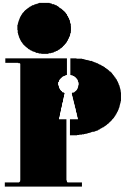

RECONSIDERATION ORDER PO-2590-R

Appeal PA-020276-1

PO-2298

Office of the Public Guardian and Trustee

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NATURE OF THE APPEAL:

On June 30, 2004, I issued Order PO-2298, in which I partially upheld the decision of the Office of the Public Guardian and Trustee (the PGT) to withhold records located in the file of a named deceased individual. The records at issue were the 63 pages of an identified deceased individual's estate file, and I upheld the PGT's decision to deny access to the majority of them. In Provision 1 of Order PO-2298, I ordered the PGT to provide the appellant with copies of portions of Records 24 and 63.

Following the issuance of Order PO-2298, I received a request from the PGT to reconsider Order PO-2298, and to stay the operation of the Order pending my decision regarding the reconsideration request. In the circumstances, I granted an interim stay of Provision 1 of Order PO-2298, pending my determination of whether or not a full stay of the Order should be granted.

I then invited the PGT to provide representations on the issue of whether a full stay should be granted until the reconsideration request was dealt with, along with the PGT's detailed arguments in support of its request for reconsideration. I also referred to a decision of the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations)* v. *Ontario (Information and Privacy Commissioner)* (March 5, 1996), Toronto Doc. 120/96, which was made in the context of an application for a stay of an order of this office.

I subsequently received a detailed request from the PGT to reconsider my Order PO-2298 on a number of identified grounds. I sent a copy of the PGT's request to the appellant, and invited the appellant to provide representations on the following issues: 1) whether a full stay should be granted until the reconsideration request is dealt with; 2) whether the request for reconsideration fit within the grounds set out in section 18.01 of the *Code of Procedure*; and 3) the substantive issues raised in the reconsideration request.

The appellant provided representations on the issues, and I subsequently wrote the parties, advising them that I was granting the request to stay Provision 1 of Order PO-2298, pending my decision regarding the reconsideration request. With the copy of the letter that I sent to the PGT, I also attached the appellant's representations, and I provided the PGT with the opportunity to respond to the appellant's representations. In response, the PGT provided reply representations to me.

One of the grounds upon which the PGT made its reconsideration request is that the passage of the Federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) ought to have affected my decision in Order PO-2298. I identified that this issue, raised by the PGT, concerned an alleged conflict between the appellant's right of access to the personal information ordered disclosed in Order PO-2298, made under the *Act*, and the rules concerning the collection of the same personal information in section 7(1) of *PIPEDA*. Based on the position taken by the PGT, I identified that the PGT was raising a constitutional question. Accordingly, I issued a Notice of Constitutional Question pursuant to section 109 of the *Courts of Justice Act*, inviting the parties, as well as the Attorneys General of Canada and Ontario, to provide written representations on the constitutional question. The resolution of this issue is discussed below.

In response to the Notice of Constitutional Question, I received representations from the appellant, the PGT, and the Attorney General of Ontario. The PGT also provided a revised copy of its earlier representations.

PRELIMINARY ISSUE

As identified above, one of the grounds upon which the PGT made its reconsideration request was that the passage of the Federal *PIPEDA* affects my decision in Order PO-2298. The PGT stated:

> Before January 1, 2004, there was no regulatory framework governing the collection and dissemination of personal information by provincially regulated commercial enterprises such as the appellant. As a general rule, the [*Act*] does not require that the [Information and Privacy Commissioner] examine the requester's authority to collect personal information.
>
> Since January 1, 2004, the requester's commercial activities are governed by the federal *Personal Information Protection and Electronic Documents Act* [*PIPEDA*]. The [PGT] respectfully submits that the requester may now only collect personal information in accordance with *PIPEDA*. *PIPEDA* now limits the appellant's right to collect personal information and it is submitted that these new statutory limitations on the appellant must be taken into account by the IPC in considering a request for personal information where the individual concerned has not consented to the disclosure.
>
> In the absence of consent by the individual in question, section 7 of *PIPEDA* does not authorize the Appellant to collect such personal information. As Estate Trustee of the deceased individual, the [PGT] is the only person entitled to consent to the collection of this personal information. Therefore disclosure of the personal information as ordered by the IPC would cause the Appellant to be in breach of *PIPEDA* unless section 7(1) of *PIPEDA* applies. None of the exceptions listed in section 7(1) apply to this case.
>
> … the [PGT] respectfully submits that the IPC cannot order disclosure of personal information that the [requester] is not authorized to collect under *PIPEDA*, as this would lead to a breach of *PIPEDA*. Such an order would result in a conflict between the federal and provincial legislation. In the event of a conflict, *PIPEDA* is paramount to [the *Act*] and the records therefore could not be disclosed to the requester.
>
> Where provincial and federal legislation overlap, neither legislation will be *ultra vires* if the field is clear, but, if the field is not clear and in such a domain the two legislations meet, then the federal legislation must prevail. (*Nordee Investments v. Burlington (City)* (1984), 4 O.A.C. 282 (Ont. C.A.); leave to appeal to S.C.C.

> refused (1985), 58 N.R. 237n (S.C.C.) In this case, the conflict will occur in the operation of [the *Act*] if the IPC orders disclosure of personal information which the [requester] is not authorized to collect under the terms of *PIPEDA*.
>
> The important factor is the scope and application of the federal Act. Once that is determined, the provisions of the provincial Act must be examined to see whether "there [would be an] actual conflict in operation" when the two statutes purport to function side by side. (See *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, per Dickson J. (as he then was), at p. 191.)
>
> In the event of an express contradiction, the federal enactment prevails to the extent of the inconsistency. (*M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.* [1999] 2 S.C.R. 961 pp 972-3; and *Garland v. Consumers' Gas Co.* [2004] S.C.J. No. 21 para 53).

Simply put, the PGT alleged that a conflict exists between the requester's right of access under the *Act* to the personal information ordered disclosed in Order PO-2298, and the rules governing collection of the same personal information in section 7(1) of *PIPEDA*.

The issue as set out above and identified by the PGT raised a constitutional question of federal paramountcy. The doctrine of federal paramountcy has been described as follows:

> "… where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails. … The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent."
>
> P.W. Hogg, *Constitutional Law of Canada*, looseleaf, 4th ed. (Toronto: Thomson Carswell, 1997) at 16-2, 16-3

Based on the position taken by the PGT, I identified that the legal basis (as set out above) for the constitutional question gives rise to the following question:

> Is there an inconsistency between sections 10(1) and 21(1)(f) of the *Act*, on the one hand, and section 7(1) of *PIPEDA*, on the other hand, to the extent that the prohibition in section 7(1) of *PIPEDA* is in conflict with the requester's right of access to the information at issue in this case under section 10(1) of the *Act* in light of the exception to the exemption at section 21(1)(f)?

I accordingly issued a Notice of Constitutional Question pursuant to section 109 of the *Courts of Justice Act*, which I sent to the parties, as well as to the Attorneys General of Canada and of Ontario, inviting written representations on this question. I also identified that the following provisions were relevant to the constitutional question: Sections 1, 10(1), 21(1)(f) and 54 of the *Act*, and sections 3, 4, 7(1) and 13 of *PIPEDA*.

In response to the Notice of Constitutional Question, I received representations from the Attorney General of Ontario in which the Attorney General took the position that the doctrine of paramountcy does not apply in the circumstances. After reviewing the doctrine of paramountcy, the Attorney General states that the first question to be determined in these circumstances is whether there is an overlap between the federal and provincial provisions of the respective laws. The Attorney General of Ontario then states:

> There is no overlap between the federal (*PIPEDA*) and provincial [the *Act*] statutes in these cases. In order for there to be overlap, a precondition to the applicability of the doctrine of paramountcy, both statutes must impose obligations on one entity. In this case, *PIPEDA*'s restrictions on the collection, use and disclosure of personal information do not bind [the PGT]. The requester is bound by *PIPEDA*, but [the *Act*] imposes no obligation on the requester. As a result, there is no possibility that there is any constitutional conflict between the statutes or that the operation of [the *Act*] would frustrate the purposes of *PIPEDA*.
>
> [The *Act*], which governs access to information held by the government, imposes obligations on the Ontario government, including [the PGT]. *PIPEDA* does not impose obligations on the Ontario government, including [the PGT]. There is therefore no overlap between the duties imposed in the federal and provincial statutes from the perspective of [the PGT]. Without this overlap, no issue of constitutional conflict can arise.
>
> Similarly, there is no overlap from the perspective of a requester. *PIPEDA* applies to "every organization in respect of personal information that... the organization collects, uses or discloses in the course of commercial activities": *PIPEDA*, s. 4(l)(a). Thus, *PIPEDA* will apply to any requester that meets the definition of an "organization" which "collects, uses or discloses" personal information "in the course of business activities". The only requirement imposed on the requester under [the *Act*] is to comply with the access procedure contained in s. 24 of [the *Act*]. Although the requester may be bound by *PIPEDA*, its obligations under *PIPEDA* do not pose any constitutional conflict.
>
> The Attorney General therefore submits that s. 21 of [the *Act*] is not inoperative because of the doctrine of paramountcy.

In addition to receiving these representations from the Attorney General of Ontario, the PGT provided revised representations to me. It identified that the revised representations replaced the earlier representations provided by the PGT in its reconsideration request. In its revised representations, the PGT withdraws its position regarding the paramountcy of *PIPEDA*, and defers to the Attorney General of Ontario on this issue.

The appellant, through counsel, also provided representations in response to the Notice of Constitutional Question. In his representations, the appellant also takes the position that there is

no conflict between the provisions of the *Act* and the provisions of *PIPEDA*, such that the doctrine of federal paramountcy is triggered.

In the circumstances, and based on the positions taken by all of the parties that there is no overlap in the *Act* and *PIPEDA*, I will not conduct a review of the constitutional question of federal paramountcy in this reconsideration.

THE RECONSIDERATION REQUEST

Introduction

Paragraph 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Paragraphs 18.01 and 18.02 of the *Code* state as follows:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in thedecision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The PGT's request for reconsideration is made on the grounds that there were fundamental defects in the adjudication process, and a jurisdictional defect in the decision. Specifically, the PGT identifies five separate grounds for the reconsideration request. The appellant's representations also refer to the applicable standards set out in paragraph 18 of the *Code*, above. However, the appellant submits that none of the criteria permitting reconsideration have been shown to exist by the PGT in this case. He also provides submissions in response to a number of the arguments made by the PGT in support of its request for reconsideration. The PGT provided reply representations in response to some of the arguments made by the appellant.

I will review each of the grounds identified by the PGT in turn, in regards to whether they constitute grounds for reconsideration, whether the order should be reconsidered on that basis and, if so the result of any such reconsideration decision.

Ground 1 – that the existence of *PIPEDA* should be considered as a relevant circumstance under section 21(2) of the *Act*, such that the disclosure of the record would amount to an unjustified invasion of privacy

The PGT submits that the provisions of *PIPEDA* respecting the treatment of personal information should be considered as a relevant circumstance under section 21(2) of the *Act*, such that the disclosure of the record would amount to an unjustified invasion of privacy. In its initial representations on this point, the PGT states:

> Before January 1, 2004, there was no regulatory framework governing the collection and dissemination of personal information by provincially regulated commercial enterprises such as the appellant. As a general rule, the [*Act*] does not require that the [Information and Privacy Commissioner] examine the requester's authority to collect personal information.
>
> Since January 1, 2004, the requester's commercial activities are governed by the federal *Personal Information Protection and Electronic Documents Act* [*PIPEDA*]. The [PGT] respectfully submits that the requester may now only collect personal information in accordance with *PIPEDA*. *PIPEDA* now limits the appellant's right to collect personal information and it is submitted that these new statutory limitations on the appellant must be taken into account by the IPC in considering a request for personal information where the individual concerned has not consented to the disclosure.
>
> In the absence of consent by the individual in question, section 7 of *PIPEDA* does not authorize the Appellant to collect such personal information. As Estate Trustee of the deceased individual, the [PGT] is the only person entitled to consent to the collection of this personal information. Therefore disclosure of the personal information as ordered by the IPC would cause the Appellant to be in breach of *PIPEDA* unless section 7(1) of *PIPEDA* applies. None of the exceptions listed in section 7(1) apply to this case.
>
> … Pursuant to section 21(2), a head, in determining whether the disclosure of personal information constitutes an unjustified invasion of personal privacy, is required to consider all relevant circumstances, including matters that are not listed. Before the coming into force of *PIPEDA,* there were no restrictions on the right of private organizations to collect personal information. *PIPEDA* has now set legislative restrictions on this previously open field. Therefore both the head of the institution and the IPC, in an appeal, are now required to consider whether a requester is authorized under *PIPEDA* to collect such personal information. This would be a key factor favouring privacy protection and consideration of such a legislative factor would clearly outweigh disclosure of the records. In this case, the Appellant does not have the consent of the individual or the deceased's

> personal representative. None of the exceptions under section 7(1) of *PIPEDA* apply.

As identified above, in its response to the Notice of Constitutional Question I sent to it, the PGT withdrew its arguments regarding the Federal paramountcy issue. However, the PGT also provided revised representations on the ground for reconsideration set out above. In its revised representations, the PGT provides additional arguments in support of its position that *PIPEDA* applies to the appellant, and that the exceptions in section 7(1) of *PIPEDA* do not apply. The PGT also states:

> It is submitted that, once the [appellant's] ability to collect the personal information is challenged on the grounds of *PIPEDA*, [an appellant] who is subject to *PIPEDA* bears the onus to prove its authority to collect under *PIPEDA*.

The appellant's representations do not address the PGT's position on this issue. However, in its response to the Notice of Constitutional question the appellant does provide representations on this issue, providing various arguments in support of his position that disclosure of the records to him would not violate the provisions of *PIPEDA*.

Findings

In this ground for reconsideration, the PGT argues that the existence and application of *PIPEDA* should be considered as a new "unlisted factor" under section 21(2) of the *Act*, such that the disclosure of the record would amount to an unjustified invasion of privacy. The PGT also states that, once the issue of the application of *PIPEDA* is raised and the appellant's authority to collect the information under *PIPEDA* is challenged, the appellant bears the onus to prove its authority to collect the information under *PIPEDA*. I do not accept the position taken by the PGT.

Previous orders have established that section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. They have also confirmed that the list of factors under section 21(2) is not exhaustive, and that an institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99]. I accept the approach to this section taken in these previous orders.

Although the enactment of *PIPEDA* and its possible application to the appellant may have significant impact on the appellant and the manner in which the appellant conducts its business when dealing with the personal information of identifiable individuals, the existence of *PIPEDA* is not a relevant unlisted factor or circumstance for me to consider in the context of this appeal.

The PGT submits that this office is required to conduct a review of the possible application of *PIPEDA*, including its application and the possible existence of any exceptions to its application, in circumstances where the requester is a corporate entity. Conversely, the PGT argues that, at a minimum the application of *PIPEDA* is to be reviewed by this office where the "the [appellant's]

ability to collect the personal information is challenged on the grounds of *PIPEDA*". Once this occurs, the PGT argues that the onus to show that *PIPEDA* does not apply, or that various exceptions apply to the appellant, shifts to the appellant. I do not accept this argument.

In the first place, the provisions of *PIPEDA* provide a comprehensive procedure to determine the application of that legislation in particular instances, and also provides remedies for breaches of the legislation. The Attorney General of Ontario, in its representations on the preliminary issues set out above, confirms that there is no constitutional conflict or overlap between *PIPEDA* and the *Act* in cases where requests for information are made by corporate entities. The legislative schemes are separate, and apply to separate bodies. In addition, the oversight bodies are different, and different remedies apply in circumstances where breaches of the legislative provisions occur. For the reasons that follow I have concluded that it is neither necessary nor desirable for this office to adjudicate an issue under *PIPEDA*, a function which the Parliament of Canada has expressly assigned to the Privacy Commissioner of Canada.

Under section 10(1), the *Act* provides a public right of access to information held by institutions unless an exemption applies or the request is frivolous or vexatious. Previous orders have confirmed that the functioning of the *Act* is distinct from other processes, including legislated processes for civil discovery and criminal disclosure of information, as well as court processes. In a recent Order I confirmed that various processes respecting the public's right to obtain access to information are distinct, including the application of a publication ban in certain circumstances, and stated in Order MO-2178:

> The functioning of the *Act* is distinct from the processes of the courts, even where access is requested to information that falls under a publication ban. This is confirmed in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), in which Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the *Act*, in the context of a motion to clarify an earlier order he had made granting a publication ban:
>
> > The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act.
>
> Mr. Justice Lane also stated as follows regarding the interaction between the *Act* and other legislation concerning confidentiality issues (in that case, the Ontario Rules of Civil Procedure):
>
> > … In my view, there is no inherent conflict between the *Act* and the provisions of the Rules [of Civil Procedure] as to maintaining

> confidentiality of disclosures made during discovery. The *Act* contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the *Act*; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

> In the same way, in the event that an order of this office were to find that certain requested information is not exempt and ought to be disclosed, and as a consequence an individual chooses to publish that information, there is no remedy under the *Act*. Rather, the remedy is found within the context of the criminal law and, in particular, in the mechanisms it provides for dealing with breaches of a publication ban.

In the same way, the possible application of *PIPEDA*, including whether the appellant is covered by it and, if so, what restrictions or exceptions apply, is a matter for the Privacy Commissioner of Canada to determine. The fact that section 21(2) allows this office to review all relevant factors does not require this office to review the possible application of all legislative requirements which may or may not apply to appellants. If an appellant infringes *PIPEDA* by collecting the information he has requested from the PGT, this would properly be addressed in the complaints process established under that statute. In the circumstances, I do not consider the existence of *PIPEDA* to be a relevant unlisted factor to consider in the circumstances of this appeal.

In the alternative, if the existence and possible application of *PIPEDA* were to be a relevant factor to consider in the circumstances of this appeal, based on the PGT's own alternative arguments, I would find that the existence of *PIPEDA* would be a factor favouring disclosure of the requested information to the appellant. As identified under Ground 5, below, if *PIPEDA* were found to apply to the appellant, the appellant would be limited in the manner in which he could deal with the personal information obtained under the *Act*. This, in my view, may be a relevant factor favouring disclosure of the information in the circumstances of this appeal.

In conclusion, I reject the PGT's argument that *PIPEDA* should be considered as a relevant circumstance under section 21(2) of the *Act*, such that the disclosure of the record would amount to an unjustified invasion of privacy.

Ground 2: That the IPC disclosed to the appellant the PGT's representations, but failed to disclose the appellant's representations to the PGT.

The PGT takes the position that IPC disclosed to the appellant the PGT's representations, but failed to disclose the appellant's representations to the PGT. The PGT states:

The IPC appears to have relied on representations made by the Appellant in reaching its conclusions with respect to the unlisted factors of "benefit to unknown heirs":

> ***"Unlisted factor - benefit to unknown heirs***
>
> The appellant provided representations on this unlisted factor. He asserts that disclosure of the requested information to him increases the possibility of locating rightful heirs who might otherwise remain unknown, and refers to previous orders of this office in support of his position (Orders PO-1493, PO-1717 and PO-1936)." (page 12 of PO-2298) …
>
> "Applying similar reasoning to that followed in Orders PO-1717, PO-1736, PO-1923 and PO-2260, I find the possibility that disclosure of personal information about the deceased might result in individuals successfully proving their entitlement to assets of estates is a relevant factor favouring disclosure." (page 13 of PO-2298)

The [PGT] was not provided with a copy of the appellant's representations, which presumably contain allegations about the [PGT's] practices and assertions about the appellant's business. The [PGT] has therefore been unable to verify the truth of statements made by the appellant about its own business practices, and has not been afforded the opportunity to comment on the appellant's business practices. The [PGT] respectfully submits that it is inappropriate for the IPC to rely on an heir tracer's allegations as to the [PGT's] own practices and procedures, without affording the [PGT] some ability to review those assertions and respond to them.

Furthermore, the heir tracer's business practices are not confidential. The appellant is requesting access to personal information of deceased persons for commercial purposes. Close scrutiny of the purpose of the request is particularly important in this regard, and it goes directly to the "unlisted factor" of "benefit to unknown heirs". The IPC appears to have completely accepted the appellant's argument that disclosure of the deceased's personal information for commercial purposes will be of benefit to other persons, without affording close scrutiny to the assertions made by the appellant.

The process prescribed by the Act for appeals to the IPC is an inquisitorial process. It does not give a party a right to disclosure of the evidence submitted by another party. As a consequence there is a much greater onus on the IPC, in its role as inquisitor, to ensure that the facts provided by the parties and relied on by the IPC are accurate. The IPC must either take extra steps to ensure that it obtains reliable information or disregard the unreliable information. This is particularly the case where individuals' rights to privacy are at stake. (s. 52; *Grant v. Cropley*, [2001] O.J. No. 749 at 15-17 (Div. Ct.)

> The statutory creation of an inquisitorial process does not remove the duty of fairness. Given the important interests at stake, it is essential that the IPC gather and base its decisions on accurate information. This would require at least some disclosure to the [PGT] for the purpose of enabling the [PGT] to know the case it had to meet.
>
> The IPC cannot assume in every case that disclosure of sensitive (in the commonly understood sense of the word) personal information which otherwise would remain private and confidential, should be disclosed simply because in each case, the appellant asserts that there is a *possibility* of locating rightful heirs who may not have been found by the [PGT]. It is a fundamental error in this case to "apply similar reasoning" of previous Orders, as the IPC is then relying on gross assumptions of fact which vary significantly in each case. Each access request must be considered on its merits and the IPC should have asked the [PGT] to comment on the appellant's representations in this regard. The *possibility* of the Appellant locating rightful heirs ahead of the [PGT] is in fact extremely remote and should not take precedence over the protection of the personal information.

In response to the PGT's representations, the appellant submits:

> The [PGT] argues that the adjudicative process has been unfair because the IPC disclosed to the Appellant the [PGT's] appeal representations, but failed to disclose the Appellant's appeal representations to the OPGT.
>
> The Appellant submits that the IPC is not required to share submissions. In any event, this ground for reconsideration does not fall under any of the permitted reasons for reconsideration under s. 18.01 of the *Code of Procedure.*
>
> In its submissions, the [PGT] does not ground its argument in any past IPC decisions. The [PGT] argues that the information the Appellant is requesting is very sensitive and that the Appellant's practices are not confidential. The [PGT] relies on the doctrine of fairness and states that according to *Grant v. Cropley,* [2001] O.J. No. 749, the IPC should take extra steps to ensure that it obtains reliable information.
>
> The Appellant submits that the basic objective of the doctrine of fairness is to ensure that individuals are provided the degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded official or authority would need to be informed in order to reach a rational result. The duty of fairness also requires that reasons for the decision be provided.
>
> The Appellant respectfully submits that the [PGT] was given the opportunity to present its case fully and it was provided with reasons for the IPC decision. There was no violation of the doctrine of fairness.

The PGT responded to the appellant's position in its reply representations, and states:

> The [PGT] respectfully reiterates its submission that it is inappropriate for the IPC to rely on an heir tracer's allegations as to the [PGT's] own practices and procedures, without affording the [PGT] some ability to review those assertions and respond to them. Fairness and natural justice would require that the [PGT] should be given the opportunity to review and comment on the Appellant's arguments. With respect, we submit that the IPC must either take extra steps to ensure that it obtains reliable information or disregard the unreliable information.

The PGT then reviews the appellant's representations made in response to the reconsideration request, and submits that these statements support the PGT's view that I may have relied on inaccurate information about the PGT's current practices and that, if the PGT had been given an opportunity to review and comment on those statements to the IPC in the original appeal, I may have arrived at a different conclusion.

Analysis and Findings

I have carefully reviewed the representations of the parties and the positions taken regarding whether my decision not to share the representations made by the appellant on the unlisted factor of "benefit to unknown heirs" gave rise to a fundamental error or jurisdictional defect. On my review of this issue, and of the representations of the parties (both the initial representations and the representations in this reconsideration request), I have decided that my decision not to invite the PGT to provide reply representations in response to the appellant's submissions did not result in a fundamental defect in the adjudication process or any other jurisdictional defect in the decision.

By their nature reply submissions are restricted to responding to the other party's case, and new issues or arguments cannot be raised. As a result, reply representations are sought only in those instances where a party raises new issues or provides new evidence, to which the other party ought to be given an opportunity to respond. That did not occur in this appeal.

In Order PO-2298, I summarize the appellant's representations on the application of the unlisted factor "benefit to unknown heirs" as follows:

> The appellant takes a different position on the possible application of this unlisted factor. He asserts that disclosure of the requested information to him increases the possibility of locating rightful heirs who might otherwise remain unknown, and refers to previous orders of this office in support of his position (Orders PO-1493, PO-1717 and PO-1936).

Although the appellant provides a few similar general statements in support of his position, this summary of the appellant's position captures the essence of the appellant's representations on

this factor. In my view, these representations did not raise new issues or provide new evidence to which the PGT ought to have been given the opportunity to respond.

The Notice of Inquiry I sent to the PGT invited representations on the issues raised in this appeal. With respect to the issue of whether any of the factors under section 21(2) applied, the Notice of Inquiry stated:

> Section 21(2) lists various criteria which must be considered in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy within the meaning of section 21(1)(f). [See Order P-239]
>
> The subsection lists some of the criteria to be considered; however, the list is not exhaustive. By using the word "including" in its opening paragraph, I believe it requires the head to consider the circumstances of a case that do not fall under one or more of the listed criteria. [See Order P-99]
>
> Are any of the circumstances listed under section 21(2) relevant to the determination of whether disclosure of the personal information constitutes an unjustified invasion of personal privacy in the circumstances of this appeal? Please explain.
>
> What other facts and circumstances, if any, are relevant to the determination of whether disclosure of the personal information constitutes an unjustified invasion of personal privacy in the circumstances of this appeal? Please explain.

The Notice of Inquiry proceeded to ask specific questions of the PGT regarding the possible application of a number of the listed factors.

In its representations in response to the Notice of Inquiry, the PGT provided representations on the issue of whether the unlisted factor of "benefit to unknown heirs" applies, and stated as follows (as set out in Order PO-2298):

> The unlisted factor of "benefit to unknown heirs" has been applied by the IPC in Orders PO-1717 and PO-1936. The [PGT] submits that this factor is not applicable to this request, since no "benefit to unknown heirs" can be established by the requester with respect to access to information in advance of it being filed with the Court. Since the [PGT] provides the same services at minimal cost, which is part of its fiduciary duty as estate trustee, it is the position of the [PGT] that there can be no "benefit to unknown heirs" to disclose personal information where the deceased died as recently as 2000.
>
> Order PO-1717 and other orders decided prior to the year 2000, deal with *escheated* estates, where the deceased had been dead for over 10 years and the

> [PGT] had ceased searching for heirs. (An escheat does not occur before 10 years following the date of the death of the deceased.) These situations are clearly distinguishable on the fact of the year of death of the deceased and the fact that the estates had escheated to the Crown.

The PGT was provided with the opportunity to address the application of the unlisted factor of "benefit to unknown heirs" and, in fact, provided representations on this issue. The PGT was fully aware of the previous orders of this office where the factor was considered relevant, and the PGT reviewed those decisions and sought to distinguish them from the circumstances of this appeal. It is clear from my decision in Order PO-2298 that I was not satisfied that these orders were distinguishable from the circumstances in this appeal, and I found that the principles from those earlier decisions applied. In the circumstances, there was no need to share the appellant's general representations on this point with the PGT.

In its reconsideration request, the PGT makes certain assumptions regarding what is contained in the appellant's representations. It appears that these assumptions are based on the fact that representations from the appellant were shared with the PGT in different appeals. However, as set out above, in this appeal the appellant's main argument in support of its position that the unlisted factor of "benefit to unknown heirs" ought to apply is based on the previous orders of this office; the appellant did not provide any new evidence. The PGT had access to those same orders, and was indeed a party to many of them.

I also note that in an appeal involving these same two parties, which was resolved by my Order PO-2260 a few months prior to Order PO-2298, the parties addressed the issue of the application of this unlisted factor. In Order PO-2260, I found the factor to apply, and found that it should not be accorded significant weight for the first year following death, after which it should be accorded moderate weight.

My general finding that disclosure of certain personal information about the deceased to the appellant might result in individuals successfully proving their entitlement to assets of estates, based on previous orders of this office, is not reliant on the specific representations of the appellant, but rather on the previous orders of this office, which the PGT also referred to. In my view, my decision not to share the appellant's general representations on this issue with the PGT did not give rise to a fundamental defect in the adjudication process or some other jurisdictional defect in the decision. Accordingly, I dismiss this as a ground for reconsideration.

Ground 3 – that the IPC failed to consider the exclusive authority of the PGT as the personal representative of the deceased under section 66(a) to authorize the disclosure of sensitive personal information.

The PGT takes the position that the IPC failed to consider that the PGT has exclusive authority in its capacity as the personal representative of the deceased under section 66(a) to authorize the disclosure of sensitive personal information. The PGT states:

Absent the consent of the [PGT], the Order to disclose the records in question will result in a fundamental breach of the deceased individual's privacy.

Section 66(a) expressly confers on a deceased's personal representative the deceased's right to privacy in relation to the administration of the deceased's estate. Only the deceased's personal representative may consent to disclosure of a deceased's personal information to a third party. The Divisional Court has held that, "To disclose personal information of the deceased to someone who is not and is not found to be her personal representative is beyond the jurisdiction of the Commissioner." Even family members of a deceased person are not entitled to access to the deceased's personal information unless they are the deceased's personal representative. "The Act assures the public of Ontario of protection of the privacy of an individual by limiting the circumstances and the type of information that the privacy of an individual by limiting the circumstances and the type of information that may be disclosed after death. It is not open to the Commissioner to grant access to personal information of a deceased to anyone but that individual's personal representative." As family members are not permitted access to a deceased person's personal information, it is clearly unreasonable for the IPC to grant access to an unrelated person who wants the information solely for commercial purposes. *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4^h) 12 (Div. Ct.);.); Order P-679; Order P-1070; Order P-1254; Order P-1444; Order P-1493; Order PO-1743; Order PO-1761; Order PO-1849.

The [PGT] is declining to consent to the disclosure and collection of the information by the Appellant because the [PGT] is of the opinion, on policy grounds, that disclosure at this time would not be of benefit to the deceased or the estate. The [PGT] either already has identified the legal heirs to the estate, or will continue searches until the heirs are located at minimal cost to them. Based on many years of experience in such cases, the [PGT] is of the view that the payment of the heir tracer commission by the heirs is of no benefit to the heirs and the heirs will not receive their share of these two estates either more quickly or at less cost to them by disclosing personal information about the deceased to the Appellant. The [PGT] is the best and only person to judge whether disclosure will be of benefit to the estate and to the potential heirs to the estate.

Furthermore, the [PGT] is the deceased's duly appointed Estate Trustee Without a Will, and therefore the deceased's sole personal representative. Therefore the [PGT] is the only person with legal authority to grant or refuse consent in accordance with section 66(a) of [the *Act*]. As personal representative, the [PGT] strongly objects to disclosure. The exercise of this right relates to the administration of the deceased's estate by the [PGT] as personal representative. The individual's opposition to disclosure is a very important unlisted factor that should be weighed under section 21(2), particularly in light of sections 42(b) and

> 21(1)(a). Given the importance that the Act places on protection of privacy, as well as the authority given to personal representatives under section 66(a), disclosure should not be ordered over the objections of the deceased's personal representative. This case does not present strong enough reasons to override the objections of the individual's personal representative to the invasion of privacy.

The appellant submits:

> The [PGT] submits that the IPC failed to consider the exclusive authority of the [PGT] as the personal representative of the deceased under s.66(a) to authorize the disclosure of sensitive personal information. The Appellant submits that s.66(a) has no application to this case.
>
> Section 66(a) of FIPPA states:
>
> Any right or power conferred on an individual by this Act may be exercised,
>
> > (a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate.
>
> On closer reading, it is clear that this provision does not support the [PGT's] position. On its face, the legislation states "Any right or power *conferred* on an individual *by this* Act ...". The legislation does not in any section confer on an individual the right to consent to the disclosure of his/her information. This right is inherent, and is in no way "conferred on an individual by [the] Act."

In its reply representations, the PGT states:

> The Appellant argues that section 66(a) of [the *Act*] does not apply to vest in the estate representative the right to consent to disclosure of personal information. This is contrary to a plain reading of the subsection. The Appellant further argues that [the *Act*] does not in fact confer on an individual the right to consent to disclosure of personal information. This is also inaccurate. The following are three important provisions of [the *Act*] which grant to an individual the right to consent or to refuse to consent to disclosure of his or her personal information:
>
> 21(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) *upon the prior written request or consent* of the individual, if the record is one to which the individual is entitled to have access;

> 41. An institution shall not use personal information in its custody or under its control except,
>
> > (a) where the person to whom the information relates has identified that information in particular and consented to its use;
>
> 42. An institution shall not disclose personal information in its custody or under its control except,
>
> > (a) in accordance with Part 11;
> >
> > (b) where the person to whom the information relates has identified that information in particular *and consented to its disclosure*; [emphasis added by the PGT]

Analysis and Findings

The PGT takes a unique approach in arguing that section 66(a) of the *Act* grants the PGT the exclusive authority to authorize the disclosure of personal information that relates to deceased individuals whose estates it administers. As I understand the PGT's position, it argues that I ought have considered this "exclusive authority" in my determination, and my failure to do so has resulted in a fundamental defect in the adjudication process or some other jurisdictional defect in the decision. The PGT's position suggests that if it does not consent, the personal information at issue may not be disclosed under any circumstances. I disagree.

First, the representations of the PGT provided in the course of this appeal, although they did refer to section 66(a), only referred to it in the context of their arguments concerning the application of the factor of "diminished privacy interest after death". The PGT did not take the position that section 66(a) operates in such a way to prohibit this office from ordering the disclosure of records relating to the deceased.

Raising this argument at the reconsideration stage is too late. In this appeal, the arguments put forward by the PGT on its "exclusive authority" under section 66(a) could have been advanced at an earlier time, but the PGT chose not to do so. Accordingly, I reject this ground as a ground for reconsideration of Order PO-2298.

However, even if I were to accept that the arguments put forward by the PGT were advanced in its earlier submissions, I would not accept the PGT's position on this issue.
The PGT is essentially taking the position that, although it is the institution with custody and control of the records at issue in this appeal, it is at the same time the personal representative of the deceased under section 66(a), and has the sole authority to determine whether the records ought to be disclosed. On this basis, the PGT submits that it has the sole authority to consent to the disclosure of the deceased's personal information.

I find the position of the PGT fails for a number of reasons.

As noted above, section 66(a) states:

> Any right or power conferred on an individual by this *Act* may be exercised,
>
> > if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

Previous orders have established that, under this section, a requester can exercise the deceased's right of access under the *Act* if he/she can demonstrate that

- he/she is the personal representative of the deceased, and
- the right he/she wishes to exercise relates to the administration of the deceased's estate.

Previous orders have also stated that, if the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased him or herself [Orders M-927; MO-1315]. These decisions reflect the fact that, in most instances, section 66(a) is relied on by people seeking access. By contrast, the PGT seeks to rely on it to refuse consent.

The PGT refers to the Divisional Court decision in *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12, in support of its position that ordering the disclosure of the personal information of a deceased individual to someone who is not the personal representative is beyond the jurisdiction of the Commissioner. In the appeal giving rise to that decision, the requester was found not to be the personal representative of the deceased and, therefore, did not fit within the parameters of section 66(a). As a result of that finding, access to the information was not granted to the requester in that appeal.

I completely disagree with the PGT's interpretation of the *Adams* decision, and of section 66(a). The *Adams* decision was made in the context of a requester who relied on section 66(a) as the basis for an access request, and must be seen in that light. It stands for the proposition that, where the disclosure of requested personal information of a deceased individual depends on the application of section 66(a), the information cannot be disclosed to the requester if that section does not apply. That could be the case, for example, where the requested information would otherwise be exempt under section 21(1) of the *Act* because its disclosure would be a presumed unjustified invasion of the deceased individual's privacy under section 21(3).

However, not all requests for the personal information of deceased individuals rely on the requester qualifying under section 66(a) as the basis for disclosure. The question then becomes

whether one of the exemptions from disclosure identified in the *Act* applies. Most commonly, this would be one of the personal privacy exemptions found in sections 21(1) and 49(b). In the case of both these exemptions, where it is established that disclosure would not be an unjustified invasion of personal privacy, the exemption would not apply and the *Act* clearly contemplates that in this situation, the requested personal information of the deceased would be disclosed. This is the analysis I undertook in Order PO-2298. Similarly, in *Public Guardian and Trustee v. David Goodis, Senior Adjudicator et al.* (December 13, 2001), Toronto Doc. 490/00 (Div. Ct.), leave to appeal dismissed March 21, 2002 (C.A. M28110), the Divisional Court upheld Orders PO-1736 and PO-1790-R of this office, which required the Public Guardian and Trustee to disclose personal information about deceased individuals to an heir tracer, on the basis that the information was not exempt under section 21(1).

Because this is not a case in which section 66(a) could apply to assist the requester in gaining access, the question before me in Order PO-2298 was whether the requested information is exempt from disclosure under one of the exemptions provided by the *Act* (in particular, section 21(1)). That is the context for the PGT's main argument here, to the effect that it has the right to refuse consent under section 66(a), and that this refusal is definitive.

In making this argument, the PGT appears to take the position that it is an institution under the *Act*, with all the considerable rights granted by that status, but should also be able to exercise the rights of the deceased under section 66(a) where it is the personal representative. This puts it in the position of being not only the institution, but also an affected party under the *Act* where someone makes a request for information about one of the individuals for whose estate the PGT is personal representative. I am not sure this is a situation contemplated or intended by the legislature.

In any event, the PGT purports to exercise a right of the deceased under the *Act*, as personal representative, by refusing consent under section 66(a). But in the circumstances of this appeal, the PGT is not in a position to rely on section 66(a) to exercise its purported right to refuse consent, since section 66(a) requires that the exercise of such rights must relate to "the administration of the deceased's estate". Refusal of an access request, which relates to the PGT's statutory role as an institution under the *Act* does not, in my view, fall into this category.

A further flaw in this argument is the notion that consent is definitive regarding disclosure of personal information in the context of an access request. Section 21(1)(a) identifies consent as just one of a total of *seven* exceptions to the non-disclosure of personal information. In my view, it is highly significant that there are six other exceptions. One of these, found at section 21(1)(f), mandates disclosure where it would not be an unjustified invasion of personal privacy, a standard that is also applied in the other personal privacy exemption at section 49(b). So even if the PGT were in a position to state its position as an affected party (under section 66(a) or otherwise), declining consent and arguing against disclosure, this would not be definitive – the question is whether one of the other exceptions in section 21(1) applies. In Order PO-2298, I found that the exception in section 21(1)(f) applies, and I ordered disclosure because it would not be an

unjustified invasion of personal privacy. The consent exception at section 21(1)(a) was irrelevant to that conclusion because consent had not been provided.

I dismiss Ground 3 as a ground for reconsideration.

Ground 4 - that the IPC has fundamentally exceeded its jurisdiction in ordering the disclosure of sensitive personal information about the deceased or next-of-kin

The PGT takes the position that the IPC has fundamentally exceeded its jurisdiction in ordering the disclosure of sensitive personal information about the deceased or next-of-kin. The PGT states:

> "Personal information" is broadly defined in section 2 of [the *Act*]. Protection of the privacy of individuals is one of the paramount purposes of [the *Act*]. Third parties are granted access to personal information only in narrowly defined circumstances. Privacy is paramount over third parties' right of access to personal information. The protection of privacy provisions should not receive a cramped interpretation. They must be given such fair, large and liberal construction and interpretation as best ensures the attainment of their objects. In determining whether an individual has a reasonable expectation of privacy in a particular piece of information, it is important to have regard to the purpose for which access to the information is sought. The Supreme Court of Canada has held that a reasonable person would not expect strangers to have access to their personal information for commercial purposes: *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 at 404-408 (S.C.C.), *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 at 398-399 (S.C.C.), *Interpretation Act,* R.S.O. 1990, c. I.11, s. 10.

The PGT then states that there are a number of issues in the Order which fall under this heading, and lists three of them. I will address these three issues in turn.

Issue A: The PGT takes the position that this office ignored the importance of legislative requirements protecting the confidentiality of the records.

The PGT's representations on this issue read:

> The [PGT] respectfully submits that the IPC fundamentally erred in neglecting to consider and attribute appropriate weight to the confidentiality provisions of several relevant statutes protecting the information contained in the [PGT's] files. These confidentiality provisions should have been accorded greater weight in assessing the listed and unlisted factors in a determination under section 21(2). The IPC has determined that paragraph 21(2)(h) ("information supplied by the individual ... in confidence") does not apply to the records ordered disclosed because the information in question was not provided directly by the deceased

> person. Nevertheless, the [PGT] argues that the fact that the information is provided by *a third party individual or institution* to the [PGT] with the expectation of confidentiality, particularly where a statute protects the confidentiality of the information, should be taken into account by the IPC.
>
> In Order P-309, the Assistant Commissioner considered the existence of a confidentiality provision in the *Vital Statistics Act* as a factor in accepting the Ministry's argument that the information on a live birth registration is individuals registering the required notice would reasonably expect that the information provided would remain confidential. In his view, section 21(2)(h) was a relevant consideration in the circumstances of that appeal, weighing against disclosure of the record. This factor was given little weight in PO-1923. However in that case, the deceased had been dead for 21 years. The deceased individual in this case has only been dead since 2000. In light of the fact that these individuals are recently deceased, and in light of the identity theft concerns that are raised in these submissions, it is submitted that the need for confidentiality with regard to the personal information at issue should be given greater weight than it was given in PO-1923.
>
> The provisions relevant to the records ordered disclosed are as follows:
>
>> i) Section 18 of the *Public Guardian and Trustee Act* requires the [PGT] to preserve secrecy with respect to deceased's estates and not communicate any information to any person not legally entitled to the information;
>>
>> ii) Section 44(b) of Regulation 470 under the *Funeral Directors and Establishments Act,* R.S.O. 1990, c. F.36 which states that professional misconduct of a funeral director includes ".... failing to respect the confidentiality of information concerning a client except with the consent of the client or the client's personal representative unless required to do so by law;"

In response to the PGT's representations on this issue, the appellant submits:

> The [PGT] submits that the IPC has fundamentally exceeded its jurisdiction in ordering the disclosure of sensitive personal information about the deceased or next-of-kin without the consent of the [PGT].
> In support of its argument, the [PGT] relies on the necessity to protect privacy and the confidentiality of the records. The [PGT] relies on the decision by the Supreme Court of Canada *Dagg v. Canada (Minister of Finance).* [PGT] alleges that the Court in *Dagg* held that a reasonable person would not expect strangers to have access to their personal information for commercial purposes.

> A close reading of *Dagg,* however, reveals a key element of the decision expressed by the court in para. 75. The Court stated that in determining whether an individual has a reasonable expectation of privacy in a particular piece of information, it is important to have regard to the purpose for which the information was divulged. Generally speaking, when individuals disclose information about themselves they do so for specific reasons. The Court indicated that the purpose for which the information was collected should be protected.
>
> The *Dagg* case was decided in the context of the *Privacy Act.* The Court was concerned that the sign-in logs of the employees collected for the purpose of fire and other emergencies would be used for unintended purpose of collective bargaining strategies.
>
> The Appellant submits that the purpose for which it is intending to use the information is *identical* to the purpose for which this information was collected by [the PGT]; namely, the determination of the heirs of the estate of the deceased and the administration of the estate to the benefit of those heirs. In the circumstances, the deceased person would have expected his or her information to be used for the purpose the Appellant is intending to use it. [The PGT] would be furthering that purpose in consenting to such disclosure.

In its reply representations, the PGT states:

> In response to the Appellant's argument of "identical purpose", the [PGT] reiterates the representations set out in paragraph 4(c) of our [initial submissions].

Analysis and findings

I have reviewed the PGT's arguments on Issue A, and reject them as grounds for reconsideration.

Firstly, I do not accept the PGT's position that I ought to take the same approach to this issue as was taken by former Assistant Commissioner Tom Mitchinson in Order P-309. In that appeal, the former Assistant Commissioner considered the existence of a confidentiality provision in the *Vital Statistics Act* as a factor in accepting the Ministry's argument that the information on a live birth registration is of such sensitivity that individuals registering the required notice would reasonably expect that the information provided would remain confidential. However, the PGT correctly identifies that Order PO-1923 took a different approach to this issue. In that order, former Assistant Commissioner Mitchinson stated:

> Order P-309 dealt with a request by a baby food manufacturer for access to information provided by parents regarding their children contained on the "Statement of Live Birth" forms filed with the Ministry under the *VSA*. The form included a statement outlining the authority for collecting the information, and listed the purposes for which the registration information would be used. In those

> circumstances, I found that "it would be reasonable for a parent to infer from the statement that the information on the form would be kept confidential except in the circumstances outlined on the form". *No such statement or similar indication regarding the intended use of the information is contained on the form which is the record at issue in the present appeal, and it is clear that the uses of information on a "Statement of Death" form are different from those relating to information contained on a "Statement of Live Birth" form*. I accept the Ministry's position that an "informant" would have a reasonably held expectation that the information provided would be kept confidential except when used for purposes connected to the death of an individual, and that this would include the administration of estates. *However, given the nature of the information and the need to use it in ways which would require disclosure in order to effectively administer estates*, I find that the section 21(2)(h) factor carries low weight in these circumstances. [emphasis added]

I adopt the approach taken by the former Assistant Commissioner in this later decision, both with respect to his position that the uses of information on a "Statement of Death" form are different from those relating to information contained on a "Statement of Live Birth" form, and his position that different factors apply, given the nature of the information and the need to use it in ways which would require disclosure in order to effectively administer estates. In addition, I am also not persuaded by the PGT's position that other legislative provisions are relevant in the circumstances. Both of the provisions referred to by the PGT relate to the importance of either the PGT or a funeral director maintaining the confidentiality of information of deceased individuals that it deals with, and restricts its disclosure to persons not legally entitled to it. In my view these provisions have no relevance in the circumstances of this appeal and reconsideration request.

Accordingly, I reject the argument put forward by the PGT in Issue A under Ground 4 of its reconsideration request.

Issue B: The PGT submits that the IPC has fundamentally erred in ruling that information ordered disclosed with respect to a deceased's occupation and place of employment did not qualify as "employment or educational history" under section 21(3)(d), "presumed invasion of privacy".

The PGT's representations on this issue state:

> The [PGT] respectfully submits that the IPC has applied a legally incorrect and unsupportable interpretation of paragraph 21(3)(d) in requiring that the record include detailed information such as more than one place of employment. Paragraph 21(3)(d) states, in full, "*relates* to employment or educational history" (emphasis added). This clearly broadens the scope of the type of personal information within the ambit of section 21(3) beyond the narrow definition

incorrectly applied by the IPC, to include information such as the deceased's occupation or a single place of employment.

The Supreme Court of Canada considered virtually identical language under the federal *Privacy Act,* R.S.C. 1985, c.P-21, in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* [2003] 1 S.C.R. 66. Specifically, subsection 3(b) of the *Privacy Act* provides that *"information relating to the* education or the medical, criminal or *employment history of the individual..."* is considered to be personal information. This language is virtually identical to the definition of personal information in Ontario's FIPPA. The Court pointed out that the definition of "personal information" in the federal act is expansive and not limited.

> In my view, there is no reason to limit the scope of the expression "employment history" to particular aspects of employment or to modify its usual meaning. Parliament referred broadly to "employment [page 83] history" and did not qualify that expression. There is no evidence of an intent to limit its meaning. Further, the wording of s. 3(b) suggests that it has a broad scope. Indeed, the provision does not state that personal information includes "employment history" itself. Rather, it stipulates that it includes "information *relating to* ... employment history" (emphasis added). *Black's Law Dictionary* (6th ed. 1990) defines the word "relate" at p. 1288 as "to bring into association with or connection with". The wording of the French version of s. 3(b) is equally general: "*Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, ... relatifs a* ...ses *antecedents professionnels* ..." (emphasis added). The *Dictionnaire de droit quebecois* et *canadien* (2nd ed. 2001) defines "*relatif*" at p. 477 as "*[q]ui concerne, qui se rapporte a*". Considering the wording of the provision, it would seem that the personal information referred to is that relating to employment history. In the absence of clear legislative intent to the contrary, the ordinary meaning of the legislative provision must prevail. The ordinary meaning of "employment history" includes not only the list of positions previously held, places of employment, tasks performed and so on, but also, for example, any personal evaluations an employee might have received during his career. Such a broad definition is also consistent with the meaning generally given to that expression in the workplace. (paragraph 25, pages 82 and 83) (emphasis added)

> The IPC's limited definition of "employment history" is not supported by the Supreme Court of Canada and therefore consists of a fundamental error of jurisdiction.

Analysis and Finding

On my review of the representations of the PGT on this issue, I am not satisfied that my finding that the presumption in section 21(3)(d) did not apply is inconsistent with the decision of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* (supra).

In the first place, in this decision, the Supreme Court of Canada interprets a provision of the federal *Privacy Act*. Although the *Privacy Act* and the *Access to Information Act* are similar to the *Act*, the particular provision being reviewed by the Supreme Court has no equivalent in the Ontario statutes. The Court was interpreting a specific subsection, and was not opining on the meaning of personal information at large.

In the second place, upon my review of the specific information contained in the record, I remain satisfied that information in the record simply would not qualify as "employment history", even under an expanded definition of that phrase. Although I stated in Order PO-2298 that the information at issue in this appeal does relate to the occupation of the deceased, and the location of the occupation, I also stated that the information is of a general nature, without reference to specifics. The information ordered disclosed in Order PO-2298 is also not a list of positions previously held or places of employment (as mentioned in the *RCMP* case), but rather very general (and somewhat speculative) information about the deceased's possible occupation and location.

As a result, I reject the argument put forward by the PGT in Issue B under Ground 4 of its reconsideration request.

Issue C. The PGT submits that the IPC has fundamentally erred in considering the relevance of a commercial purpose for one heading but not for another.

The PGT's representations on this issue state:

> In Order PO-2298, the IPC is taking the position that paragraph 21(2)(c) (promote informed choice in the purchase of goods or services) did not apply to allow access to otherwise protected personal information for commercial purposes, merely to market the Appellant's services. There is a fundamental inconsistency in the dismissal by the IPC of access to information about babies born in Ontario in Order P-309, yet allowing this Appellant to approach heirs to offer his services. If the commercial purpose is relevant to deny access under 21(2)(c) then it is equally relevant to other factors under [the *Act*]. There is little if any qualitative

> difference between offering goods and services to the mothers of newborns or to potential estate beneficiaries before they are located by the [PGT].

Analysis and findings

In Order PO-2298 I found that the listed factor in section 21(2)(c) (promote informed choice in the purchase of goods or services) did not apply to the circumstances, nor did it favour disclosure of the information to the appellant. I stated:

> The appellant takes the position that section 21(2)(c) is a factor because, as an alternative to the PGT administering an estate, the appellant provides a viable alternative choice for beneficiaries. After identifying what the appellant perceives as the benefits of providing competition in the search for heirs, the appellant submits:
>
>> In its submission the [PGT] suggests that correspondence from individual third parties known by and related to the deceased should also be protected. The appellant submits that it is this very information that should be released in order to enable the lawful beneficiaries of the deceased to be identified and notified of their rights and assisted accordingly.
>>
>> … providing access to such information would be used by the beneficiaries of the estate to facilitate the estate's proper and efficient administration.
>
> This position is similar to the one raised by the appellant in Order PO-2260. In that order I stated:
>
>> With respect to the appellant's position that providing him with the information would allow him to approach the beneficiaries and provide his services, Assistant Commissioner Tom Mitchinson addressed this issue in Order P-309. That appeal arose as a result of a request made to the Ministry of Consumer and Commercial Relations for a list of the names and addresses of all babies born in Ontario in a given year. The requester took the position that the disclosure would promote informed choice of goods and services under section 21(2)(c). The Assistant Commissioner rejected the requester's claim and stated:
>>
>>> In my view, section 21(2)(c) is not intended to create an exception to the mandatory personal information exemption for the purpose of making

> mailing lists available to the public for marketing purposes.

> I agreed with the position taken in P-309, and found that section 21(2)(c) did not apply in the circumstances.

> I adopt the same approach to this issue in this appeal. Other than the possible benefit of locating unknown heirs, which is dealt with under the "unlisted factor" set out below, the appellant's reliance on section 21(2)(c) is based on his position that he can use the information at issue to offer his services to beneficiaries. Section 21(2)(c) does not apply in these circumstances.

In Order PO-2298 I specifically found that the factor in section 21(2)(c) did not apply, based on the wording of that factor and the manner in which that factor had been considered in previous orders. I also did find, however, that the unlisted factor of "benefit to unknown heir" was relevant to some of the information. Again, this followed previous decisions including Order PO-1790-R, upheld on judicial review (*Public Guardian and Trustee v. Goodis et al*, cited above), in which the Divisional Court specifically referred to the finding by Adjudicator Goodis that there was a benefit to unknown heirs in disclosing the information he ordered disclosed. The Court stated:

> [Adjudicator Goodis] was satisfied there was a benefit in having additional resources, outside the Public Guardian & Trustee, directed towards locating unknown heirs.

> *Public Guardian and Trustee v. David Goodis, Senior Adjudicator and John Doe, Requester*, Tor. Doc. 490/00 (Div. Ct.); motion for leave to appeal denied March 21, 2002, Tor. Doc. M28110 (C.A.)

Previous orders have also confirmed that the list of factors under section 21(2) is not exhaustive, and that all circumstances that are relevant ought to be considered, even if they are not listed under section 21(2) [Order P-99]. In that regard, my finding that the unlisted factor of "benefit to unknown heirs" applies is not connected to the finding that the factor in section 21(2)(c) is not relevant to the circumstances of this appeal.

Accordingly, I reject the argument put forward by the PGT in Issue C under Ground 4 of its reconsideration request.

Summary

In summary, I reject the arguments put forward by the PGT in Issues A, B and C under Ground 4 of its reconsideration request that the IPC has fundamentally exceeded its jurisdiction in ordering the disclosure of personal information about the deceased.

Ground 5 – that the IPC failed to consider that disclosure under the *Act* results in the information being placed in the public domain.

The PGT takes the position that the IPC failed to consider that disclosure under the *Act* has the effect of placing the information in the public domain. The PGT states:

> The IPC has stated in a number of Orders that records become part of the public domain when they are disclosed. "(…) disclosure of the record to the appellant's organization must be viewed as disclosure to the public generally." (Order P-169). (See also Orders P-1113, MO-1719; PO-2197, MO-1389.)
>
> Such a "disclosure to the world" is not regulated under the [the *Act*], nor is it necessarily regulated under *PIPEDA,* depending on the requester. The IPC has ordered the disclosure of this information to one requester and as a result, the IPC considers that this information is now publicly available information for which no special protection is required, even though it is sensitive personal information. While the Appellant's request may be legitimate, neither the IPC nor the [PGT] will have any control over the use of the personal information once it is disclosed.
>
> Order MO-1719 is of particular interest. The appellant requested access to information about proposed construction to a synagogue and adjoining school. The appellant was involved in a dispute about the use of the property. The adjudicator held:
>
>> Although the appellant's right of access to the records is a legitimate one and I have been provided with no evidence whatsoever to indicate that the appellant intends to use the records to encourage or create a security problem for the synagogue, disclosure to the appellant may be equated with disclosure to the world in these circumstances [Orders P-169 and PO-2197]; ... the synagogue facility has been the subject of other threats and vandalism in the past and is now subject to certain restrictive security measures. The concerns expressed by the affected parties concerning the security of the facility should disclosure of the requested information be ordered are not, in my view, frivolous or exaggerated.
>
> The [PGT] submits that the IPC erred in applying a narrow interpretation of 21(2)(f) ("the personal information is highly sensitive")in Order PO-2298. The ordinary meaning of "sensitivity" is not merely limited to causing hurt feelings or embarrassment. Sensitivity should be considered a factor in relation to the proliferation of identity theft, for example, in the same way as the potential threat of violence to a synagogue (Order MO-1719) or to research facilities using animals (Orders P-169, PO-2197, etc).

In this respect, the [PGT] respectfully submits that the prevention of identity theft should also be considered as an "unlisted factor" in a consideration of all the relevant listed and unlisted circumstances in a determination under section 21(2).

In response to the tragic events of September 11, 2001 and concerns about identity theft, the Ontario Legislature amended the *Vital Statistics Act,* by passing Bill 109, *An Act to enhance the security of vital statistics documents and provide for certain administrative changes to the vital statistics registration system* in December of 2001 to limit access to vital statistics documents. Several items of information contained in the records ordered disclosed in this instance are identical to information which would be provided on a registration of death under the *Vital Statistics Act*. It is submitted that the release of this information must be considered in light of the genuine public concern, expressed in the Legislature's passage of this bill, that false identities are increasingly being created for criminal purposes.

The IPC is aware of the alarming proliferation of identity theft, and has expressed its concerns in a number of publications: *Identity theft: How to avoid becoming a target; What to do* if *you do become a victim* (February 10, 2003); *Identity theft and your credit report: What you can do to protect yourself* (Revised February 2003); *Identity Theft One of the Fastest Growing Crimes Says Information and Privacy Commissioner in a Recently Released Paper* (June 24, 1997); *Identity Theft: Who's Using Your Name?* (June 1997). The sensitivity of such personal information as home address, date of birth, place of birth, and mother's maiden name has been recognized by the IPC. In particular, the documents note that criminals use this information to redirect mail, set up credit accounts and obtain other documents such as birth certificates, drivers' licences and passports. The IPC advises consumers to be aware of the sensitivity of their personal information and to take a number of precautions to avoid having the information fall into the hands of persons who may use it for illegal purposes. It is respectfully submitted that the same standard of care and caution should be applied to the personal information of deceased persons whose estates are administered by the [PGT].

In Order PO-2198, Adjudicator Donald Hale stated:

> "The Ministry has placed a great deal of emphasis on the notion that the disclosure of the information contained in these records could be used to assist in the commission of a crime such as (...) "identity theft". I note, however, that for the most part, the personal information contained in these records relating to the deceased persons and their parents is, to say the least, sparse. In my view, the information contained in the records at issue in these appeals is not such that it could reasonably be used to assist in perpetrating "identity theft" or some other fraudulent activity. Accordingly, I will afford little significant weight to this factor with respect to the

> information remaining at issue in these appeals. However, in different circumstances involving different types of information, this consideration may have greater relevance and be afforded greater weight."

> It is respectfully submitted that the risk of fraudulent activity being facilitated by the release of certain items of personal information is best determined by the experts in the field. The [PGT] has obtained an affidavit from [a named detective for] the Anti-Rackets Consumer Fraud Team of the OPP, attached to these submissions as Appendix A. [The named detective] discusses the incidence of identity theft and a number of actual cases in relation to the information which has been ordered disclosed [in Order PO-2298]. In paragraph 18 of the Affidavit, he states:

>> These fields of information on their own may not be sufficient to obtain documents fraudulently bearing the name of a deceased individual. However, various investigations in Ontario and elsewhere, have found that the collection of a few pieces of information such as name, date of birth and address, can be used by individuals with criminal intent to engage in identity theft. I am of the opinion that these fields of personal information could be used as the basis for obtaining further information that could successfully be used for identity theft/fraud. In my opinion government release of these fields of information for deceased individuals without controls on how they can be used poses a significant risk with respect to potential identity theft.

> Given the interest shown by the IPC in protecting individual privacy and its concern over the proliferation of identity theft, the [PGT] respectfully submits that it would be consistent for the IPC to consider the protection of personal information disclosed in an access order, and the risk of identity theft, as an unlisted factor weighing strongly against disclosure. This factor should take precedence over other factors favouring disclosure such as "the benefit to unknown heirs" or "the diminished privacy interest after death".

In response to the PGT's submissions, the appellant submits:

> In its submissions, the [PGT] argues that once the information has been disclosed to the Appellant, it should be considered to have been released to the public generally. The [PGT] further argues that the information will no longer be protected and the risk of identity theft is increased.

> The Appellant submits that this argument by the [PGT] must fail for at least two reasons. First, the arguments respecting release to the public domain and identity

> theft do not fit into any of the permissive grounds for reconsideration under s.18.01 of the *Code of Procedure.*
>
> The [PGT] is simply raising new arguments, rather than demonstrating that there was a defect in adjudication, jurisdiction or other error, as required by s.18.01 of the *Code of Procedure.*
>
> The Appellant respectfully submits that any new line of argument not directed at a permitted ground of reconsideration should not be considered by the IPC.
>
> Second, and in any event, the IPC decisions relied upon by the [PGT] were all issued prior to the coming into force of *PIPEDA*. At the time the Orders were issued, it was true that the requested information was not subject to any statutory protections and it therefore was logical to consider a release to the requester to be a release to the public generally. The situation is now different. The federal legislature has taken the necessary precautions in enacting *PIPEDA* to ensure that personal information is subject to protections. Once the information is released to the Appellant, the provisions of *PIPEDA* will apply to limit the Appellant's use, disclosure and retention of the information and to impose rules respecting safe-guarding the information.

The appellant also provides additional information on the issue of identity theft, and provides an affidavit in support of its position.

The appellant's representations were shared with the PGT, whose reply representations state:

> The [PGT] respectfully submits that this is a significant issue for purposes of reconsideration. … the issue here is that the prevention of identity theft should also have been acknowledged as an "unlisted factor" in a consideration of all the relevant listed and unlisted circumstances in a determination under section 21(2).

The PGT also provides representations in which it disputes the appellant's affidavit, and argues that statements attributed to a different named detective, referred to in the appellant's affidavit, should not be given any weight. The PGT also specifically refers to the affidavit it had provided in support of its position, and that the named detective refers to four actual cases involving fraudulent use of personal information of deceased persons. In addition, the PGT provided submissions which question the information provided by the appellant in support of his position.

Analysis and Findings

In the circumstances of this reconsideration request, I reject the position taken by the PGT that I failed to consider that disclosure under the *Act* may result in the information being placed in the public domain.

In the first place, I agree with the appellant that this argument by the PGT does not fit into any of the permissive grounds for reconsideration under s.18.01 of the *Code of Procedure*, and agree that the PGT is simply raising new arguments, rather than demonstrating that there was a defect in adjudication, jurisdiction or other error, as required by s.18.01 of the *Code of Procedure*. Section 18.02 states that the IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision. In this appeal, the arguments put forward by the PGT on its concern that the disclosure of the information would result in the information being in the public domain could have been advanced by the PGT at an earlier time, and the PGT chose not to do so. Accordingly, I reject this as a ground for reconsideration of Order PO-2298.

Even if I were to accept this as a valid ground for reconsideration under the *Act*, I find it curious that the PGT chose not to respond to the appellant's position on the current application of *PIPEDA* to him (as the PGT relied on earlier). The appellant takes the position that it is now governed by the prohibitions to disclosure of the information under *PIPEDA*, and that disclosure of the information to the appellant is no longer disclosure "to the world".

Finally, I note that the factor of the "benefit to unknown heirs" upheld by the Divisional Court in *Public Guardian and Trustee v. David Goodis, Senior Adjudicator and John Doe, Requester*, Tor. Doc. 490/00 (Div. Ct.); motion for leave to appeal denied March 21, 2002, Tor. Doc. M28110 (C.A.), confirmed the valid, positive impact of disclosure of certain information to entities such as the appellant in certain circumstances. In that regard, the Divisional Court took into account the nature of the appellant and the nature of the business it was in, and found there to be a positive benefit to unknown heirs in disclosing the information. The appellant's unique position as an heir tracer was a factor in that consideration.

It is important to note that, although in many instances the identity of a requester is irrelevant to the issue of disclosure, and any information disclosed would be in the public domain, this is not always the case. This is particularly true in the context of section 21(1), where the identity of the requester may be relevant, including in the following instances:

- the requester is engaged in research (section 21(1)(e));
- the personal information is relevant to a fair determination of the requester's rights (section 21(2)(d));
- the requester is a spouse or close relative of a deceased individual and the disclosure is desirable for compassionate reasons (section 21(4)(d)).

The finding of a "benefit to unknown heirs" is an additional example of this type of situation, where it is established that the requester is an heir tracer.

Quite apart from the potential application of *PIPEDA*, it is not in the appellant's commercial interest to treat the requested information as being in the public domain.

Accordingly, although identity theft is an important issue, and potentially a "relevant circumstance" under section 21(2), I am not persuaded that it is a consideration here.

In summary, I reject ground 5 as a valid ground for reconsideration of Order PO-2298.

ORDER:

1. I dismiss the reconsideration request, and uphold my decision in PO-2298.

2. I order the PGT to disclose the records to the appellant by July 12, 2007.

Original signed by: June 12, 2007
Frank DeVries
Adjudicator