



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

ORDER PO-2219

Appeal PA-020336-1

Public Guardian and Trustee



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

BACKGROUND

In 1984, the Public Guardian and Trustee (the PGT) entered into a voluntary trust agreement pursuant to what is now section 238(4) of the *Business Corporations Act* R.S.O. 1990, C. B-16 with a corporation which was being dissolved. The trust involved the unredeemed shares in the corporation owned by 38 shareholders and claims to the payment of certain interest and dividends on those shares. The company had been incorporated in 1930 and did not carry on business after 1931. In 1962 the company was revitalized when it was discovered that it had substantial assets available for distribution to its shareholders. The liquidator of the company was able to locate some of the original shareholders, but 38 others could not be found. The proceeds of the sale of the assets of the company were distributed by the liquidator to those shareholders who could be located in 1984. The undistributed funds were then deposited with the PGT by the liquidator and remain undisbursed to this date.

The PGT received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to those shareholders who had not been located by the liquidator of the company at the time of its dissolution in 1984. The PGT refused to disclose this information and an appeal of that decision was filed with this office. The requester narrowed the scope of that original request to include only the names of the shareholders. In Order PO-2011, dated April 24, 2002, former Adjudicator Dawn Maruno ordered the PGT to provide the requester with access to the names of the 38 unlocated shareholders. The PGT complied with the order and disclosed the names to the requester.

Some months after Order PO-2011 was issued, the requester in the first appeal submitted a further request to the PGT seeking access to:

The names of the missing shareholders of this company and the number of shares that each owned and the value of the same at the time that the company was dissolved and the date of dissolution.

Again, the PGT granted the requester access to the shareholder's names but denied access to the remaining information contained in the responsive record pursuant to the mandatory invasion of privacy exemption in section 21(1) of the *Act*.

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

During the mediation stage of the appeal, the parties confirmed that the issues in dispute are limited to those set out in the appellant's original request letter. With the PGT's consent, the mediator informed the appellant of the date of dissolution of the named company. Therefore, this information is no longer at issue.

Also during the mediation stage, the appellant indicated that he wished to rely on the application of section 42, under Part III of the *Act*, to support his claim for access.

As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process.

This office first sought representations from the PGT by providing it with a Notice of Inquiry setting out the facts and issues in the appeal. The PGT submitted representations, which were shared with the appellant, in their entirety. The Commissioner's office then sought the representations of the appellant, who also made submissions, the confidential portions of which were not shared with the PGT, at the appellant's request. The PGT was then invited to make additional representations by way of reply.

The PGT indicates in its reply submissions that it has disclosed to the appellant the names of three corporate shareholders along with the dollar value of the shares on the date of distribution in 1984. Accordingly, it states that the sole remaining piece of information contained in the record consists of the number of shares owned by each of the 35 shareholders who are natural persons. The reply submissions from the PGT were then shared with the appellant who provided additional reply representations as well.

RECORDS:

The sole information at issue in this appeal is the number of shares owned by 35 unlocated shareholders which is included in a six-page record entitled "Final schedule of amounts paid to the Public Trustee for Unlocated Shareholders of [the named company]".

DISCUSSION:

PERSONAL INFORMATION

Only information which qualifies as "personal information" can be exempt from disclosure under the invasion of privacy exemption in section 21(1). The term "personal information" is defined, in part, in section 2(1) to mean recorded information about an identifiable individual, including information relating to financial transactions in which the individual has been involved (paragraph b).

I am satisfied based on my review of the information contained in the record that it contains information relating to financial transactions, in this case the purchase of shares in a corporation, involving each of the individuals named in the record. Accordingly, I find that the information relating to the number of shares held by the 35 individual shareholders contained in the record qualifies as the "personal information" of the shareholders for the purposes of section 2(1).

However, section 2(2) excludes from the definition of "personal information" information about an individual who has been dead for more than 30 years. The appellant submits that all of the individuals whose names appear on the list of unlocated shareholders have been deceased for at least 30 years. He states that:

Given that the company was incorporated in 1930 one could reasonably assume that the shareholders at the time of incorporation were at least 30 years of age or more at the time of incorporation. Given the fact that the company was inactive

from 1931 to 1962 and [that] no evidence exists of new shareholders arising between the date that the company was revived to the date it was dissolved in 1984 for the second time, it stands to reason that all of the shareholders have been deceased for more than 30 years.

The appellant also relies on an affidavit sworn by the company's liquidator in 1979 in which he attests to the fact that he has been unable to locate the 35 individuals referred to as "missing shareholders" in the appellant's submissions. The liquidator outlines the steps taken to locate the missing shareholders at that time and includes his conjecture that they are likely all deceased.

In the appellant's confidential representations, he has provided me with evidence to substantiate his arguments that at least some of the missing shareholders have, in fact, been deceased for more than 30 years. Because of the confidential nature of this evidence I am unable to refer to it in greater detail in the text of this order. The appellant has also provided certain evidence obtained from internet search engines based in the United States with respect to the possible dates of death of several other missing shareholders who resided there. I do not accept that the evidence provided respecting these individuals conclusively establishes the dates of their deaths on a balance of probabilities. While the listings include the names and social security numbers of certain persons, I am unable to make a finding that they conclusively relate to the individuals listed in the record.

Accordingly, based on the submissions of the appellant, I am satisfied that those individuals listed as Numbers 5, 7, 16, 18, 26 and 30 on the record have been deceased for at least 30 years. As a result, the information concerning the number of shares held by these six individuals does not qualify as their "personal information" for the purposes of section 2(1) and cannot be exempt from disclosure under section 21(1). As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order the PGT to disclose to the appellant the number of shares owned by each of these six individuals.

The appellant has not provided me with sufficient evidence to establish that the other 29 individuals listed on the record have been dead for more than 30 years. Using the calculation posited in the appellant's representations, if an individual had been 30 years of age in 1930, they would be 103 years old today but only 73 years of age 30 years ago when the 30-year clock began to run. In my view, it is not reasonable to assume that all of the individuals listed on the record have been dead for 30 years, particularly using the appellant's calculations as a basis for reaching such a conclusion.

I find that the record contains the personal information of the 29 individual shareholders who have not been conclusively proven to have died more than 30 years ago.

INVASION OF PRIVACY

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. The only exception which has any possible application in the present appeal is 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 institution 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.

The PGT relies on the presumed unjustified invasion of personal privacy in section 21(3)(f) which reads:

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 PGT states that this presumption applies because:

. . . the number and value of shares describes the assets of each individual shareholder, a portion of their financial history and investment activities.

The appellant submits that:

. . . the value held in the unclaimed shares payable to the missing shareholders in question are 'one time payments to be conferred immediately or over a period of time' and as such are analogous to retirement packages and therefore the information sought should be deemed accessible pursuant to Orders M-173, M01082 and MO-1184.

In my view, the information sought by the appellant, the number of shares held by each individual, describes the assets or net worth of the individual shareholders who are entitled to the funds being held by the PGT. The amounts listed in the record are not analogous to the retirement packages that formed the subject matter of the decisions referred to by the appellant. Rather, this information refers specifically to the value of an asset belonging to these individuals. I find that the information falls within the ambit of the presumption in section 21(3)(f).

The appellant makes reference to a number of listed and unlisted factors under section 21(2) that he feels are applicable in the circumstances of this appeal. As noted above, however, once the application of a presumption has been established, it cannot be overridden by the considerations in section 21(2), either singly or in combination. In addition, the appellant has not raised the possible application of the "public interest override" provision in section 23 and I find that none of the exceptions in section 21(4) have any application.

Accordingly, I find that the undisclosed information in the record stating the number of shares held by each of the 29 individual shareholders who have not been conclusively proven to be dead for more than 30 years is exempt from disclosure under section 21(1).

APPLICATION OF SECTION 42

The appellant submits that because of the operation of section 42(a), (c) and (i), he is entitled to disclosure of the requested information. These provisions state:

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

- (a) in accordance with Part II;
- (c) for the purpose for which it was obtained or compiled or for a consistent purpose;
- (i) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

In support of his argument that the disclosure is permissible under section 42(c), the appellant submits that:

. . . the information sought is for the express purpose of locating persons interested in the estate with a view to finding the heirs at law and, where no estate trustee may have yet been appointed, a person with a higher priority at law to serve as estate trustee. Disclosure to the appellant of the information sought allows the appellant to select those cases where recovery [is] feasible and thereby facilitates those goals. The disclosure is therefore authorized by section 42(c) of the *Act*.

With respect to the application of section 42(i), the appellant argues that:

. . . it is the appellant's experience that on a regular basis many persons in Ontario pass away intestate and without their next-of-kin being made aware of their deaths. The fact that no family members responded to the ads placed in various newspapers [by the liquidator in 1979], which were placed to attract the attention of missing shareholders or their next-of-kin, suggests that the next-of-kin of these missing shareholders were not aware of the deaths of these shareholders. The appellant submits that if provided with the information sought, where feasible, the appellant will endeavour to locate the next-of-kin of the deceased missing shareholders, and that pursuant to section 42 of the *Act* the information should be released.

The PGT relies upon the reasoning in the decision of Assistant Commissioner Tom Mitchinson in Order M-96 (upheld on judicial review in *O.S.S.T.F., District 39 v. Wellington (County) Board of Education* (February 6, 1995), Toronto Doc. 407/93, (Ont. Div. Ct.), leave to appeal refused (October 16, 1995, Doc. M15357 (C.A.)), which was followed with approval by former Assistant Commissioner Irwin Glasberg in Order P-679. The PGT states:

In Order M-96, Assistant Commissioner Tom Mitchinson commented on the relationship between section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M-56, as amended (the equivalent of section 42 of the *Act*), and the access provisions in Part I of that [the municipal] *Act*:

This Part [of the municipal *Act*] establishes a set of rules governing the collection, retention, use and disclosure of 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 was made under Part I of the *Act* [the equivalent to Part II of the provincial *Act*], and this appeal concerns the Board's decision to deny access. In my view,

the considerations contained in Part II of the *Act* [the equivalent to Part III of the provincial *Act*], and specifically the factors listed in section 32 are not relevant to any access request made under Part I.

I adopt the reasoning expressed in this decision for the purposes of the present appeal. In my view, the provisions of Part III of the *Act*, including section 42 do not apply to a request and the subsequent appeal of an access decision made under Part II of the *Act*. Accordingly, I find that section 42 has no application in the circumstances of this appeal.

ORDER:

1. I order the PGT to disclose the number of shares owned by those individuals listed as Numbers 5, 7, 16, 18, 26 and 30 on the record by providing him with this information by **January 30, 2004** but not before **January 23, 2004**.
2. I uphold the PGT's decision to deny access to the share ownership information relating to the other 29 individuals listed in the record.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the PGT to provide me with a copy of the record that is disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

December 22, 2003 _____