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

Reconsideration Order PO-2012-R

Appeal PA-010056-1

Order PO-1963

Office of the Public Guardian and Trustee

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NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the OPGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Copies, appropriately edited as per the FOI *Act*, of any releasable documents, memos, letters and reports that refer to persons who have died between April 1, 2000 and June 30, 2000 inclusive, without a known will or with a will that is no longer effective because the beneficiaries of the residue of the estate have either deceased or their whereabouts is unknown; and where the closest next-of-kin of the deceased are unknown.
>
> If such documents, referred to in paragraph one, do not exist, then we ask that we be simply provided with the name of the deceased.

Following its discussions with the requester, the OPGT confirmed that he was seeking access to:

> The names of Ontario residents, who have died between January 1, 2000 and December 31, 2000 inclusive, who passed away without a known will or with a will that is no longer effective because the beneficiaries of the residue of the estate have either pre-deceased the deceased or their whereabouts is unknown, and where the closest next-of-kin of the deceased are unknown.

The OPGT also confirmed that the requester sought access only to information pertaining to those estates with a value of more than $100,000. The OPGT then provided the requester with a decision letter indicating that it was prepared to produce a record containing the responsive information upon payment of the sum of $1,290. The requester paid the fee, and the OPGT produced and then denied access to the responsive record, claiming that this information was exempt from disclosure under section 21 of the *Act*. The requester, now the appellant, appealed the OPGT's decision to deny access to the record it had created.

During the mediation stage of the appeal, the appellant advised that he was not seeking access to the account numbers of the estates which are included in the record. As no other mediation was possible, the appeal was moved to the adjudication stage of the process.

Following the exchange of representations, I issued Order PO-1963 in which I upheld the OPGT's decision to deny access to the responsive record. At the request of the appellant, however, I then rescinded my decision on the basis that a fundamental defect in the adjudication process had taken place. I determined that I did not properly consider or address certain concerns raised by the appellant in his submissions and that the rules of natural justice respecting procedural fairness required that I begin the adjudication process anew.

To this end, I provided the appellant with a revised Notice of Inquiry seeking his submissions on the issues identified in the original appeal, as well as those raised in his earlier representations. The appellant made submissions, the relevant portions of which I shared with the OPGT. The OPGT also provided me with submissions that were shared with the appellant who then made additional representations by way of reply.

The appellant has asked that I consider whether he is entitled to information about estates without heirs based on several different scenarios. The appellant indicates that he prefers that I address the question of his obtaining access to information about only those estates valued at more than $100,000. He also presents several other alternative approaches should I make a finding that the preferred request would result in my upholding the OPGT's decision to deny access. These alternatives include: 1) those estates with an average or greater than average value with respect to those estates administered by the OPGT; 2) those estates valued at more than $20,000; or 3) all estates regardless of their value.

Because of the manner in which I have addressed the application of the section 21(1) exemption to the information which is responsive to the request as originally formulated, it is not necessary for me to address whether the alternative requests would result in the appellant obtaining the information sought. Similarly, I decline the appellant's suggestion that the request be amended to include information about estates where the intestate individual died in the year 2001.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines the term "personal information" to mean "recorded information about an identifiable individual, including, the individual's name where it appears with other personal information relating to the individual (paragraph (h)). The information remaining at issue in this appeal consists of the names of the deceased persons only. The list is comprised of those estates having a value of more than $100,000 where the deceased died between January 1, 2000 and December 31, 2000 and includes those estates where no next of kin has been located.

I find that this information qualifies as "personal information" within the meaning of the definition of that term in section 2(1) of the *Act*. The fact that each estate has been valued at more than $100,000 and the fact that no next of kin had been located, together with the names of the deceased persons, constitute information about identifiable individuals and, therefore, qualifies as the personal information of these individuals under paragraph (h) of the definition in section 2(1).

INVASION OF PRIVACY

Having found that the information contained in the records qualifies as "personal information" as that term is defined in section 2(1), I must now determine whether it is exempt from disclosure under the mandatory exemption in section 21(1), as claimed by the OPGT.

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

In my view, the only possible exception to the prohibition against disclosure in section 21(1) is that described in section 21(1)(f), which reads:

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

Sections 21(2) 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].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption [Order PO-1764].

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

Application of the Section 21(3) Presumptions

Section 21(3)(a) – Medical Information

The presumption in section 21(3)(a) reads:

> 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;

The OPGT submits that the information in the responsive record is subject to the presumptions in sections 21(3)(a) as it contains medical information about each of the deceased persons, specifically the year of their death. The bare fact that an individual died cannot, without more, qualify as personal information relating to their medical history or condition under section 21(3)(a).

Contrary to the assertions of the OPGT in its representations, I did not make such a finding in Order P-1187. Rather, I simply held that, in the absence of any considerations under section 21(2) favouring disclosure of information relating to the dates of death of certain individuals, this information is exempt under section 21(1). I did not make a finding that the presumption in section 21(3)(a) applied to information about an individual's date of death, as is inferred in the OPGT's submissions.

Section 21(3)(f) – Financial Information About an Individual

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 OPGT submits that the disclosure of the names of the individuals contained in the record would reveal the fact that they have an estate valued at more than $100,000 and that this information "describes an individual's net worth" as contemplated by the presumption in section 21(3)(f). It relies on the decision of Senior Adjudicator David Goodis in Order PO-1736 where he held that:

> In my view, the Client Names, together with the Value of Personal Property, Value of Real Property and Total Value of Estate information clearly meet the section 21(3)(f) presumption of an unjustified invasion of personal privacy. I do not accept the appellant's submission that disclosure of the total value of assets can be distinguished from the precise details of the assets, or the appellant's suggestion that an estimate can be distinguished from a precise figure. The fact that section 21(3)(f) applies to an individual's "net worth" means that a total figure, without a detailed breakdown, can qualify for this presumption. Further, in the absence of any evidence to indicate that the figures would be substantially inaccurate, there is no basis for finding that the amounts do not "describe" these individuals' finances, assets or net worth. Information need not be absolutely precise or accurate in order to qualify for the section 21(3)(f) presumption.

In Order PO-1736, Senior Adjudicator Goodis evaluated the application of the section 21(3)(f) presumption to a record which listed a precise dollar value for each estate. He found that because the information in that record described a "total figure" of the value of the deceased individual's estate, it properly described the individual's "net worth" and fell, accordingly, within the ambit of the presumption.

I agree with this interpretation and application of the section 21(3)(f) presumption. However, this case is clearly distinguishable on its facts. Here, the record does not "describe" the total value of the estate with anywhere near the degree of specificity as was the case in Order PO-1736. Rather, the information at issue reveals only the fact that the estates are valued at more

than $100,000. In my view, this is not sufficiently specific to attract the section 21(3)(f) presumption. The value of the estates could, conceivably, range from $100,000.01 to a much higher amount in the order of hundreds of thousands or even millions of dollars. Therefore, I conclude that section 21(3)(f) does not apply in the circumstances.

Application of the Considerations in Section 21(2)

Introduction

The OPGT relies on two factors listed in section 21(2) which weigh against disclosure of personal information to a requester, sections 21(2)(e) and (f) which 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,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> . . .
>
> (f) the personal information is highly sensitive;

I asked the OPGT to refer to three earlier decisions of this office, Orders PO-1717, P-1187 and 71, and to provide me with submissions as to why the principles set forth in them are not applicable to the circumstances extant in the present appeal. The OPGT distinguishes these cases by arguing that they involved situations where the estates had escheated to the Crown as more than ten years had elapsed from the date of death of the deceased person to whom the estate related. It submits that in those cases, the OPGT was no longer searching for heirs and that the factors favouring disclosure under section 21(2) were "far stronger" under these circumstances. The OPGT also distinguishes these cases on the basis that the records at issue in those appeals did not reveal the dollar value of the estates themselves.

I note that, in fact, the record at issue in Order P-1187 included only those estates which had a dollar value of more than $10,000. The record did not stipulate the exact value of the estate, as is the case in the present appeal.

The appellant argues that the considerations listed in sections 21(2)(a) and (c), as well as the unlisted considerations described in earlier orders such as PO-1736 as "diminished privacy interest after death" and "benefit to unknown heirs" apply to the present appeal. The appellant also takes issue with the position taken by the OPGT that it operates in an efficient and cost-effective manner in locating missing heirs.

Sections 21(2)(a) and (c) state:

> 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;
>
> . . .
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;

Section 21(2)(e) – Unfair Exposure to Pecuniary or Other Harm

The OPGT is of the view that this consideration is a significant one in the circumstances of this appeal. It argues that the record consists of the names of individuals who died in 2000 and that the OPGT is currently actively searching for next-of-kin to verify first, if these individuals are willing to administer the estate of the deceased person or consent to the OPGT's appointment as the estate trustee. It takes the position that if the appellant is given access to the information at issue, harm to the pecuniary position of the heirs of each estate is reasonably likely to follow. It submits that the fees charged by the appellant and other heir tracers are far in excess of what would be payable to the OPGT for its services. Accordingly, harm to the pecuniary position of the heirs would result from the disclosure of the record.

The OPGT has made extensive submissions on the efficiency of its operations and reasonableness of the fees which it charges to heirs, and contrasts this with what it argues are the excessive fees charged by heir tracers for the same service. For this reason, it argues that pecuniary harm to the estates and beneficiaries is reasonably likely to occur should the record be disclosed.

In Order PO-1790-R, Senior Adjudicator Goodis reconsidered but did not alter his earlier decision in Order PO-1736. Both orders were upheld on judicial review [*Ontario (Public Guardian and Trustee) v. Goodis* (December 13, 2001), Toronto Doc. 490/00 (Ont. Div. Ct.), leave to appeal refused (March 21, 2002), Doc. M28110 (C.A.)]. In the latter order, Senior Adjudicator Goodis considered a similar argument from the OPGT, which he referred to as the "pecuniary harm to unknown heirs" factor. The Senior Adjudicator stated:

> In my view, the PGT has not established that disclosure in accordance with my Order PO-1736 will cause pecuniary or other harm to potential heirs for the purpose of section 21(2)(e) or otherwise under section 21. The PGT admits that "because the [PGT] has legitimate access to the personal papers of the deceased and to various sources of pertinent information, we are in most cases able to locate the heirs and assist them with their documentation, far more quickly than

> would an heir tracer." This statement undermines the PGT's submission that if the information is disclosed in accordance with the order, heir tracers such as the appellant will be able to locate potential heirs sooner than the PGT would, thus resulting in the heirs being charged a greater fee. Further, the PGT indicates that while it had difficulties in the past locating heirs, its "skills and ability to search [for potential heirs] have greatly increased even in the past two years ..." I am not persuaded based on the material before me that there is a serious risk of Order PO-1736 resulting in a substantial number of heirs being located by heir tracers who otherwise might have been located first by the PGT.
>
> In addition, the PGT has not satisfied me that the circumstance of an heir tracer locating and seeking a contractual arrangement with a potential heir would constitute pecuniary or other harm. I accept the appellant's submission that potential heirs are free to either reach an agreement with an heir tracer, or not. While it may be that in some cases heir tracers have been known to mislead potential heirs during the course of contractual discussions, I do not have sufficient material before me on which to reach a conclusion that this is a significant risk. In any event, potential heirs who contract with heir tracers based on, for example, duress or misrepresentation, may seek remedies in the courts based on contract law.

I agree with the Senior Adjudicator's approach, which has been upheld by the courts and, for similar reasons, I conclude that the section 21(2)(e) factor does not apply here.

Section 21(2)(f) – Highly sensitive Information

With respect to the application of the factor listed in section 21(2)(f), the OPGT submits that:

> Disclosure of personal information, leading to a loss of 25 to 50% of the estate at the expense of the heirs, can be assumed to be contrary to the wishes of the deceased persons and likely to have caused them extreme distress if they had known while they were alive of the possibility that this information could be released to a person in the business of locating heirs for a fee.

In Order PO-1736, Senior Adjudicator Goodis was also called upon to decide whether the section 21(2)(f) factor applied. He found that it did not, for the following reasons:

> The appellant argues that the information at issue is not highly sensitive since it had previously been made available by the court. This office has stated in previous orders that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M-1053, P-1681]. This factor has been found to apply, for example, to information about professional misconduct [Order M-1053] and in circumstances involving allegations of workplace harassment [Order P-685]. In my view, based on the material before me, it cannot be said that disclosure of the information remaining

> at issue could reasonably be expected to cause excessive personal distress to the subject individuals. While there may be some degree of sensitivity to this information, it is not comparable in sensitivity to the types of information that have been found to meet the section 21(2)(f) threshold. As a result, I find that this factor does not apply here.

I agree with the Senior Adjudicator's approach and, in my view, it is not reasonable to assume that an individual who is now deceased may have experienced "extreme personal distress" at the prospect of their estate being the subject of a search for heirs by a firm such as that represented by the appellant. I cannot agree with the position taken by the OPGT that section 21(2)(f) has any application in the present appeal.

Section 21(2)(a) – Public Scrutiny

In Order PO-1736, Senior Adjudicator Goodis made certain findings with respect to the application of section 21(2)(a) in circumstances similar to those in the present appeal. He held that:

> In Order PO-1717, Assistant Commissioner Mitchinson stated the following in the context of a request to the PGT by an heir tracer for information about a particular estate:
>
> > The appellant carries on the business of heir tracing, and has made this request in the ordinary course of his business activity. The appellant's representations on this issue do not persuade me that a public scrutiny concern exists, nor how disclosure of the particular record at issue in this appeal is desirable for the purpose of subjecting the [PGT] to public scrutiny. Accordingly, I find that section 21(2)(a) is not a relevant consideration.
>
> In my view, the Assistant Commissioner's findings are applicable in the circumstances of this case. The appellant here is in a similar position to the appellant in Order PO-1717, and the appellant's representations do not satisfy me that disclosure of this information would advance any interest in subjecting the PGT to public scrutiny. As a result, I find that the section 21(2)(a) factor does not apply here.

I adopt the findings of Assistant Commissioner Mitchinson in Order PO-1717 and Senior Adjudicator Goodis in Order PO-1736 and find that the consideration listed under section 21(2)(a) is not a relevant consideration in determining whether the disclosure of this record would constitute an unjustified invasion of personal privacy under section 21(1)(f).

Section 21(2)(c) – Informed Choice in the Purchase of Goods or Services

In Order PO-1717, Assistant Commissioner Mitchinson addressed similar arguments from the appellant regarding the possible application of the consideration listed in section 21(2)(c). He found that:

> The appellant submits that by obtaining access to the information, "... our firm and the clients that engage our services will be able to make more informed choices in the purchase of related goods and services that are required to effect the recovery of their portions of such estates (i.e. legal services, vital statistic documents etc.)".
>
> Again, I do not accept the appellant's position. I do accept that disclosure of the information might enable the appellant to more efficiently conduct his heir tracing business, but I am not persuaded that this in and of itself would "promote informed choice", as the appellant appears to argue. In my view, section 21(2)(c) is not a relevant consideration in the circumstances of this appeal.

I agree with the conclusion reached by Assistant Commissioner Mitchinson and find that section 21(2)(c) is not applicable in the present appeal.

Unlisted Factors - Diminished Privacy Interest After Death

The appellant submits that this consideration is applicable to the present appeal. The OPGT submits that "the Legislature has considered the privacy rights of deceased persons and has decided to protect them, undiminished, until 30 years after death." It relies on the decision of Assistant Commissioner Mitchinson in Order PO-1936 in which he found that "the unlisted factor 'diminished privacy interest after death' should be applied with care, given the wording of [section 2(2) of the *Act*]" which excludes from the definition of personal information, information about an individual who has been dead for more than 30 years.

In Order PO-1717, the Assistant Commissioner stated:

> 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.

Senior Adjudicator Goodis adopted this reasoning in Order PO-1736 and, for similar reasons, I find that the privacy interests of the deceased individuals whose names are listed in the record are moderately reduced, but not eliminated in these circumstances.

Unlisted Factors - Benefit to Unknown Heirs

The appellant also makes reference to another unlisted factor favouring the disclosure of the information contained in the records. He does not, however, elaborate on why this consideration is relevant to the record at issue. The OPGT argues that no benefit to unknown heirs will accrue from the disclosure of this information to the appellant until such time as it brings an application to court to be appointed the administrator of the estates. The OPGT suggests that because it provides the same service as that being offered by the appellant to potential heirs, at a much reduced cost, no benefit will result to such individuals.

Again, the OPGT submits that the facts of the present appeal are distinguishable from those in PO-1717 and other earlier orders where the request was for records involving escheated estates, as opposed to the estates of recently-deceased individuals. It argues that disclosing the record "at this juncture of administration of the estate" would clearly not benefit the unknown heirs. Finally, the OPGT submits that "there can be no benefit to unknown heirs for them to enter into a fee for service contract with an heir tracer if the services are not required."

The appeal which gave rise to Order PO-1736 was similar to the circumstances in the present appeal as it too involved information about recently-deceased individuals. In that order, Senior Adjudicator Goodis stated:

> In Order PO-1717, the Assistant Commissioner stated:
>
> > 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.

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

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

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

Here, the information at issue consists only of the names of the deceased individuals. Following the approach of the Senior Adjudicator, I find that the unlisted factor of "benefit to unknown heirs" applies to the names to a high degree.

Analysis of Factors

In my discussion above, I have reached several conclusions with respect to the weight to be afforded each of the considerations raised by the parties under section 21(2). To summarize, I have found that sections 21(2)(e) and (f), which weigh against disclosure of the personal information contained in the record and are relied upon by the OPGT, have no application. In addition, I have found that the listed considerations in sections 21(1)(a) and (c) also have no application in the present circumstances. In addition, none of the remaining listed factors apply. The only factors which I have found to have any application are the two unlisted factors

weighing in favour of disclosure, "diminished privacy interest after death" and "benefit to unknown heirs".

On the one hand, it is clear that the disclosure of the names of the individuals which comprises the information at issue would constitute an invasion of personal privacy of the deceased individuals, to some degree. However, following similar previous orders, including Orders 71, P-1187, PO-1717 and PO-1736, I find that the privacy interest inherent in the name alone is low in the circumstances. This conclusion is strengthened by the "diminished privacy interest after death" factor.

On the other hand, the potential for disclosure of the information at issue to lead to individuals proving their entitlement to the assets of estates which they may not otherwise have had access to is a significant factor favouring disclosure.

On balance, I find that the factors favouring disclosure of the names of the deceased individuals clearly outweighs the relatively low privacy interest inherent in this information. Accordingly, I find that the disclosure of this information would not constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(f). Therefore, the names of the deceased are not exempt under section 21 of the *Act*.

Because of my findings with respect to the application of the exemption in section 21(1), it is not necessary for me to address the possible application of section 23 to the record.

ORDER:

1. I order the OPGT to disclose the names of the deceased individuals contained in the subject record to the appellant by **June 6, 2002 but not before May 31, 2002**

2. In order to verify compliance with Provision 1, I reserve the right to require the OPGT to provide me with a copy of the material sent to the appellant.

Original signed by: May 2, 2002
Donald Hale
Adjudicator