



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2193**

**Appeals PA-990087-2 and PA-990088-2**

**Public Guardian and Trustee**



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## **NATURE OF THE APPEAL:**

The Public Guardian and Trustee (PGT) received a request under the *Freedom of Information and Privacy Act* (the *Act*) for the following information:

. . . a list of all estates being administered by the office of the Public Guardian and Trustee, which came to their attention between September 1, 1996 to October 31, 1997. The list should contain the same information supplied to the Court when making an Application for Certificate of Appointment of Estate Trustee without a Will which includes as follows:

1. Name of the deceased
2. Address of fixed place of abode
3. Last occupation of the deceased
4. Place of death
5. Date of death
6. Estimated value of the assets: personal property, real estate and total.
7. Names of persons entitled to share in the estate.

The PGT received a second request under the *Act* for the following information:

Information to be extracted from the electronic files containing the estates being administered by the office of the Public Guardian and Trustee. The Information requested is from the estates which came to the attention of the Public Guardian and trustee between November 1, 1997 and July 31, 1998. The information requested is the same as that which is supplied to the Court when making an Application for Certificate of Appointment of Estate Trustee without a Will and includes the following:

1. Name of the deceased
2. Address of fixed place of abode
3. Last occupation of the deceased
4. Place of death
5. Date of death
6. Estimated value of the assets: personal property, real estate and total.
8. Names of persons entitled to share in the estate.

In responding to the requester, the PGT produced a sample record responsive to each of the two requests. In its decisions the PGT explained that the sample records contain the requested categories of information for several estates administered by the PGT whose files were opened during the period specified in the requests. The PGT denied access to the information requested in both requests on the basis that they were exempt from disclosure under the mandatory exemption in section 21(1) of the *Act*.

The requester, now the appellant, appealed the decisions and this office opened Appeals PA-990087-1 and PA-990088-1.

During the mediation stage, the parties agreed that the appeals would proceed by way of the two sample records produced by the PGT. The parties also agreed that any decisions made by the Adjudicator during the inquiry stage of the appeals with respect to these sample records would also apply to the remainder of the information which is responsive to the appellant's request.

The appeals proceeded to the adjudication stage and in Order PO-1736, Senior Adjudicator David Goodis ordered the PGT to disclose to the appellant the Client Name, Client Address, Last Occupation, Place of Death and Date of Death information on the responsive records. He upheld the PGT's decision to deny access to the remaining information on the basis that it was exempt under section 21(1). This decision was upheld by the Senior Adjudicator in two separate reconsideration requests initiated by the PGT, one of which resulted in the issuance of Order PO-1790-R. An application for the judicial review of the decisions in Orders PO-1736 and PO-1790-R was dismissed by the Divisional Court and leave to appeal that decision to the Ontario Court of Appeal was refused. [see Ontario (Public Guardian and Trustee) v. Goodis (March 21, 2002), Doc. M28110 (C.A.)]

Following the conclusion of the leave application to the Court of Appeal and pursuant to the order provisions of Order PO-1736, the PGT disclosed a 12-page record to the appellant consisting of lists of information.

The appellant was not satisfied with this record as he felt that it was incomplete and that it did not comply with Orders PO-1736 and PO-1790-R. The appellant objected to the fact that the record did not list the addresses and last known occupations for each of the individuals listed, as he requested.

The PGT and the appellant subsequently communicated in writing on several occasions. In its letter of June 20, 2002 the PGT stated that the information in the lists was responsive to Order PO-1736. The PGT explained that certain information relating to last known addresses and occupations was not contained on the lists provided as it was not available in the database from which the list was compiled. The PGT set out its reasons for this as follows:

Your client requested a list, governed by part (b) of the above definition of "record", which implied the production of a record from a database by means of computer hardware and software normally used by the institution, etc. as long as it did not unreasonably interfere with the operations of the institution (section 2 of O.Reg.460).

Your client's request for a list does not require this Office to complete the record manually, where the requested information has not been entered by staff into the data base. The Order for this request does not require the OPGT to manually provide this information, in the form of a copy of an actual record from the file, for each and every estate named in the list provided. It requires the information to be provided if available in a machine-readable format. This is the understood and accepted practice in all responses to information requests under the *Act*. Specific

information not available from a machine-readable format, must be the subject of a separate request under the *Act*, and the appropriate fee will apply.

The appellant appealed this decision to the Commissioner's office, on the basis that the PGT had not complied with Orders PO-1736 and PO-1790-R. Our office then opened Appeals PA-990087-2 and PA-990088-2. During mediation, the appellant stated that he is not satisfied that the lists provided to him by the PGT comply with Orders PO-1736 and PO-1790-R as they are missing information relating to the last known addresses and occupations of the majority of the individuals included therein.

As the parties to the appeal were unable to reach a mediated settlement, the matter was moved to the adjudication stage of the appeal process. I requested and obtained representations from the PGT initially. I then provided the appellant with a Notice of Inquiry along with the complete representations of the PGT. The appellant made submissions which were also shared, in their entirety, with the PGT. I then invited the PGT to make additional submissions by way of reply and it did so.

## **RECORDS:**

The records at issue consist of four pages listing estates (by name of the deceased person) opened by the PGT between September 1, 1996 and October 31, 1997 (Appeal Number PA-990087-2), and three pages listing estates opened between November 1, 1997 and July 31, 1998 (Appeal Number PA-990088-2). Based on my review of the disclosed lists, I estimate that approximately 90% of the entries do not include the deceased's person's occupation and up to 75% do not include their last known address.

## **DISCUSSION:**

### **HAS THE PGT COMPLIED WITH THE ORDER PROVISIONS IN ORDERS PO-1736 AND PO-1790-R?**

#### **Submissions of the PGT**

The PGT submits that it has complied with the order provisions of Orders PO-1736 and PO-1790-R as it has granted access to all of the information contained on the lists. It submits that:

The lists form the initial records which could be produced for the initial fee estimate, that is the production of a machine readable record. Unfortunately, the machine readable record is not complete.

The 'record' requested did not exist in a paper record in that format or in any format at all. It could only be generated – and only in part – from the existing computer data base at the PGT. A request for information is limited to a physical or electronic record responsive to the request for information, as it exists in the

hands of the institution. Both requests are explicitly for 'a list' or 'information to be extracted from the electronic files' of the PGT.

The gaps in the information on the record supplied is due to the fact that the information has not been keyed into the computer data base for those deceased. At the time that those estate files were opened by the PGT, it was not mandatory for staff in the Estates program to enter this information in the computer data base. The Estates program was paper-driven and the electronic data base was only used for certain financial transactions. The missing information can therefore only be retrieved by a manual search of the PGT's file in each estate, in which case the copy of the relevant document which contains the information is a separate 'record'. The PGT is not obliged to include this information manually for all the individuals listed in the computer generated lists, in response to a request for an electronic list for the reasons discussed under Issue B. Completing the information missing from the machine readable list generated by the data base requires a manual search of each file, and the PGT is not obliged to provide the paper record containing the missing information, if the requester is unwilling to pay the applicable fee.

It is crucial to note that at all times, the issue of the relevant fees and the production of the actual records was set aside during the debate over whether the requester was entitled to access the information under the *Act*. The likelihood of gaps in a computer generated record was known to the PGT at the time of the original request. It was discussed in the original mediation with the IPC. This issue was explicitly reserved and set aside for the duration of the appeal, as noted by correspondence between the IPC Mediator [a named individual] and the Ministry FOI Coordinator in 1998. *This was communicated to the requester.* It could not be known how many fields would be left blank until the computer generated record was actually produced.

The PGT refers to its original representations dated June 3, 1999 in which it confirmed that the issue of fees was deferred until such time that a decision respecting access was made. It also indicates that this agreement was confirmed with the appellant in October 1998 in a letter from the Ministry's FOI Coordinator. The PGT concludes its submissions on this issue as follows:

The PGT has created a record in accordance with Order PO-1736 and PO-1790-R as it was required to, since some data could be retrieved from the PGT's data base through a special computer program. Access will be given to the missing records, which can only be retrieved manually, in accordance with Order PO-1736 upon payment of the applicable fees by the requester.

### **Representations of the appellant**

The appellant sets out the long and tortuous history of these appeals and points out that the Mediator's Report prepared following the initial mediation of the appeals stated that:

During the course of the appeal, the PGT clarified that most of the requested information exists in an electronic database. In order to produce all the requested information, a few fields (i.e. last occupation) may have to be supplemented from hard copy files.

The appellant takes the position that the order provisions in Orders PO-1736 and PO-1790-R were clear. In each case, the PGT was ordered to disclose the client's name, address, last occupation and their place and date of death. The lists provided by the PGT do not contain this information for all of the individuals listed. The appellant further argues that:

During the course of the various appeals, reconsideration requests, appeal to Divisional Court and application for leave to appeal [to the Court of Appeal], the PGT had the full opportunity to make submissions and did in fact make extensive and thorough submissions in opposition to the disclosure of the information requested by the Requester and the information ordered by the Senior Adjudicator.

The appellant argues that the additional information which is missing from the records generated by the database is within the custody or under the control of the PGT. He submits that no objection was made in the reconsideration requests, the judicial review before the Divisional Court or at the leave to appeal to the Court of Appeal stage "about producing that information although the PGT had the opportunity to do so." The appellant points out that the missing information is significant as 75-85% of the addresses and 100% of the occupations are not provided in the documents released to him. However, the appellant indicates that this information is in the possession of the PGT and represents information which the PGT "includes in applications for letters of administration which it files with the Court."

The appellant also states that the fee estimate provided by the PGT is deficient in that it fails to describe the amount of the fee estimate or how it is to be calculated. He summarizes his representations on this issue by urging that the OPGT ought to comply with the orders issued by Senior Adjudicator Goodis. He states that:

. . . to produce a list which is so seriously deficient after the extensive process involved is consistent with the PGT's reluctance to produce the information in the first instance and further would make a mockery of Freedom of Information and the entire process which has taken place to date.

### **Reply representations of the PGT**

In response to the representations of the appellant, the PGT states that:

The PGT's acknowledgment that there may be missing information on the machine produced list, which ' . . . may have to be supplemented from hard copy files' did not include a waiver of the payment of appropriate fees for the

production of the requested record where a manual search is required. Furthermore, it cannot be construed as a waiver of the appropriate fees for manual searches.

. . . the PGT did not know in 1998 the extent to which data in some fields would be missing until the computer software was written to produce the record as ordered by the IPC (as upheld by the courts). It was also hoped that some of the missing information would be entered in the computer data base in the meantime as staff worked on relevant files while the appeals proceeded.

No submissions were made on the matter of additional fees for missing information because during the initial appeals, the PGT assumed that this principle was accepted and understood by the appellant. Furthermore, the sole issue on the appeals was whether the appellant was entitled to access the records.

The PGT therefore relies on Order 50 in support of its position, and reiterates that the PGT is not required by the *Act* to physically transcribe information from the various individual file records onto a chart. The proper response, upon clarifying the right of access under the *Act*, is to provide a copy of a physical record on which the information is found, with appropriate severances in accordance with the *Act*, upon payment of the appropriate fees for manual searches. It would be inappropriate to provide access in a manner not contemplated by the *Act*, as this would create a precedent on which similar requesters could rely in future requests. In addition, imposing such a requirement on the institution would lead to unreasonable interference with the institution's operations.

## **Findings**

In my view, the appellant has been aware since the conclusion of the mediation of the initial appeals in April 1999 that the PGT was taking the position that it would be entitled to charge fees for conducting searches of its paper files should its decision to deny access to the information not be upheld. The Report of Mediator dated April 26, 1999, following the conclusion of the initial mediation, states that "should the Ministry be ordered to disclose such information by the Information and Privacy Commissioner's office, it reserves the right to charge fees in that regard." I find that although the PGT chose not to charge a fee for the provision of the information located in its databases, it clearly retained the right to payment for any searches conducted in its other paper-based record-holdings.

Following the conclusion of the PGT's unsuccessful application for leave to appeal the Divisional Court's decision to the Court of Appeal, the PGT indicated in a letter to the appellant dated June 20, 2002 that it intended to charge a fee of \$30 for each "individual request for the missing information per estate file". It stated that this amount represents one hour of time required to obtain the file from its record storage, locate the requested information in each file, and to prepare and copy each record, severing the exempt information from each, in accordance

with the findings in Order PO-1736. It also stated that the information is available in each court file containing the PGT's application for a Certificate of Appointment of Estate Trustee.

In its submissions, the PGT indicates that it is relying on Order 50, a decision of former Commissioner Sidney Linden which addressed the obligations of institutions under the *Act* when faced with requests for information which exists in a format that is not the same as that sought by a requester. He found that:

The *Act* requires the institution to provide the requester with access to all relevant records, however, in most cases, the *Act* does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the *Act* gives requesters a right (subject to the exemptions contained in the *Act*) to the "raw material" which would answer all or part of a request, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize this information into a particular format before disclosing it to the requester.

The *Act* imposes additional obligations on institutions when dealing with computer generated information. When a request relates to information that does not currently exist in the form requested, but is "...capable of being produced from a machine readable record..." [paragraph (b) of the definition of "record" under subsection 2(1)], the *Act* requires the institution to create this type of record, "subject to the regulations".

Section 10 of Ontario Regulation 532/87, as amended, provides that:

A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

...

Thus it appears that, subject to the Regulation, the *Act* does place an obligation on an institution to locate information and to produce it in the requested format whenever that information can be produced from an existing machine readable record, and providing that to do so will not unreasonably interfere with the operation of the institution.

Having concluded that the *Act* does not give the requester the right to insist that non-computerized information be produced in a format in which it does not presently exist, I do not wish to be understood as promoting an attitude of rigidity on the part of the institution. There will be situations in which, for example, the requester wants a list of certain types of information currently stored in two or three "paper files." Rather than release the records from which the requester



could create a list, the institution may, in some circumstances, prefer simply to create the list. However, as noted above, I do not find that the *Act* requires that this be done.

Insofar as the present appeals are concerned, in Order PO-1736 the Senior Adjudicator ordered the PGT to disclose to the appellant “the Client Name, Client Address, Last Occupation, Place of Death and Date of Death information *on the responsive records*” by a certain date. The responsive records in that decision consisted of the computer-generated lists of names which have now been disclosed to the appellant. While I recognize that there are significant gaps in the information contained in the responsive records derived from the database, the fact remains that they are the records identified as responsive to the request. Additional records exist containing the information not included in the database information in each individual client file and manual searches of these records would be required to extract it. The PGT has indicated its willingness to perform these searches and seeks to charge the applicable fees for doing so.

In my view, the PGT has complied with the requirements of Orders PO-1736 and PO-1790-R as it has disclosed to the appellant the information which is contained in the database-generated lists found to be not exempt in those decisions. The sole issue in those appeals was whether the exemptions claimed to apply to the information was exempt from disclosure under section 21(1) of the *Act*. I find that the PGT explicitly reserved its right to charge a fee for the provision of the information ordered disclosed and has done so with respect to the paper records identified as containing responsive information. While this may not have been the result expected by the appellant or the PGT, once the computer-generated records were created, it was clear that additional searches of those paper records would be required to complete all of the fields of information ordered disclosed.

The PGT has agreed to conduct searches of its individual file holdings relating to those individuals on whose behalf it has made an Application for Certificate of Appointment of Estate Trustee without a Will. It has also provided the appellant with a fee estimate for the cost of conducting these searches and preparing the records for disclosure. If the appellant takes issue with the amount of that fee estimate, he may choose to appeal that decision or to limit the scope of the searches to fewer client files.

**ORDER:**

I dismiss the appeal without prejudice to the appellant’s right to appeal the PGT’s fee decision.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_  
October 17, 2003