



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2301

Appeal PA-020156-1

Office of the Public Guardian and Trustee



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NATURE OF THE APPEAL:

The appellant is a private company that was formed for the purpose of assisting beneficiaries with the recovery of unclaimed property. The appellant has had numerous dealings with the Public Guardian and Trustee (the PGT) related to the appellant's desire to obtain information regarding unclaimed assets over which the PGT has responsibility. This appeal pertains to a request made by the appellant to the PGT under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to

a list of unclaimed monies, which were paid into court for all matters, which remain unclaimed, and where such monies were paid into court up to and including April 30, 2002 with the following information:

- court file number
- date monies paid into court
- individual amounts of monies paid into court, which remain unclaimed
- description of transactions (i.e. missing beneficiary payments, bonds to secure court fees, payments held for minors, guardianship payments etc).

The PGT issued a decision letter to the appellant indicating that the appellant's request related specifically to the work of the Accountant of the Superior Court of Justice (the Accountant) and, furthermore, that the Accountant does not maintain such a list nor can a machine-readable record responsive to the request be generated by their current technology system. In later discussions with the appellant, the PGT indicated that there was no need for the Accountant to maintain such a list and as a machine-readable list cannot be generated, the production of a list for the appellant would entail a manual search of approximately 40,000 files, seriously impairing the operations of the Accountant's program.

The appellant appealed the PGT's decision and the matter proceeded to mediation.

The mediator's report indicates that during mediation the appellant was advised that there was no list of unclaimed monies as he requested. The appellant was also provided with the financial statements of the Accountant of the Ontario Court prior to its amalgamation with the Public Guardian and Trustee, because it was thought that the statements would furnish information pertinent to the appellant's request.

The appellant was not satisfied with this outcome. The appellant indicated that if the PGT could not provide the list sought, the appellant then wanted the raw information. The request was modified to be one for access to

a copy of the computer records of all 40,000 files that exist relating to [the Accountant] up to and including April 30, 2002

The PGT was unwilling to deal with this modified request arguing that it was beyond the scope of the original request. No further mediation was possible, so the appeal was moved to the adjudication stage.

Initially, I sought representations from the PGT on the issue of the scope of the appellant's request. I received those representations and then sought a response to them from the appellant. The appellant provided representations on the issue of the scope of his request and also made detailed representations on other issues, including the operation of the PGT and its efficacy, and the factors weighing in favour of disclosure of the information to the appellant. None of these additional issues is before me in this inquiry. The only issue on which I rule in this order is whether the appellant's modified request is within the scope of his original request.

ANALYSIS:

Is the appellant's modified request beyond the scope of the original request?

In the appeal letter, the appellant made the following specific comments with regard to the request and the records the appellant believes could be provided:

In speaking with IT personnel of [the Accountant] as well as professional consultants in the computer industry we learned that if the 40,000 files, referred to in Ms. Eeles' email message, contain only scanned images then manipulation of this data to facilitate a printed list would indeed be cumbersome. However, in the event that such data is not primarily comprised of scanned images then data manipulation can readily be executed and a suitable list and/or electronic version of the relevant data can be produced.

The PGT contends that the appellant's modified request for all of the files of the Accountant is a new request that goes beyond the scope of the appellant's original "list" request.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The appellant submits:

... [T]he information that [the appellant] requested ... is the same information that is contained in the 40,000 records in question. In addition the Appellant submits that the [PGT] is well aware of the commercial activities of the Appellant and its desire to obtain information regarding unclaimed assets in order to help beneficiaries recover such property. Accordingly, the Appellant submits that the [PGT] had a duty, as per the *Act*, to assist the Appellant with his response and that the [PGT] did not provide any such assistance.

Furthermore, it has been the experience of the Appellant, over the past ten years that it has been providing its services to beneficiaries throughout Canada, the US and Europe, that unclaimed funds exist in all provinces and states studied. Such unclaimed funds typically exist in various forms including unclaimed bank accounts, travelers' cheques, unclaimed estates, insurance policies and various forms of unclaimed monies paid into court and never properly distributed, despite the likelihood of court orders having been applied.

Furthermore, the Appellant submits that both [the Accountant], operating under the [PGT], and the [PGT] itself have a conflict of interest in that they benefit where funds are not returned to the original owners. In addition, they have no incentive in place to monitor any monies that were ordered by the court to be distributed and which have remained in the hands of [the Accountant] despite such orders.

Certainly, it is reasonable to assume that [the Accountant] must maintain an estimate of such unclaimed funds so that it can manage the liabilities of funds it has received. The fact that such a list may not presently exist does not excuse [the Accountant] from being obliged to track such information to ensure the proper management of such funds.

...

Since the [PGT] claims that the compiling of a list that satisfies the Appellant's request is either too difficult to produce the Appellant revised his request to suit the circumstances. It stands to reason therefore the Appellant wishes to access copies of each of the 40,000 files so that it can obtain the information that it is seeking in order to help such beneficiaries recover monies that rightfully belong to them.

...

Accordingly, given the above, the Appellant submits that the copy of the computer records relating to the 40,000 files is not beyond the scope of the original request given wording of *Act* and purpose of the request.

The PGT submits:

“If an institution has any doubts about the interpretation to be given to a request, it has an obligation under section 24(2) of the Act to assist the requester in reformulating the request”: Order P-880, Order PO-1730. The original request was for “unclaimed monies...paid into Court...which remain unpaid”. In this case, the requester is a commercial heir tracer, who locates individuals who are entitled to money or assets held by others. A liberal interpretation of the request is for a list of unclaimed monies which remain unpaid and can be paid out by the Accountant. The [PGT] admits that such a list, if one existed or could be machine-generated, would be responsive to the original request. The [PGT] advised the requester through the Ministry that such a list does not exist and cannot be machine-generated.

“To be responsive, a record must be “reasonably related” to the request”: Order P-880, Order P-1051. The appellant’s modified request for a list of all the Accountant’s 40,000 files is beyond the scope of the original request, since the Accountant holds most of its trust funds and assets subject to further order of the Court...The money and assets are not “unclaimed”, because the Court has not ordered payment out of Court. No one can claim them in the absence of a court order in the proceeding in which the money or assets were paid into Court: Rule 72.03 of the Rules of Civil Procedure.

The [PGT] has explained to the appellant that the [PGT] does not maintain a list of “unclaimed monies paid into Court” as requested, nor can a list be generated. While the appellant is accustomed to obtaining lists of information from the [PGT] regarding the estates of deceased persons, the information held in the Accountant’s database is less sophisticated and complete because of the program’s reliance on paper files and original legal documents. Since the [PGT] provided a liberal interpretation to the original request, there is no assistance, other than explanation, which can assist in reformulating a request for information that does not exist in a list or machine-generated format.

In some cases where the scope of the appellant’s request is at issue, the problem is the institution’s failure to properly interpret the appellant’s request. In these cases, this office has found that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* and that, generally, where it is ambiguous, the request should be resolved in the requester’s favour [Orders P-134, P-880].

Conversely, where the scope of the request is clear, the institution cannot unilaterally determine what, in its view, the proper scope should be, and conduct a search for records based on its own views, rather than on the request [Order PO-1897-I].

Moreover, many orders of this office recognize that an institution must examine the request itself for guidance in determining how to properly respond to a request:

... [T]he need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. *The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request.* I am of the view that, in the context of freedom of information legislation, “relevancy” must mean “responsiveness”. That is, by asking whether information is “relevant” to a request, one is really asking whether it is “responsive” to a request. While it is admittedly difficult to provide a precise definition of “relevancy” or “responsiveness”, I believe that the term describes anything that is *reasonably* related to the request [Order P-880; see also Orders P-1051, PO-1730 and MO-1770]. (my emphasis)

The circumstances of this appeal do not raise issues of ambiguity or lack of clarity and detail. Indeed, there is no confusion whatsoever about what information the appellant was seeking through the initial request: the appellant was not seeking information on all of the Accountant’s files; the appellant was seeking information about a particular kind of file administered by the Accountant, namely files with unclaimed monies, which were paid into court for all matters, which remain unclaimed. The computer records of all of the Accountant’s files are not records or information that is reasonably related to the appellant’s initial, particular, request. In my view, the appellant has broadened the scope of the request well beyond the boundaries of that which was intended initially.

That having been said, and having examined all of the evidence before me, I also note that the appellant broadened the scope of the request to include *all* of the files maintained by the Accountant in order to get around what he believed was the PGT’s unwillingness and/or inability to provide the specific information sought initially.

The PGT’s initial decision was concerned with the difficulty of retrieving the requested information. It did not indicate that the PGT does not have the information. In fact, it is clear that the Accountant’s information does contain the information sought by the appellant, and the PGT has not issued a decision regarding access to it as required by section 26 of the *Act*. In view of the difficulty that the PGT might experience in searching through its 40,000 files to find the responsive information, the appropriate type of response from the PGT might well be an interim access decision and fee estimate as contemplated by Order 81, the principles of which have been confirmed in numerous subsequent orders. For example in Order MO-1336, the adjudicator relies on those early principles.

The issue of interim decisions was first raised by former Commissioner Linden in Order 81. In that order Commissioner Linden set out the procedures to be followed where the records are unduly expensive for the institution to produce for review by the head for the purpose of making a decision on access to the records. These procedures contemplate the institution reviewing a representative sample of

records, or seeking the advice of knowledgeable staff within the institution who are familiar with the type and content of the records, in order to produce an interim notice containing a fee estimate and an indication of what exemptions might apply. In this regard, former Commissioner Linden stated:

In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the *Act*. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. **In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access.** Anything less, in my view, would compromise and undermine the underlying principles of the *Act*.

In my view, in the circumstances of this appeal, it is incumbent on the PGT to provide an appropriate response to the appellant's initial request.

ORDER:

1. I uphold the PGT's decision that the appellant's modified request is beyond the scope of his original request.
2. I order the PGT to provide either an interim or final access decision on the appellant's initial request, and a fee estimate in accordance with section 54 of the *Act* to the appellant not later than August 9, 2004.
3. I further order the PGT to provide me with a copy of the decision given to the appellant in accordance with Order Provision 2.

Original Signed By: _____
Rosemary Muzzi
Adjudicator

July 19, 2004 _____