all of the records containing personal information of individuals other than the appellant. Next, I will consider the application of Act to those records which contain the personal information of both the appellant and other individuals.

INVASION OF PRIVACY
PERSONAL INFORMATION OF INDIVIDUALS OTHER THAN THE APPELLANT

Section 21: Introduction

Once it has been determined that a record contains only the personal information of persons other than the requester, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Of relevance in this case is section 21(1)(f) of the Act which permits disclosure if " the disclosure does not constitute an unjustified invasion of personal privacy".

Sections 21(2) and (3) 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) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. 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 Public Guardian takes the position that "the release of any of the records would be an unjustified invasion of the personal privacy of the appellant's deceased father". The Public Guardian relies on section 21(3)(a) and (f) which establish a presumed invasion of personal privacy where the requested records contain medical and financial information of a person other than the requesting party. As well, the representations cite section 21(2)(f), which directs an institution, in considering the disclosure of records as a possible invasion of privacy, to take into account whether the personal information sought is "highly sensitive". The Public Guardian takes the position that none of the exceptions in section 21(4) apply to the facts in this case.

Unfortunately, the Public Guardian's representations do not specify which records have been withheld on the basis of which particular provision in the legislation. Although the written submissions appear to take the position that section 21(3)(a) and (f) apply to all of the records, the indices to the first two packages, containing all but 13 pages of the identified responsive documents, fail to cite section 21(3) in respect of any of the withheld materials. Instead, in the indices to the records, the Public Guardian has relied on the general duty in section 21(1) not to disclose personal information of a non-requester, or has claimed that specific records are exempt from disclosure under other sections of the legislation, citing section 14(2)(a) (reports of a law enforcement agency), section 19 (solicitor-client privilege), and section 13 (public servant's advice).

Given the overriding duty under section 21(1) to refuse to release information where the presumption against disclosure in section 21(3) applies, I will begin by considering the application of section 21(3)(a) and (f), as relied upon in the Public Guardian's representations, to all of the records at issue in this appeal which contain only the personal information of persons other than the appellant.

Section 21(3)(a)

Section 21(3)(a) provides that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
>> relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

Having reviewed all the records identified by the Public Guardian as responsive to the appellant's request, I find that there are a relatively small number of the records at issue in this appeal which contain information relating to the medical condition of the appellant's father and/or mother. These documents include correspondence to and from doctors, medical clinics and hospitals, sent to or received by the Public Guardian in the course of its investigation of the need for their intervention to protect the property of the appellant's parents. Also included are the assessment report for each parent which set out the findings of the Public Guardian's investigator under the Substitute Decisions Act.

I find that the presumption in section 21(3)(a) applies to these records, listed below, all of which contain medical information of the appellant's parents. Given that there is no personal information relating to the appellant in these documents, the Public Guardian was required to refuse to disclose them to him. I uphold the refusal and find that the following records are exempt from disclosure under section 21(1):

- second package: 11-1; 11-2; 15-1 to 3; 25; 26; 53-1 to 7; 54-1 to 5.

Section 21(3)(f)

Section 21(3)(f) 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 Public Guardian, in its index to the record, has identified section 21(3)(f) as specifically applying to the limited number of documents released in the third package of records identified in its search. These documents consist of various kinds of records detailing disbursements made by the Public Guardian in respect of the appellant's father, and an account record created by the Public Guardian in the name of the appellant's father.

I have reviewed these records in detail. With respect to the account record in the father's name, I find it relates to the Public Guardian's management of the father's financial affairs and contains the father's financial information, including information as to his bank balance and net worth. Accordingly, the presumption in section 21(3)(f) applies and I uphold the decision of the Public Guardian to withhold, under section 21(1), these pages of the record identified as follows:

- third package: 2-1; 2-2.

The remaining eleven pages in package three consist of computer printouts of what are described elsewhere in the indices as "data base screens", with attached photocopies of cheques from the Public Guardian. The appellant's name is referred to as part of the identification information on these sheets which contain information relating to his finances and assets, including the results of property searches conducted by the Public Guardian. I find that these pages are also exempt from disclosure under section 21(3)(f):

- package three: 3-1; 3-2; 4; 4-2; 4-3; 5; 5-2; 5-3; 5-4; 6 and 6-2 .

Although, as I have noted, the Public Guardian did not specifically cite section 21(3)(f) in its indices to the first and second packages of records, I have reviewed all of these records containing the personal information of individuals other than the appellant and have identified a number of records which contain financial information relating to the appellant's parents. These records include: property search records; correspondence between solicitors (for the Public Guardian; for the appellant's parents; for the bank; for the sheriff); correspondence between solicitors for the bank and the appellant's parents; land registration documents; and an income tax return for 1998.

I find that the presumption in section 21(3)(f) applies to these records. Disclosure of records containing the financial information of the appellant's parents would constitute an unjustified invasion of their privacy. As such, the Public Guardian was required, under section 21(1), to refuse to disclose these records to the appellant. I uphold the decision of the Public Guardian to deny access to the following records:

- first package: 32-2 to 6; 32-11; 67-1; 85-12;

- second package: 21; 38; 52; 55-1; 55-5; 55-8; 55-9;56-1 to 16; 61-1 to 3; 68-1 to 6; 69-1 to 5; 70-1 to 8; 71-1; 71-2.

Because of my finding with respect to the application of section 21(1) to these records, it is unnecessary for me to review the Public Guardian's exercise of discretion in withholding the documents on the basis of other provisions in the Act.

Section 21(1)(f)

I will now consider the final group of records which contain only the personal information of persons other than the appellant. This group of records includes a series of letters written by the Public Guardian in January 1998, in respect of the management of the property of the appellant's father, after the Court had granted an Order of temporary guardianship. Also included is a number of letters, written in March 1998, to many of the same institutions, advising them of the death of the father. The letters went to: the Registrar of the Ontario Court of Justice; Health Welfare Canada, Revenue Canada, Canada Post Corporation, as well as financial institutions and others. I have also included in this group two letters written by a Public Guardian investigator to a medical clinic to obtain medical records relevant to the upcoming guardianship application and several letters written by the Public Guardian to the appellant's mother and to financial institutions, among others, enclosing the Order of temporary guardianship in respect of his father. Finally, there are several fax transmittal sheets which I have considered as part of the attached letters.

All of these materials contain personal information relating to the appellant's father or mother. Pursuant to section 21(1), the Public Guardian is required to refuse to release this personal information to the appellant unless one of the exceptions set out in paragraphs (a) to (f) apply. The appellant has not asserted a basis for applying section 21(1)(f), nor has he taken the position that any of the specific exceptions in section 21(1)(a) to (e) apply. I note that the appellant's mother has not consented to the release of her personal information as would be necessary to allow disclosure under section 21(1)(a).

In the absence of representations to assist me in making a determination as to whether disclosure of these records would result in an invasion of privacy, I have considered the factors weighing for and against disclosure in section 21(2). I note that, although these particular records may not be considered "highly sensitive" (s.21(2)(f)), none of the factors favouring disclosure in subsection (2) are present in this case.

Accordingly, having reviewed each of the documents, and considered the statutory exceptions and factors, I uphold the decision to refuse access to the records, listed below. The following records were properly withheld from disclosure on the basis that they qualify for exemption under section 21(1):

- first package: 59; 71-1; 71-2;
- second package: 12; 13-1; 13-2; 14-1; 14-2; 16-1; 16-2; 18; 19; 20; 22; 22-2; 23; 24-1; 24-2; 27; 30; 31;32;33-1; 33-2; 39; 44; 47; 48-1; 48-2; 49; 50; 55-2; 55-3; 55-6; 55-10; 55-11; 72-5 to 17.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

None of the records under consideration in this appeal contain exclusively the personal information of the appellant. However, many documents in the first and second packages of records include personal information relating to the appellant, together with significant personal information of other persons, primarily his parents. Pursuant to section 47(1) of the Act , the appellant has a general right of access to his own personal information held by a government body, subject to the exceptions in section 49.

Under section 49(a) of the Act, an institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions apply to that information pursuant to section 13 (public servant's advice); section 14 (reports of law enforcement agency) and section 19 (solicitor - client privilege).

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals, and an institution determines that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, the institution has the discretion to deny the appellant access to that information.

Given the nature of the records in this case, I have decided to begin by discussing the documents which may qualify for an exemption under section 49(b). I will then discuss access to the remaining documents in light of the exemptions in section 49(a).

SECTION 49(b): INVASION OF ANOTHER PERSON'S PRIVACY

The records to be considered under section 49(b) consist of a varied group of documents including: Public Guardian account profiles; correspondence between solicitors for the Public Guardian and the solicitors for the bank; guardianship investigation notes and records; fax cover sheets; and draft court documents.

Section 49(b) of the Act introduces a balancing principle. In making determinations under this section, an institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the Act provide guidance in assessing whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. As discussed above, section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

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]. However, in making determinations under section 49(b) in situations where a presumption under section 21(3) applies, the institution retains the discretion to release the records despite the application of the presumption.

In this case, in considering the application of section 49(b) to the records containing mixed personal information of the appellant and his parents, the Public Guardian takes the position that disclosure would constitute an unjustified invasion of the personal privacy of the parents. The Public Guardian cites section 21(2)(f) and submits that the records contain highly sensitive personal information of the parents. Further, the Public Guardian submits that the presumptions in section 21(3)(a) and (f) weigh against disclosure in that some or all of the records contain the medical or financial information of the parents. The Public Guardian submits that it has properly exercised its discretion under section 49(b) in refusing to grant the appellant access to these records because they contain personal, medical and financial information of other persons.

Having reviewed these documents, I am satisfied that the Public Guardian has, for the most part, exercised its discretion appropriately in refusing to allow the appellant to have access to the records considered in this group. The personal information of the appellant is limited in all of the documents which contain, often overwhelmingly, the personal information of his father, and to a lesser extent, his mother. In considering the balancing factors in section 21(2), I agree that much of the personal information of the parents, particularly in the investigations reports, is highly sensitive. Further, there is nothing in the circumstances of this case to suggest that any of the factors favouring disclosure in section 21(2) are present, and the appellant has not asserted that position. Finally, I note that many of the documents contain financial and/or medical information of the appellant's parents, in addition to other personal information.
Accordingly, I uphold the decision of the Public Guardian to refuse to grant the appellant access to the following records on the basis that disclosure would constitute an unjustified invasion of the personal privacy of the appellant's parents:

- package one: 28-1 to 3; 29-1 to 3; 30-1 to 4; 33-1 to 3; 45-1; 45-2; 46-1 to 8; 50-1 to 3; 51-1 to 3; 52-1 to 7; 53-1 to 7; 54-1 to 7; 55-1 to 7; 56-1 to 3; 57-1 to 7; 58-1 to 7; 62-1; 62-2; 63-1; 63-2; 66-1 to 3; 69-3; 69-4; 85-1;

- package two: 55-7; 55-15 to 18.

I arrive at a different conclusion with the following records: 43 and 44; 68; 69-1; 69-2; 69-5 and 85-8 to 11 (package one); 55-4 and 55-12 to 14 (package two).

Records 43 and 44 are letters from the solicitors for the parents' bank to a Trial Co-ordinator for the then Ontario Court of Justice, asking that the bank's action against the appellant's parents be set down for pre-trial. Although the Public Guardian has specifically cited the exemption in section 49(b) in refusing to disclose these letters, I note that the records contain only the family name of the appellant in the reference line, and no other personal information of any individual. In my view, there are no factors present which

would weigh against disclosure of these letters. In the circumstances, I conclude that disclosure would not constitute an unjustified invasion of personal privacy.

I order the Public Guardian to release the following records on the basis that they are not exempt from disclosure:

- package one: 43 and 44.

The next group of records (package one: 68; 69-1; 69-2; 69-5 and 85-8 to 11) have all been withheld under section 49(a), on the basis of section 14 (report of law enforcement agency), not section 49(b). However, because these records contain personal information of both the appellant and his parents, I will first of all consider the application of section 49(b) to these records.

Records 68 and 69-1 are intake sheets created by the Public Guardian during a telephone conversation with the appellant after it was first contacted about his parents. Records 69-2 and 69-5 are attachments to the intake sheets, and consist of a letter to the appellant from the lawyer who brought the situation of his parents to the attention of the Public Guardian. Records 85-8 to 11 are four letters from the Public Guardian to a financial institution.

Considering first of all the intake sheets and the letter to the appellant, I find that the parents are identified by name but that the documents otherwise contain no personal information of individuals other than the appellant. I am satisfied that disclosure of these records to the appellant would not constitute an unjustified invasion of personal privacy under section 49(b).

Further, I note that disclosure of the intake sheets and the letter is consistent with previous decisions of this Office which have granted an appellant access to documents containing personal information which he or she originally provided to the institution, or which was already known to the appellant. These decisions have held that denying access to information which an appellant has provided, or which is clearly known to him or her, would offend the rule of statutory interpretation holding that an absurd result, or one which contradicts the purposes of the governing statute, cannot be a proper implementation of the legislature's intention: Order M-444; M-613; M-847; M-1077 and P-1263.

Turning to the four pages of correspondence from the Public Guardian to a financial institution (85-8 to 11), I note that the letters inform the institution about the temporary guardianship in respect of the father, and also contain personal information of the appellant, relating to a power of attorney which he may have held. Two of the letters (85-8 and 85-10) also contain personal information of the appellant's mother. Under section 10(2) of the Act, an institution is required to disclose as much of a record as can reasonably be severed without disclosing exempt information. I find that it would be possible to give the appellant a severed portion of two of these letters (85-8 and 85-10), and the other letters in their entirety, without disclosing the personal information of another person.

Given my finding that all or part of these records (68; 69-1; 69-2; 69-5 and 85-8 to 11) could be released to the appellant under section 47(1), on the basis that they contain his personal information, I must consider

whether the records should otherwise be withheld pursuant to section 49(a) and section 14, as has been submitted by the Public Guardian. I set aside this question for consideration at a later stage in this decision.

Turning next to records 55-4 and 55-12 to 14, these documents are described in the index to package two as "data base screens". They are part of a larger group of similar items, some of which (including 55-15 to 18, referred to above), contain significant personal, medical and financial information of the appellant's parents. Records 55-4 and 55-12 to 14 are distinguishable in that these pages contain predominantly the personal information of the appellant. Further, pages 55-4 and 55-12 to 14 are almost entirely a record of information which the appellant has communicated to the Public Guardian in a series of telephone calls. To the extent that these pages contain personal information relating to the appellant's parents, that information has either been provided to the Public Guardian by the appellant himself and/or is already known to him.

I have decided to order the Public Guardian to release these pages to the appellant. In coming to this decision, I have considered the fact that the Act places fundamental importance on a person's right of access to his or her own personal information. As discussed above, previous decisions of this Office have ordered disclosure when the personal information at issue was originally provided to the institution by the appellant, or was already known to the appellant. These decisions have held that denying access to information which an appellant has provided, or which is clearly known to him or her, would offend the rule of statutory interpretation holding that an absurd result, or one which contradicts the purposes of the governing statute, cannot be a proper implementation of the legislature's intention: Order M-444; M-613; M-847; M-1077 and P-1263.

I apply this principle of statutory interpretation, which seeks to avoid a result which is inconsistent with a fundamental purpose of the Act in ordering the Public Guardian to disclose the following records to the appellant:

- package two: 55-4 and 55-12 to 14.

The final group of documents to be considered under section 49(b) consists of 82 pages of legal billings, dockets and statements of account from the solicitors for the bank which held the debt on the family farm. These records contain personal information of the parents, and to a much lesser extent, of the appellant. I note that there is no covering letter attached to these accounts to indicate the basis upon which they were forwarded to the Public Guardian. Further, the Public Guardian's representations do not make any reference to the legal accounts of the bank. The index to package one cites section 19 and section 49(a) as the basis for the refusal to disclose these records.

The Public Guardian's apparent reliance on solicitor-client privilege in withholding the bank's legal accounts raises a question as to the possible waiver of that privilege, given the unexplained presence of the accounts in the files of the Public Guardian. The issue of waiver was not addressed in the representations which, as I have said, make no mention of these records. In the circumstances, I have decided to consider the application of section 49(b) to the bank's legal statements of account because they contain information with respect to the parents' assets, together with very limited personal information of the appellant.

A reading of the statement of accounts details the steps which the bank took in relation to the parents' property. The accounts reveal information which would come within the presumption against disclosure of personal financial information in section 21(3)(f). In my view, the appellants' parents are entitled to have this information protected under section 49(b) on the basis that disclosure would constitute an unjustified invasion of their personal privacy. Accordingly, I uphold, on other grounds, the decision of the Public Guardian to withhold the following records:

- package one: 25-1 to 82.

SECTION 49(a): DISCRETION TO REFUSE TO DISCLOSE WHERE EXEMPTIONS APPLY

The Public Guardian has relied on section 49(a) in refusing to disclose a large number of the records at issue in this appeal. Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

In this case, the Public Guardian has relied in particular on sections 13(1), 14(2)(a) and 19. In order to determine whether these exemptions apply to the records, I will consider the application of section 19 and then section 14(2)(a) to the documents at issue. It is unnecessary for me to consider section 13(1), as I have already upheld the Public Guardian's decision to refuse access to the records (package two: 53 and 54) for which section 13(1) was claimed.

SECTION 19: SOLICITOR - CLIENT PRIVILEGE

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

In applying section 19 in a number of orders, previous orders of this Office have identified two branches of privilege which can form the basis for a discretionary refusal to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); **and**
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**
   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation [Orders 49, M-2 and M-19].

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation [Order 210].

In this case, the Public Guardian has specifically relied on Branch 1 in refusing the appellant access to a large number of records including lawyer's statements of account, internal memos between lawyers, investigators and legal clerks in the Public Guardian's office, correspondence between solicitors for the Public Guardian and the appellant's parents.

I note that, although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)].

In the circumstances of this case, there is no need to consider the application of litigation privilege. The Public Guardian has not claimed litigation privilege and there is no current litigation affecting the records at issue in this appeal. Accordingly, I will consider the application of the common law with respect to solicitor-client communication privilege to the records for which the Public Guardian has relied on section 19.

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> Y all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship Y [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been held to apply to "a continuum of communications" between a solicitor and client:

> Y the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client Y Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> [Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to extend to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

In this case, the Public Guardian has claimed solicitor-client privilege in relation to a number of records, including many which were created during the Public Guardian's investigation and which have already been considered for the purposes of this appeal under section 21 above. The remaining records for which privilege is claimed pertain to legal matters arising in relation to the temporary guardianship application. There are approximately 60 pages of internal memos that fall within this description. As well, there are 50 pages of handwritten notes, 10 pages of photocopied excerpts from statutes or court decisions and 119 pages of legal billings including the 82 pages of legal billings from the bank's solicitors, pertaining to the legal

proceedings of the bank in respect of the debt registered against the farm, which I have found to be exempt from disclosure under section 49(b). I will begin by considering the memos, notes and photocopied excerpts.

Internal Memos, Notes and Photocopied Legal Research

I have reviewed all of these records in detail. Beginning with the internal memos, I find that they are written communications of a confidential nature between various Crown counsel, internal to the Public Guardian, or between counsel and other Public Guardian staff, particularly investigators and law clerks. All of the memos relate to the seeking, formulation or giving of legal advice.

In the case of the handwritten notes of counsel for the Public Guardian, and the photocopied pages of legislation or jurisprudence, I find that these records form part of the working papers of Crown counsel. The contents of the notes, and the photocopied legal research, relate to the seeking, formulating and provision of legal advice. The disclosure of the information contained in these records would reveal the strategies suggested by counsel and the particulars of the legal advice provided by counsel to the Public Guardian regarding the handling of its intervention to protection the financial assets of the appellant's father. [See Susan Hosiery Ltd., *supra.*]

I conclude that the memos, the handwritten notes and the photocopied legal research qualify for exemption under section 19. Further, I am satisfied that the Public Guardian exercised its discretion reasonably, in the circumstances of this case, in withholding access under section 49(a). Accordingly, I uphold the decision to refuse to grant the appellant access to the following records on the basis of solicitor-client privilege:

- package one: 32-1; 32-9; 32-10; 32-12 to 15; 34-1 to 18; 48-1 to 4; 49-1 to 4; 64-1 to 5; 65-1 to 7; 69-6; 84-1 to 71; 85-2 to 4; 85-13 to 14;
- package two: 17-1 to 2; 28; 29; 36; 37-1 to 4; 51; 60; 63; 65; 66; 67-1 to 4; 72-17 to 38.

Included with the internal memos and notes were two pages of records which I find are not covered by solicitor-client privilege. These pages consist of typed notes apparently made by the appellant himself and contain the appellant's personal information, together with personal information of his parents. Even if the notes were not created by the appellant, it is apparent from the fax notations on the bottom of both sheets that they have been faxed to the Public Guardian from the appellant. The appellant is not a client of the lawyers at the Public Guardian and accordingly these records cannot be considered to be confidential communications between solicitor and client and are not privileged.

The Public Guardian did not cite section 49(b), or raise the issue of invasion of privacy, in withholding these records. However, given my finding that the two pages are not covered by solicitor-client privilege, I must consider whether they should otherwise be released to the appellant or withheld under section 49(b). In applying section 49(b), it is necessary, as discussed above, to balance the appellant's right of access to his own information against the privacy rights of his parents. In this case, although the faxed sheets contain

some personal information of the appellant's parents, together with his own personal information, it is all information which is known to the appellant and has been supplied to the Public Guardian by the appellant.

In these circumstances, I am satisfied that disclosure of the faxed notes would not constitute an unjustified invasion of personal privacy. In my view, non-disclosure would produce a result that is inconsistent with one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information. In coming to this conclusion, I have again considered the previous decisions of this Office holding that an absurd result, or one which contradicts the purposes of the governing statute, cannot be not a proper implementation of the legislature's intention: Order M-444; M-613; M-847; M-1077 and P-1263.

Accordingly, I order the Public Guardian to disclose the following records to the appellant:

- package one: 32-7; 32-8.

Solicitor's Statements of Account

The Public Guardian has identified in its search approximately 37 pages of legal statements of account generated by internal counsel at the Public Guardian, as well as the 82 pages of legal billings, previously found to be exempt, from the solicitors for the bank which held the debt on the appellant's family farm. The Public Guardian has claimed that solicitor-client privilege applies to all of these records. Included in this group of documents were several cover memos and handwritten notes attached to the billings.

In claiming privilege, the Public Guardian relied on the decision of the Federal Court of Appeal in *Stevens v. Canada (Privy Council),* (1998) 161 D.L.R. (4th) 85, as applied in Order PO-1714. In that decision, Adjudicator Big Canoe found that a blanket privilege applied to legal bills of account as confidential communications between a lawyer and client. She cited the following passage from the *Stevens* decision:

> In the case at bar, ... I am satisfied that the narrative portions of the bills of account are indeed communications. .... Despite the fact that the appellant is content to have the specific topic of research remain privileged, those other portions of the bills of account still constitute communications for the purpose of obtaining legal advice. ..... This is true whether the lawyer is conducting research (either academic or empirical), interviewing witnesses or other third parties, drafting letters or memoranda, or any of the other myriad tasks that a lawyer performs in the course of his or her job. It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account. (at pages 107-8)

Adjudicator Big Canoe concluded as follows:

> Accordingly, despite the complexity of the issues, the bottom line in Stevens is clear. Unless an exception such as waiver applies, lawyers' bills of account, in their entirety, are subject to solicitor-client privilege at common law, and the common law must determine the application of privilege where an access statute incorporates it in an exemption.

I agree with this conclusion and find that it applies to the legal billings generated by the solicitors for the Public Guardian. As statements of account, these records are properly considered, on their face, to be confidential written communications between internal Crown counsel and the Public Guardian which relate directly to the seeking, formulating or giving of legal advice. In fact, a review of the documents demonstrates that the accounts do contain considerable information setting out the steps taken in seeking, formulating and giving legal advice in respect of the temporary guardianship application and the pending sale of the family farm. Accordingly, I find that these bills of account as set out below, were properly withheld under section 49(a) as subject to solicitor-client privilege at common law and under section 19 of the Act:

- **package one: 70-1 to 7;**
- package two: 34; 35; 40-1 to 3; 41-1 to 2; 42; 43; 45; 46; 57-1 to 9; 58-1 to 4; 59; 64-1 to 2; 72-1 to 3.

SECTION 14: REPORT OF LAW ENFORCEMENT AGENCY

As was noted above, the Public Guardian has relied on section 14(2)(a) in denying access to a small number of records in package one. Section 14(2)(a) provides:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

The records for which the Public Guardian has relied on section 14(2)(a) are:

- two intake sheets (package one: 68 and 69-1) created by the Office of the Public Guardian when it was first contacted about the appellant's parents;
- a letter (with fax cover sheet) to the appellant attached to the second intake sheet (package one: 69-2 ; 69-5);
- four letters from the Public Guardian to a financial institution (package one: 85-8 to 11).

These records have already been considered above, under section 49(b). Before considering the application of section 14(2)(a), I will describe these records in more detail.

The two intake sheets are each entitled "Referral Summary"; they are filled with handwritten notes made by Public Guardian staff in the course of two telephone conversations with the appellant in December 1998.

The attachment to the intake sheet is a copy of a letter to the appellant from the lawyer in private practice who brought the situation of the appellant's parents to the attention of the Public Guardian. The letter advises the appellant that the lawyer has made a referral to the Public Guardian.

The four letters from the Public Guardian to the financial institution are written to advise the institution that the property of the appellant's father is being managed by the Public Guardian. The letters also contain personal information of the appellant relating to a power of attorney which he may have held in respect of his father's property.

In my view, section 14(2)(a) does not apply to any of these records because they cannot be considered "reports" within the meaning of section 14(2)(a). In previous decisions, this Office has held that a report must consist of a formal statement or an account of investigation results, not merely observations or recordings of fact. See for example: Orders P-1109; P-1108; P-1049; P-1119.

Applying these decisions to the records under consideration here, it is apparent that none of these documents consists of a formal statement recording the results of an investigation. The intake sheets contain only rough notes taken during a telephone call. The letter from the private lawyer cannot be considered a report prepared by the Public Guardian, and cannot come within section 14(2)(a) on this basis alone. The letters to the financial institution communicate the fact that there is a temporary guardianship but do not report in any way on the result of the prior investigation.

In the case of the "Referral Summary"sheets, I also note that previous orders have held that intake sheets and notes are not to be considered "reports" under section 14(2)(a): Orders P-363; P-417.

Given my finding that these records cannot be considered "reports" within the meaning of section 14(2)(a), it is unnecessary for me to consider whether or not the Public Guardian is properly considered to be an agency with the functions prescribed in the section, or whether in the circumstances the documents were prepared in the course of law enforcement, inspections or investigations.

Further, I have already held above that these documents could otherwise be released to the appellant under section 47(1), with some portions severed in the case of records 85-8 to 11. Having found that section 14(2)(a) has no application, I order the Public Guardian to disclose the following records to the appellant:

- package one: 68; 69-1; 69-2; 69-5 85-9; 85-11; and the non-severed portion of 85-8 and 85-10.

ORDER:

1. I order the Public Guardian to disclose to the appellant the following records by November 17, 2000, but not before November 10, 2000:

   package one: 32-7; 32-8; 43 and 44; 68; 69-1; 69-2; 69-5; 85-9; 85-11 and the non-severed portion of 85-8 and 85-10;

   package two: 55-4 and 55-12 to 14.

   For greater certainty, I have provided a highlighted copy of records 85-8 and 85-10; the portions highlighted shall not be disclosed to the appellant.

2. I uphold the Public Guardian's decision regarding all of the remaining records.

3. In order to verify compliance with Provision 1 of this Order, I reserve the right to require the Public Guardian to provide me with a copy of the material sent to the appellant.

Original Signed by: October 12, 2000
Katherine Laird
Adjudicator