ORDER PO-1936

Appeal PA-000209-2

Office of the Public Guardian and Trustee

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NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a lawyer representing the Consul General of Croatia for access to "information from the records held by the Public Guardian and Trustee which will assist the Consulate General and its Foreign Ministry in Zagreb in Croatia, in locating the next-of-kin of [a named individual]."

The PGT identified a number of responsive records, and denied access to them under section 21(1) of the *Act* (invasion of privacy).

The requester, now the appellant, appealed the PGT's decision.

On appeal, the appellant indicated that he had initially made a request to the PGT outside of the *Act*, and under the provisions of Article 37 of the Vienna Convention. The PGT responded to this initial request by stating that it was actively seeking the next-of-kin of the deceased and that Article 37 of the Vienna Convention did not apply. The appellant then submitted his request under the *Act*, which resulted in this appeal. In his letter of appeal, the appellant raised the possible application of the public interest override in section 23 of the *Act*, and the application of section 42(e) of the *Act* for the purpose of complying with Articles 5 and 37 of the Vienna Convention.

Mediation was not successful, and the appeal proceeded to the adjudication stage. I sent a Notice of Inquiry initially to the PGT setting out the issues on appeal, and the PGT provided representations in response. I then sent the Notice to the appellant along with a complete copy of the PGT's representations, and the appellant also provided representations. I then provided the PGT with a Supplementary Notice of Inquiry, seeking representations on certain aspects of section 21(1) not addressed in the original Notice. I also provided the PGT with a copy of the appellant's representations. The PGT provided additional representations in response to the Supplementary Notice.

RECORDS:

There are a total of 165 records at issue in this appeal. [Record 8 is a duplicate of Records 17 and 71, Record 6 is a duplicate of Record 72, and Record 5 is a duplicate of Record 73]. The records consist of copies of the social insurance card, health card, marriage certificate, a Statement of Death form, memoranda, correspondence and copies of an address book, all of which concern the deceased individual identified in the appellant's request.

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, and includes the following specific types of information:

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

The PGT submits that the records contain personal information:

> The record[s] which the Appellant is seeking includes information about the deceased's place and date of birth, social insurance number, health and other cards and numbers, "long-form" death registration (to which public access is restricted by the Registrar General of Ontario), marital status information and information about the deceased's maiden name, immigration … status details and personal history including whether she was survived by a spouse, children or siblings. As well, the record contains internal memoranda and correspondence about the administration of the deceased's estate and searches for her next-of-kin by the Public Guardian and Trustee and her agents. It also includes information obtained by the Public Guardian and Trustee about the deceased's assets and liabilities, her friends and neighbours and their views about the deceased.
>
> The record also contains direct information about the deceased's next-of-kin, their names, current address, date and place of birth and marriage and death.

The appellant's representations do not deal specifically with this issue.

Having reviewed the records, I find that all of them contain the personal information of the deceased individual identified by the appellant, including her social insurance number and health card number [paragraph (c)], citizenship and immigration information [paragraph (a)], heir information collected by the PGT [paragraphs (a), (f), (g) and (h)], and copies of the deceased individual's personal correspondence and personal records [paragraphs (c), (d) and (h)]. I also find that some records contain personal information of other individuals, including heirs and relatives of the deceased identified by the PGT, as well as friends and neighbours contacted by the PGT for purposes of the administration of the deceased's estate.

As far as the Statement of Death form is concerned, I find that it contains the personal information of the deceased individual, including her name, date of birth, age, sex, address at the time of death, ethnic origin, marital status, occupation, social insurance number, and other information relating to her funeral and burial arrangements [paragraphs (a), (c) and (d)]. I also find that this record contains the personal information of the "informant" (the term used to describe the individual who provided the information contained on the record), including her name, address and relationship with the deceased [paragraphs (a) and (c)]. Finally, I find that the record contains the names of the deceased's husband, as well as her parents and the parents' country of birth. Although the parents'country of birth may be known by the appellant, it is technically the personal information of the mother and father under the *Act* [paragraph (a)]. The information concerning the deceased's husband is his personal information [paragraph (h)]. The information relating to the funeral home and certification details concerning Ministry officials is professional in nature and does not qualify as "personal information".

The records do not contain any of the appellant's personal information.

Section 2(2) of the *Act* states:

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

The deceased died in 1999, so section 2(2) has no application to her personal information. I also have nothing to indicate that any of the other individuals whose personal information is contained in the records has been dead for more than 30 years. Given the age of the deceased at the time of her death, if is reasonable to assume that her parents have been dead for a longer period of time, and perhaps as long as 30 years, but I do not know this for certain based on the information before me in this appeal. I also have no information to indicate that the deceased's husband has been dead for 30 years.

APPLICATION OF SECTION 42(E)

The appellant claims that section 42(e) of the *Act* permits the PGT to disclose the information. Section 42(e) states:

> An institution shall not disclose personal information in its custody or under its control except,

> for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

The appellant argues that Articles 5 and 37 of the Vienna Convention on Consular Affairs authorizes the disclosure of the personal information at issue in this appeal, in particular the following portions of these Articles:

> Article 5
>
> CONSULAR FUNCTIONS
>
> Consular functions consist in:
>
> (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
>
> (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
>
> Article 37
>
> INFORMATION IN CASES OF DEATHS, GUARDIANSHIP OR TRUSTEESHIP, WRECKS AND AIR ACCIDENTS
>
> If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:
>
> (a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;

The appellant made the following submissions in support of his section 42(e) argument.

> The position of the Appellant is that Article 37 does have the force of law in Canada. We have been advised by officials of the Department of Foreign Affairs

> and Trade that this is indeed the case and that Article 37 does have the force of law in Canada but that Article 37 is not binding on the Public Guardian and Trustee where the deceased intestate is a citizen of Canada.
>
> Inasmuch as Article 37 of the Convention refers to "the case of the death of a National of the Sending State" it is our position that the interpretation of this Section by the Department of Foreign Affairs and Trade of Canada is not correct. It is our position that the word "National" has a much broader meaning than the word "citizen".
>
> Inasmuch as Article 37 of the Vienna Convention refers to "the case of the death of a National of the Sending State" it is the position of the Consulate General of the Republic of Croatia that there is also an obligation on the part of the Government of Ontario (and the office of the Public Guardian and Trustee) to report the death of an individual intestate where it would appear probable that the next-of-kin of that individual reside in a country represented by Embassies or Consulates of General of Sending States.

The PGT disagrees with the appellant's position. It submits:

> It is the Public Guardian and Trustee's position that the provisions of the Vienna Convention which are applicable in Canada, do not require this Office to provide personal information to the consular authorities, either in addition to or in lieu of conducting our own inquiries for next-of-kin. Article 37 was not incorporated in the *Foreign Missions and International Organizations Act* and is therefore not law in this county. The Public Guardian and Trustee asserts that Canada did not agree to be bound to notify the consulate of a receiving State of incidents that were outlined in Article 37. Notification regarding succession matters is not included in Article 37. It is included in Article 5, which defines consular functions but does not set out a positive duty to the receiving State in succession matters.

In Order M-96, I made the following comments with respect to section 32(e) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is equivalent to section 42(e):

> Section 32 is contained in Part II of the [Municipal] *Act*. This Part establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The [appellant's] request to the [institution] was made under Part I of the [Municipal] *Act*, and this appeal concerns the [institution's] decision to deny access. In my view, the considerations contained in Part II of the [Municipal] *Act*, and specifically the factors listed in section 32, are not relevant to an access request made under Part I.

[See also Orders P-679, P-940, M-1118]

Similarly in the present appeal, section 42(e) appears in Part III of the *Act* and, applying the reasoning in Order M-96 and other subsequent orders of this Office, I find that this section is not relevant in considering an access request, such as the appellant's request, that is made under Part II of the *Act*. Accordingly, I find that section 42(e) and Articles 5 and 37 of the Vienna Convention are not relevant to my determination of whether or not the appellant is entitled to responsive records in this appeal.

INVASION OF PRIVACY

Where an appellant seeks the personal information of another individual, 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 this case, the PGT claims that disclosing the records would constitute an unjustified invasion of the personal privacy of the deceased and the other individuals identified in the records, pursuant to section 21(1)(f). This section 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) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. 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; and 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).

Section 21(3)

The PGT relies on the presumptions contained in sections 21(3)(a), (f), (g) and (h), which read:

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

> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
>
> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The PSG submits:

> In this particular record, the following personal information would be presumed to constitute an unjustified invasion of personal privacy under section 21(3):
>
> 1. there is information in the record with respect to opinions by other persons about the deceased's psychological history (clauses (a) and (g));
>
> 2. there is information in the record with respect to the deceased's finances, income, assets, liabilities, net worth, and financial history;
>
> 3. there is information in the record that indicates the deceased's ethnic origin and possibly her political beliefs, particularly in the citizenship, immigration … records.

Having reviewed the records, I find that:

1. the information concerning the race, birthplace and original citizenship of the deceased, her parents, or any other individual indicates their "ethnic origin" and therefore falls within the scope of section 21(3)(h), regardless of the fact that some of this information may already be known by the appellant (portions of Records 5, 6, 8, 10, 12, 13, 16, 17, 18, 19, 23, 25, 29-39, 46, 61, 62, 63, 70, 71, 72, 73, 78, 84, 86, 87, 88, 101, 113, 118, 119, 120, 121, 122 and 132);

2. Record 201 contains information concerning the deceased's finances and net worth at the time of her death, which brings this information with the scope of section 21(3)(f); and

3. references in the records to the psychological history of the deceased fall within the scope of section 21(3)(a) (Records 79, 80 and 81).

I find that disclosure of all of the information falling within these three categories would constitute a presumed unjustified invasion of the privacy of the deceased, her parents, or other identifiable individuals. None of the requirements listed in section 21(4) apply to this information and, as state above, a combination of factors under section 21(2) cannot outweigh a presumption under section 21(3). Subject to my discussion of section 23 of the *Act*, this information qualifies for exemption under section 21 of the *Act* and should not be disclosed.

Section 21(2)

The information which does not qualify under section 21(3), and remains at issue, consists of information pertaining to the heirs which was collected by the PGT, the deceased individual's health and social insurance card information, certain information about the deceased and her parents on the Statement of Death form, and other documents and/or correspondence created by the PGT or provided to the PGT by others in the context of the administration of the deceased's estate, include correspondence to and from the deceased and copies of her address book.

The PGT submits that the factors listed in sections 21(2)(e), (f) and (h), which favour privacy protection, are present and relevant with respect to the remaining information, and that section 21(2)(a) is not a relevant consideration in the circumstances of this appeal.

The appellant's representations do not speak to any listed factors under section 21(2) which favour disclosure, but the appellant does dispute the application of section 21(2)(e).

The relevant portions of section 21(2) read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The PGT's representations include the following submissions:

1. The request is not intended to allow the public scrutiny of the activities of the Public Guardian and Trustee. There has not been any allegation by the Appellant or his client that the activities of the Public Guardian and Trustee in locating the next-of-kin have been in any way negligent or indicative of poor administration of the estate.

2. With respect to records obtained from the next-of-kin in Europe, from Human Resources Canada and the Registrar General of Ontario and other such holders of personal information, the information is highly sensitive and has been supplied by the record holder to the Public Guardian and Trustee or her agent (or to the Deceased, during the Deceased's lifetime), in confidence.

3. The Appellant represents a person claiming to be one of the next-of-kin and is therefore in a position to verify the accuracy of allegations of the existence of other next-of-kin of the same relationship of the deceased.

In addition, in considering whether disclosure of the personal information constitutes an unjustified invasion of personal privacy, the Public Guardian and Trustee as head of the institution, is required to consider her fiduciary duty as Estate Trustee according to the applicable estate laws in Ontario, to search for the heirs and protect the assets of the estate from unnecessary fees and expenses. If information is released about the next-of-kin which lead other persons to locate and contact them ahead of the Public Guardian and Trustee, the heir of the estate may be exposed to unnecessary expense and diminution of the value of the estate ultimately paid to the heir. The Public Guardian and Trustee asserts that a pecuniary harm to the heirs of the estate is in effect a pecuniary harm to the estate itself.

The legal obligation to protect the assets of the estate applies to all estate trustees. However, other estate trustees in the private sector are not subject to the provisions of the *Act* and furthermore are not subject to the interest of third parties such as heir tracers who wish to locate heirs first, ahead of the estate trustee, and obtain the heirs' consent to a retainer agreement for their own commercial purposes.

The appellant objects to the PGT's practice of out-sourcing private law firms to assist in locating foreign heirs, and submits that use of embassies and consulates would be more expeditious and cost-effective. He goes on to discuss his experience with a number of estates involving various consular clients, and submits the following in support of his position that section 21(2)(e) does not apply:

> Fees charged by Embassies and Consulates General have always been considered to be reasonable fees. I do not recall when an objection has ever been raised with regard to legal fees allowed by an Embassy or a Consulate General.

> **An important point which is being overlooked by the office of the Public Guardian and Trustee** is the fact that the fees charged by Embassies and Consulates General and the legal fees allowed by an Embassy and Consulate General (by way of agreements) are consistent with all estates, regardless of value. [appellant's emphasis]
>
> There have been many estates finalized where the estates have been very small estates. In many instances, estates have been finalized where the amount available for distribution has been less than $5,000.00. In many instances, the amount distributed has been substantially less than $5,000.00. In these instances, regardless of how much time and effort goes into these estates, the fees of the Embassy or Consulate General and the legal fees are set by way of agreement, and in most instances, these fees will not exceed 10% of the net value of a small estate.

Section 21(2)(a) - public scrutiny

The appellant has not raised this factor, and I find that it is not a relevant consideration in this appeal.

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

The parties have submitted conflicting representations on this factor. Based on the material before me, I do not accept that this factor is applicable to the remaining information that relates to the deceased individual. As far as the heirs or potential heirs are concerned, I accept that in circumstances where an estate has not escheated to the Crown, that heirs or potential heirs could be contacted by the PGT, private heir tracers and/or a consulate, and that different fees could be involved, depending on circumstances. However, based on the appellant's representations in this case, I am not persuaded that any fees charged by his client in this regard would expose any heirs or potential heirs to pecuniary or other harm or, more particularly, that any such exposure would be unfair. Accordingly, I find that section 21(2)(e) is not a relevant consideration in this appeal.

Section 21(2)(f) - highly sensitive

In order for section 21(2)(f) to apply, the disclosure of the information at issue must reasonably be expected to cause excessive personal distress to the individuals in question (Orders M-1053, P-1681 and PO-1736). This factor has been found to apply, for example, to information about professional misconduct (Order M-1035) and in circumstances involving allegations of workplace harassment (Order P-685). In addition to some information which I have already determined qualifies under the section 21(3) presumptions, I find that the deceased's address book, and information concerning the immigration process whereby the deceased entered Canada, if disclosed, could reasonably be expected to cause personal distress to the individuals in question, and section 21(2)(f) is a relevant consideration with respect to the portions of records containing this type of information. While there may be some degree of sensitivity regarding the other remaining personal information, it is not comparable to the types of information that have

been found to meet the section 21(2)(f) threshold, and I find that this factor does not apply to this other personal information.

Section 21(2)(h) - supplied in confidence

Section 21(2)(h) requires that the personal information be supplied by the individual to whom it relates in confidence. I find that none of the information at issue in this appeal was supplied to the PGT by the deceased. Most of the other information was also obtained by the PGT through the course of administering the deceased's estate and not from the individuals to whom it relates. Subject to two exceptions, there is no basis in the circumstances for a finding that any of it was supplied in confidence by any of these other individuals.

The first exception is the information contained in Records 69, 70 and 71, which I have already determined qualifies under the section 21(3)(a) presumption.

The second exception is the information contained on the Statement of Death form. Based on the nature of this record and the circumstances under which it was created, I accept that an "informant" would have a reasonably held expectation that the information provided would be kept confidential except when used for purposes connected to the death of an individual, and that this would include the administration of estates. However, given the nature of the information and the need to use it in ways which would require disclosure in order to effectively administer estates, I find that the section 21(2)(h) factor carries low weight in these circumstances (Order PO-1923).

Unlisted Factor - diminished privacy interest after death

The factors listed in section 21(2) are not exhaustive. Unlisted factors may also be relevant, depending on the particular circumstances of an appeal. One such unlisted factor was described by me in Order PO-1717 as follows:

> I agree with the statement made by former Commissioner Tom Wright in Order M-50, that:
>
> > Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.
>
> A decision to consider this factor, and the assessment of the weight to be given to it in a particular appeal, must be made in the context of section 2(2).

> In that section, the legislature makes it clear that information about an individual remains his or her personal information until thirty years after death, signalling a strong intention to protect the privacy rights of deceased persons.

In addressing this unlisted factor, the PGT submits:

> The Act contains no provisions or suggestions to the effect that, as an "unlisted factor", the clear language of the Act can be ignored and that the privacy interest associated with the personal information of the deceased individual is somehow diminished during that thirty-year period.
> …
>
> The Public Guardian and Trustee did not appeal IPC Order PO-1717 because it only ordered, in effect, disclosure of the simple fact of escheat or distribution to unnamed beneficiaries within the context of an escheated estate of an individual dead for 23 years … The practical impact on the policy and practices of the PGT were minimal, since the estate had escheated and the PGT was no longer actively searching for heirs.
>
> However, IPC Order PO-1736 and the subsequent reconsideration orders expanded the scope of the disclosure to include address, last occupation and place and date of death of the deceased in the context of estates not yet escheated, that is, disclosure of personal information from the estates of individuals who had died as recently as 1998 and were still being actively administered.
>
> Order PO-1736 and this request, deal with very recent estates which have not escheated and where the PGT is actively administering the estate and searching for heirs. The impact of disclosure of the requested records in Order PO-1736 *and in this request in particular* would have a significant impact on the estate, on the PGT's duty to search for heirs, on the privacy rights of the deceased and third parties, and potentially on the heirs themselves.
>
> The Assistant Commissioner, in his letter to the Ministry dated June 5, 2001, quotes former Commissioner Tom Wright in Order M-50 on the argument of "diminished privacy interest after death". The former Commissioner clearly states that such disclosure "*may*" be justified "*in certain circumstances*". The Public Guardian and Trustee respectfully submits that in the circumstances of this case, more particularly *because of the nature of the information in the records requested*, there is no justification for disclosure based on any unlisted factors. …

Consistent with the past orders identified by the PGT, I have determined in this case that, because the deceased has not been dead for 30 years, the information about her and others contained in the records falls within the scope of section 2(2). I also accept that the unlisted factor "diminished privacy interest after death" should be applied with care, given the wording of this section. Each case must be carefully considered on its particular facts and circumstances.

In the present case, the deceased died in 1999, which means that she has only been dead for approximately two years. This is similar to the situation faced by Senior Adjudicator David Goodis in Order PO-1736, where he was dealing with individuals who were dead for a relatively short period of time. Orders PO-1717 and PO-1923, on the other hand, dealt with situations where the deceased had been dead for more than 20 years. As far as the deceased is concerned, in my view, the unlisted factor of "diminished privacy interest after death" is relevant in this appeal, as it was in Order PO-1736. However, unlike Orders PO-1717 and PO-1923, where this factor reduced the privacy interests of the deceased significantly, in this case, I find that the privacy interests of the deceased, like those in Order PO-1736, are only moderately reduced, and not eliminated. Given that the husband and the parents of the deceased have likely been dead for longer, I find that their privacy interests have been reduced to a more significant degree but, in the absence of any evidence to establish that any of them has been dead for 30 years, these interests have also not been eliminated.

Unlisted factor - benefit to unknown heirs

In Order PO-1717, I also refer to another unlisted factor when I state:

> The appellant identifies another unlisted factor. He submits that disclosure of the requested information pertaining to the deceased's estate will help unknown heirs recover funds that they would otherwise be unlikely to receive. I considered this factor in Order P-1493, involving a request by an heir tracer to the Ministry of Consumer and Commercial Relations for access to marriage and death records. In Order P-1493, I stated:
>
> > In the appellant's view, disclosure of the records would serve to benefit individuals who would otherwise never know and never be able to prove their entitlement under an estate. Although not directly related to any of the section 21(2) considerations, I find that this is an unlisted factor favouring disclosure.
>
> Similarly, I find that this unlisted factor is a relevant consideration in the present appeal.

In the present appeal, the appellant states:

> Croatia and a number of other European countries, and China, have had a special interest in estates, and in matters arising out of the death of individuals who immigrated to Canada and who in many instances have left their families, including in some instances wives and children, in the countries from which they came. The Embassy and Consulate General of the Republic of Croatia as well as other European countries, and China, have for many years taken a special interest in reporting the death of one of their Nationals to relatives in the country of origin, whether or not there is any estate. In matters where there is an estate, regardless of the value of the estate, they have been active in locating and

> representing the next-of-kin and heirs-at-law. This is a recognized diplomatic function as set out in Article [sic] of the Vienna Convention and is evidenced in the letter dated February 10, 1995 from the Consul General of Great Britain.
>
> The present practice of the Ministry of the Attorney General and the Office of the Public Guardian and Trustee and their reluctance to involve the Embassies and Consulates General in the administering of these estates will undoubtedly result in a very substantial percentage of intestate estates remaining undistributed with the rightful heirs never receiving the proceeds of these estates to which they are entitled.

The PGT distinguishes the facts in Order PO-1717 to those in the present appeal, and in particular points out that the file in this previous appeal had escheated to the Crown without heirs having been located. The PGT notes that the records at issue in the present appeal and in Order PO-1717 are different. In responding to the appellant, the PGT submits, in part:

> The potential benefit to unknown heirs [in PO-1717] from disclosure of limited information about *escheated* estates, is considerably different from the situation in this case where the deceased died a short period of time before the request for disclosure, where the PGT was actively searching for the heirs - and in fact, was ultimately successful in locating them.
> …
>
> … the [PGT] as estate trustee discloses the name of the deceased to the individuals that are identified as relatives. They are advised of the documentation currently on hand, thus avoiding duplication of searches and additional cost to the next-of-kin who may have a higher claim to the estate. They are told about the documentation that still needs to be provided to the [PGT] in order to finalize their claim. They are also advised of the approximate value of the estate, in order to make a fully informed decision about seeking and paying for assistance from a fee-for-service agent to assist them with their claim. The PGT respectfully submits that without this information at hand, the next-of-kin may enter into a representation and fee agreement that may not be in their best interests …
>
> The appellant was advised by the PGT on June 29, 2000 that he and/or his clients would be provided with personal information about a deceased for any estates where the PGT's own searches had been unsuccessful or would not be cost-effective in the circumstances. The PGT has in fact provided such information to the appellant or his clients and to the diplomatic offices of other countries in a number of estates where these circumstances apply. As estate trustee, the PGT has the authority to disclose such information under section 66 of the Act.
> …
>
> In considering any "potential benefit to heirs" as an unlisted factor, the Assistant Commissioner should also consider the likelihood of a conflict of interest between

> the appellant's clients and other potential heirs who may rank ahead of or equally with the appellant's clients under the rules for intestate distribution. If the appellant's consulate clients manage to locate and obtain powers of attorney on behalf of some of the deceased's next-of-kin, they stand to benefit by receiving a percentage of the estate distribution, if the claim is successful. They have an obvious interest in protecting and maximizing their own and the claimants' financial interests. It would be contrary to their own and their clients' best interests for the appellant and the consul general to expend additional resources to search for next-of-kin of a higher degree, who may in fact reside in another country. By contract, [the PGT] has a legal duty to satisfy herself that all potential heirs of a higher degree than the claimants represented by the appellant, have been accounted for. This is best accomplished when [the PGT] conducts its own searches, using professional, independent genealogists and researchers.

The PGT also submitted an affidavit from an employee who explains the current operations on the PGT in this regard, including the policies and procedures used in searches for next-of-kin in both Ontario and abroad.

Applying similar reasoning to that followed in Orders PO-1717, PO-1736 and PO-1923, I find the possibility that disclosure of personal information about the deceased might result in individuals successfully proving their entitlement to assets of estates is a relevant factor favouring disclosure. While I acknowledge that the appellant is not a private heir tracer, his rationale for seeking access to the record is analogous to that of a private heir tracer. The appellant's client is the Consulate of Croatia that is seeking access to information for the purpose of locating potential heirs to the estates of individuals who died in Ontario but who may have heirs in Croatia. I also acknowledge that the appellant's client has other responsibilities, but in the circumstances of this appeal, in my view, the Consulate of Croatia is performing a function akin to a private heir tracer; attempting to identify and locate individuals who could be entitled to the proceeds of an estate that would otherwise escheat to the Crown. Therefore, I find that the considerations found relevant in past orders concerning private heir tracers apply in the same manner to the appellant in the circumstances of this appeal.

I also accept that the PGT can reasonably require some evidence that a consulate requesting records for the purpose of searching for next-of-kin has reason to believe that the deceased individual was at one time a national of the country represented by the consulate. In some instances, including this appeal, the requested records themselves may contain the necessary evidence on their face.

Considering the particular circumstances of this appeal and the contents of the specific records being requested by the appellant, I find that the potential for disclosure of certain information contained on the Statement of Death form to assist individuals to prove their entitlement to assets of estates which they may not have been able to otherwise is a relevant factor. The weight of this factor varies according to the extent to which a particular item of personal information assists in the identification of potential heirs. In the circumstances of this appeal, the names of the deceased's parents and husband, as well as the date of death, place of death, age, date of birth,

martial status and occupation of the deceased could reasonably be expected to assist in the identification of potential heirs. Applying similar reasoning to that followed by Senior Adjudicator Goodis in Order PO-1736 and by me in Order PO-1923, I find that this unlisted factor applies to a high degree as it relates to the date of death; to a moderate to high degree to the place of death, date of birth, age, marital status and occupation of the deceased, and to the names of the deceased's husband and parents; and not at all to the deceased's social insurance number or any personal information of the informant.

Having reviewed the rest of the records, and in light of my decisions regarding the information contained on the Statement of Death form, I find that the "benefit to unknown heirs" factor is not a relevant consideration with respect to any personal information contained in the other records at issue in this appeal.

Analysis of Factors

I found above that there is one listed factor favouring non-disclosure of the deceased's address book and information concerning the immigration process whereby the deceased entered Canada (highly sensitive); and another listed factor favouring non-disclosure of certain personal information contained on the Statement of Death form (supplied in confidence). I also found that there is one unlisted factor favouring disclosure of the personal information of the deceased and her parents (diminished privacy interest after death); and another unlisted factor favouring disclosure of certain portions of the Statement of Death form (benefit to unknown heirs).

The PGT in its submissions suggested that I give very little weight to the two unlisted factors. It states:

> … The PGT respectfully submits that in this case, the deceased's privacy interests and those of other persons identified in the PGT file, far outweigh the appellant's access interests, which are commercial rather than personal, and any benefit to unknown heirs.
>
> The key consideration in determining the weight to be given to these unlisted factors is the nature of the record that has been requested.
>
> Decisions in Order PO-1717, Order P-1493, Order P-1187 and Order 71 all dealt with escheated estates, where the deceased had been dead for at least 10 years, where the [PGT] had not been successful in locating heirs, **and** where the PGT was not in the process of actively searching for heirs. The IPC ordered the disclosure of lists of names of estates that fell within certain parameters, or to confirm the status of an escheated estate. That is a very different situation from the matter under consideration in this Appeal, where the appellant is seeking access to 165 pages from the estate file, containing such deeply personal and sensitive information as the deceased's health and social insurance numbers, her marriage information, maiden name, letters from friends, refugee, immigration and citizenship information, details about her family and events during World

> War II, information about her assets and liabilities, and information about the [PGT's] searches for her next-of-kin and contact information about the next-of-kin themselves. A number of these records were obtained in confidence from other record holders such as the Registrar General and immigration authorities.

Taking all representations and considerations into account, I have accorded the following weights to the various factors:

- *highly sensitive* (section 14(2)(f)) - favours non-disclosure - moderate to high weight

- *supplied in confidence* (section 14(2)(h)) - favours non-disclosure - low weight

- *diminished privacy interest after death* - favours disclosure - low weight for personal information of deceased; moderate to high weight for personal information of the deceased's parents; no weight for personal information of the informant

- *benefit to unknown heirs* (only relevant to Statement of Death form) - favours disclosure - high weight for deceased's date of death; moderate to high weight for the names of the deceased's husband and parents, and for the deceased's date of birth, place of death, age, marital status and occupation; no weight for the deceased's social insurance number and the personal information of the informant; no weight for personal information contained in all other records

In balancing the various factors present in this appeal, I find that the factors favouring disclosure outweigh the factor favouring privacy protection for certain specific information contained on the Statement of Death form, but that the balance favours privacy protection for all other records. Specifically, I find that disclosure of the date of death, date of birth, place of death, age, marital status and occupation of the deceased, and names of the deceased's husband and parents contained on the Statement of Death form outweigh the privacy interests of the deceased and her husband and parents in the circumstances. Although all of the information on the Statement of Death form may have been provided by the "informant" in confidence, the information described above is not highly sensitive and much of it may already be known by the appellant and others familiar with the deceased during her lifetime. On the other hand, this information would be of value in identifying potential estate heirs, which is an important public policy objective. Accordingly, I find that disclosure of the date of death, date of birth, place of death, age, marital status and occupation of the deceased, and the names of the deceased's husband and parents would not constitute an unjustified invasion of the privacy of the deceased or her parents within the meaning of section 21(1)(f), and this information is therefore not exempt under section 21(1) and should be disclosed to the appellant.

There are no factors favouring disclosure of the personal information of the "informant" contained in the Statement of Death form, and I find that disclosure of this information would

constitute an unjustified invasion of her privacy. This information does not qualify for the section 21(1)(f) exception, and is therefore exempt under section 21(1) of the *Act*.

I will provide the PGT with a highlighted version of the record identifying the portions that should not be disclosed, either because they contain information that falls within the scope of one of the presumptions under section 21(3) or because disclosure would constitute an unjustified invasion of the privacy of the "informant".

COMPELLING PUBLIC INTEREST

In his representations, the appellant argues that section 23 of the *Act* applies. Section 23 of the *Act* states:

> 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.

I have found that certain personal information of the deceased and other identifiable individuals falls within the scope of the sections 21(3)(a), (f) and (h) presumptions; that the personal information of the "informant" and the social insurance number of the deceased contained in the Statement of Death would constitute an unjustified invasion of privacy under section 21(1); and that all other records qualify for exemption under section 21 of the *Act*. It is this information that is subject to consideration under section 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)*, (1999), 118 O.A.C. 108 (C.A.), leave to appear refused (January 20, 2000), Doc. 27191 (S.C.C.].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that 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 that 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).

The appellant provides lengthy submissions on what he views as the compelling public interest in disclosure of information concerning deceased individuals to embassies and consulates in order to assist in the identification of potential heirs. In my view, the appellant's arguments have

some persuasive value to the extent that they would apply to a finding that all of the requested information qualified for exemption under section 21. However, I have determined that some personal information of the deceased and her parents contained in the Statement of Death form does not qualify for this exemption claim. The appellant's submissions do not convince me that there is a compelling public interest in disclosing the portions of the records that fall within any of the section 21(3) presumptions or otherwise satisfy the requirements of the mandatory section 21 exemption claim.

As stated earlier in my discussion of section 21(2), although the appellant is not a private heir tracer, his rationale for seeking access to the record is analogous to that of a private heir tracer. His client is the Consul General of Croatia, which is seeking access to information for the purpose of locating potential heirs to the estates of individuals who died in Ontario but who may have heirs who are citizens of Croatia. Despite the acknowledged fact that the appellant represents a public institution, in my view, the interest that he represents in seeking access to the personal information of the deceased individual is essentially a private rather than a public interest. If heirs of the deceased's estate are identified in Croatia, either through the efforts of the appellant's client or otherwise, any proceeds would flow to them, not to the public institution. Accordingly, I find that any interest that may exist in these circumstances is the private interest of the potential heirs, not a public interest as represented by the appellant or his client.

Therefore, in the absence of a demonstrated public interest in disclosure of the personal information of the "informant", or the personal information of the deceased, her parents, or any other identifiable individual that will otherwise not be provided to the appellant as a result of this order, I find that the requirements of section 23 have not been established.

ORDER:

1. I uphold the decision of the PGT to deny access to all records with the exception of specific portions of Record 10 (Statement of Death form) described in Provision 2.

2. I order the PGT to disclose to the appellant the portions of Record 10 which consist of the date of death, date of birth, place of death, sex, age, marital status and occupation of the deceased, and the names of the deceased's husband, mother and father, as well as those portions of Record 10 that do not contain any personal information. I have attached a highlighted version of Record 10 with the copy of this order sent to the PGT's Freedom of Information and Privacy Co-ordinator that identifies those portions that should **not** be disclosed. This disclosure is to take place by **August 23, 2001.**

3. In order to verify compliance with Provision 2, I reserve the right to require the PGT to provide me with a copy of Record 10 disclosed to the appellant, only upon request.

Original signed by: August 1, 2001
Tom Mitchinson
Assistant Commissioner