



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

ORDER PO-2196

Appeal PA-020360-1

Public Guardian and Trustee



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NATURE OF THE APPEAL:

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

Any documents, memos, letters, printouts and any other types of records/communications relating to the possible existence of a mistress of [a named individual who is now deceased].

The PGT was appointed the estate trustee for the named deceased person, who died in 1996. The PGT was also the guardian of property for the deceased's spouse prior to her death and was then appointed estate trustee for the spouse as well following her death. The requester represented the sole surviving sibling of the deceased spouse in an action which resulted in the sibling being approved as the sole heir to the estates of both the deceased and his spouse. The estate has now been settled and the sibling has received the proceeds of the estates of her late sister and the deceased person.

The PGT located records containing information which was responsive to the request and denied access to them, initially claiming the application of the mandatory invasion of privacy exemption in section 21(1) of the *Act*. In a subsequent decision letter, the PGT also applied the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) to portions of the responsive records.

The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the parties agreed to limit the scope of the request to include only the information contained in those portions of the records which referred to the existence of a "mistress" of the deceased individual. The remaining information contained in the records was removed from the scope of the appeal. As further mediation was not possible, the appeal was moved to the adjudication stage of the process.

I decided to seek the representations of the PGT initially. The PGT made submissions, which were shared with the appellant, in their entirety, along with a Notice of Inquiry. The appellant also made submissions, which were shared with the PGT. In his representations, the appellant reiterated that he is not seeking the name and address of the "mistress" but, rather, he simply wishes to confirm her existence. I then received additional submissions by way of reply from the PGT.

RECORDS:

The records remaining at issue consist of all of Page 2, along with portions of Pages 3, 4, 6, 7, 10 and 11 of the identified records.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the *Act* defines the term “personal information” to mean, in part, recorded information about an identifiable individual.

The appellant argues that because he is not seeking any identifying information about the alleged “mistress”, the disclosure of the contents of the records which remain at issue would not reveal any personal information relating to an identifiable individual, as is required under the definition of that term in section 2(1).

In my view, the remaining portions of the record contain the personal information of the deceased person and his spouse. Records 2, 3, 4, 6, 7, 10 and 11 contain information relating to the deceased person and the fact that this individual may have had a “mistress” or some sort of long-standing extramarital relationship. I find this to be the personal information of the deceased person under section 2(1)(h) of the definition as it includes the deceased’s name, along with other personal information about him. In addition, I find that the undisclosed portions of Record 7 also contain the personal information of the deceased’s spouse as the information describes information within the knowledge of this individual. In my view, this information also qualifies as the personal information of the deceased’s spouse within the meaning of section 2(1)(h).

The responsive portions of Records 2, 3 and 4 also contain information relating to another individual whose identity may be known to the appellant. I find that the disclosure of this information, even with the personal identifiers such as name and address removed, could reasonably be expected to reveal personal information about this person. I find that it falls within the ambit of the definition of personal information contained in section 2(1)(a) as it relates to the marital or family status of this individual.

The records do not contain any personal information relating to the appellant.

INVASION OF PRIVACY

Only information that qualifies as personal information can be exempt from disclosure under the invasion of privacy exemption in section 21(1). 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 exceptions which could have any application in the present circumstances 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 section 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. [Orders PO-2017, 2033-I and PO-2056-I]

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 factors listed under sections 21(2)(f), (g), (h) and (i) of the *Act*.

The appellant has specifically claimed that the factor listed under section 21(2)(a) and the unlisted considerations described as “diminished privacy interests after death” and “benefit to unknown heirs” apply in the circumstances of this appeal.

Sections 21(2)(a), (f), (g), (h) and (i) provide that:

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;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant's submissions

The appellant submits that sections 21(2)(f), (g), (h) and (i) have no application as he is not seeking the name or other identifying information about the "mistress". The appellant relies on the decisions in Orders M-50, PO-1717 and PO-1936 in which the Commissioner's office recognized that in certain circumstances, "the privacy interest associated with the personal information of a deceased individual diminishes." He submits that this is a relevant consideration to be weighed in favour of the disclosure of the personal information in the records.

In support of his contention that the consideration favouring disclosure referred to as "benefit to unknown heirs" applies, the appellant submits:

This unlisted factor was recognized in Orders P-1493, PO-1717 and PO-1936. However, in the present case, the Appellant submits that the allegation by the PGT that [the deceased person] **may** have had a child with an alleged mistress may have been used as a means to delay the processing of this estate, which is believed to have caused undue harm to our client in the form of unnecessary legal fees and delays. The Appellant is concerned that such actions may have occurred and believes that that it has an obligation to confirm whether any evidence existed to suggest that such an alleged mistress did indeed have a child with [the deceased]. In the event that this was not the case then the Appellant respectfully submits that it is imperative for future heirs not to suffer similar losses.

With respect to the consideration in section 21(2)(a), the appellant argues that this section applies "as at no time did the PGT offer any evidence during its legal representations that a 'mistress' may have existed other than by making a verbal statement to [the appellant] to this effect."

The PGT's submissions

The PGT indicates that:

Personal information about whether or not an individual engaged in an extra-marital relationship, or is believed by someone to have done so, can be assumed to have been given in confidence to a person's guardian or estate trustee for the purposes of the administration of their estate or property. The information was given in the context of the investigation of an estate's or an individual's assets, or a capacity assessment of an incapable individual, to a government agency acting as fiduciary either for an estate or an incapable person. The information was not given in an informal context or any other context which could have implied that the information could be made public.

It was never relevant to the estate to prove the truth of an allegation of such a relationship. Consequently, the reliability of the information is not established and may be questionable or pure gossip.

Disclosure of the identity of the third party [the alleged mistress], who is probably still alive and may or may not have been [the deceased's] partner in the extra-marital relationship, is likely to be embarrassing to that person and may unfairly damage their reputation.

Disclosure of such information can be assumed to be contrary to the wishes of the deceased persons [the deceased and his spouse] and likely would have caused them extreme distress if they had known while they were alive of the possibility that this information could be released to an unrelated person without a valid reason for the disclosure.

With respect to the unlisted factor described as "benefit to unknown heirs", the PGT points out that:

No 'benefit to unknown heirs' can be established by the requestor, as the heir to both estates [the deceased and his spouse], has been established.

. . . the full balance in the estate has been paid to the appellant on behalf of the client, the sole heir, except for a holdback until the final tax clearance is received from Canada Customs and Revenue Agency.

The PGT submits that, with respect to the consideration referred to as "diminished privacy interest after death" this factor has no application as section 2(2) of the *Act* mandates a 30 year period extending an individual's privacy rights after their death. In addition, it submits that section 66(a) of the *Act* confers upon personal representatives of deceased persons certain rights of access to information under specified circumstances. The PGT cautions against the use of this consideration, arguing that in Order PO-1936, Assistant Commissioner Tom Mitchinson found that this factor "should be applied with care, given the wording of this section" [section 2(2)]. Each case must be carefully considered on its particular facts and circumstances."

In its reply submissions, the PGT takes issue with much of the submissions of the appellant. It submits that sections 21(2)(f) and (i) are relevant considerations with respect to the privacy interests of the deceased individual. It argues that in Order PO-1936, psychiatric records relating to a deceased person, as well as his address book and immigration records, were found to be "highly sensitive". The PGT suggests that information relating to the possible existence of an extra-marital relationship involving the deceased person "is of equal or greater sensitivity to the deceased".

Weighing the factors

In my view, the only relevant consideration raised by the appellant is the possible application of the unlisted factor “diminished privacy interest after death”. However, I find that this is one of the situations described by Assistant Commissioner Mitchinson in Order PO-1936 where great care must be exercised in applying this factor. The deceased has been dead since 1996 and his spouse since 1997. Section 2(2) of the *Act* provides for the continuation of an individual’s privacy rights for a full 30 years following death. In my view, I am able to give this consideration only negligible weight when balancing the factors favouring disclosure against those weighing in favour of privacy protection.

The appellant’s submissions regarding the application of section 21(2)(a) are not at all compelling and I find that this consideration has no relevance to a determination under section 21(1)(f). Similarly, the application of the factor referred to as “benefit to unknown heirs” has not been established by the appellant. I am unable to discern from his submissions the nature of any such benefit that may accrue to later heirs should this information be disclosed.

Ranged against the sole consideration favouring disclosure are very compelling factors favouring privacy protection. In my view, the information contained in the records is highly sensitive within the meaning of section 2(1)(f). Information which leads to a conclusion that an individual engaged in an extra-marital relationship is, by its very nature, highly sensitive. I find that this is a factor weighing strongly in favour of privacy protection. Similarly, the consideration listed in section 21(2)(i) (unfair damage to reputation) is also applicable. I find that the disclosure of information relating to the existence of an extra-marital relationship may unfairly damage the reputation of the deceased person. I give this factor moderate weight when balancing the factors favouring privacy protection against those favouring disclosure.

I also find that, in the circumstances surrounding the provision of this information to the PGT, there was a reasonably-held expectation that the information supplied would be maintained in confidence by the PGT. Accordingly, I find that the consideration listed in section 21(2)(h) is also relevant. Finally, I agree with the characterization of the information at issue by the PGT as “questionable or pure gossip”. Based on the information provided to me by the PGT, I find that it is possible, given the circumstances surrounding the provision of the information, that it is “unlikely to be accurate or reliable”. I find, therefore, that the factor listed in section 21(2)(h) is also relevant in this situation.

In balancing the single factor weighing in favour of disclosure against the considerations favouring privacy protection, I find that those favouring the non-disclosure of the information contained in the records far outweigh those against. In my view, the disclosure of all of the responsive information in the records would result in an unjustified invasion of the personal privacy of the deceased person, his spouse and the other individual referred to in the records. I find that the information is, accordingly, exempt from disclosure under section 21(1).

Because of the manner in which I have addressed the invasion of privacy exemption in section 21(1) to the requested information, it is not necessary for me to address the possible application of sections 13(1) and 19 to it.

ORDER:

I uphold the PGT's decision to deny access to the information contained in the records.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 21, 2003