



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2623

Appeal PA-050146-1

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry), on behalf of the Public Guardian and Trustee (the PGT), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a community association. The request was for access to the following information about the sale of an identified property by the PGT:

- a) a copy of all bids received and the time and date of the receipt of each bid;
- b) the dollar amount of all bids received;
- c) all correspondence and communication with the Office of the Public Guardian related to the sale itself.

In response to the request the Ministry issued a decision letter in which it identified that the PGT sold the property as estate trustee of the deceased owner of the property, and that access to the records responsive to the request was denied pursuant to the mandatory exemption in section 21(1) (personal privacy) of the *Act*. In the decision, the Ministry also indicated that the PGT was of the view that the *Personal Information Protection and Electronic Documents Act (PIPEDA)* prohibited the release of the information without the requisite consent.

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

During the course of the appeal, the Ministry issued a revised decision in which additional exemptions were claimed to withhold some of the records. The additional discretionary exemptions claimed were section 13(1) (advice or recommendations) and section 22(a) (information published or available) of the *Act*. The Ministry also attached to the decision an index of the responsive records.

During the mediation stage of this appeal, the appellant advised that it would not pursue access to records that are subject to section 22 of the *Act*, and that exemption is, accordingly, no longer at issue in this appeal. The appellant confirmed, however, that it was pursuing access to all other responsive records. In addition, the appellant raised the possible application of the public interest override provision contained in section 23 of the *Act*, and that section was added as an issue in this appeal.

Mediation did not resolve the issues, and this appeal was transferred to the inquiry stage of the process. I decided to send a Notice of Inquiry to the Ministry, initially, and the Ministry provided representations in response. In its representations, which addressed the issues set out in the Notice of Inquiry, the Ministry also affirmed its position that *PIPEDA* may apply in the circumstances, and that the doctrine of paramountcy may operate to prohibit this office from ordering disclosure of any personal information.

After reviewing the Ministry's representations and identifying that it was questioning the validity or applicability of certain sections of the *Act*, and in accordance with section 109 of the *Courts of Justice Act*, I sent a Notice of Constitutional Question to the parties and to the Attorneys General

of Canada and Ontario. The Notice of Constitutional Question invited the recipients to provide written representations on the identified Constitutional Question.

The appellant provided representations in support of its position that *PIPEDA* did not apply to this access request. The Ministry provided representations in which it confirmed that it was withdrawing the portion of its submissions that related to the possible application of *PIPEDA*. The Ministry also provided revised representations in which it maintained its position with respect to the exemption claims raised in this appeal.

The Constitutional Law Branch of the Attorney General of Ontario also provided written representations, in which it took the position that the doctrine of paramountcy did not apply in this appeal.

In light of the positions taken by the parties, I sent a modified Notice of Inquiry (with the issue of the possible impact of the *PIPEDA* removed), along with a complete copy of the revised representations of the Ministry, to the appellant. The appellant provided representations in response, and I then forwarded those representations to the Ministry, who provided me with reply representations.

PRELIMINARY ISSUES

Paramountcy

As identified above, in this appeal the Ministry initially took the position that the Federal *PIPEDA* impacts my decision in this appeal. The Ministry stated:

The Appellant community association is an “organization” governed, since January 1, 2004, by the federal *Personal Information Protection and Electronic Documents Act* [*PIPEDA*]. The [Ministry] submits that the Appellant may only collect personal information in accordance with *PIPEDA*. Absent consent, section 7 of *PIPEDA* does not authorize the requester to collect such personal information. The [Ministry] submits that either *PIPEDA* is paramount to [the *Act*] and that consequently the records cannot be disclosed to the requester, or *PIPEDA* is among the unlisted factors in section 21(2) of [the *Act*] such that the disclosure of the record would amount to an unjustified invasion of privacy ...

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 [Ministry] respectfully submits that the IPC cannot order disclosure of personal information that the appellant 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).

Accordingly, the Ministry alleged that a conflict existed between the appellant's possible right of access under the *Act* to the personal information at issue, and the rules governing collection of the same personal information in section 7(1) of *PIPEDA*.

The issue as set out above 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 Ministry, I identified that the legal basis (as set out above) for the constitutional question gave 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 possible application of the exception to the exemption at section 21(1)(f)?

I issued a Notice of Constitutional Question pursuant to section 109 of the *Courts of Justice Act* 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 Ministry in which the Ministry took the position that the doctrine of paramountcy does not apply in the circumstances. The Ministry stated:

Please be advised that the appellant in this matter has confirmed that they are a not-for-profit community association and on the basis of this information [the Ministry] is withdrawing the portion of their submissions that relates to the possible application of the federal [*PIPEDA*].

The Ministry also provided revised representations, in which references to the possible application of *PIPEDA* are removed.

The appellant also provided representations in response to the Notice of Constitutional Question, in which it took the position that the provisions of *PIPEDA* do not apply.

In the circumstances, and based on the positions taken by the parties that the provisions of *PIPEDA* do not apply, I will not conduct a review of the constitutional question of federal paramountcy in this appeal.

Scope of the request

As identified above, the request resulting in this appeal was for information regarding the sale of a specific property by the PGT, including:

- a) a copy of all bids received and the time and date of the receipt of each bid;
- b) the dollar amount of all bids received;
- c) all correspondence and communication with the [PGT] related to the sale itself.

The Ministry identified 231 pages of responsive records, and after 18 pages were removed from the ambit of this appeal during mediation, 213 pages of records remained at issue. The Ministry's initial representations addressed the application of the exemptions claimed to those pages.

After I received the Ministry's submissions and shared them with the appellant, the appellant provided representations in which it stated that, throughout this appeal, it has confirmed that it was not asking for "personal information". The appellant then states:

We requested a list of the time and date that the bids (offers to purchase) were received by the real estate agent and the dollar amount of each bid (offer to purchase) for this property. We did not request any information about who submitted the bids (offers to purchase). We already know who the previous owner of the property was and who the current owner is, through information that is public. ...

Our request was denied on the basis of disclosure of personal information. We have not requested information of a personal nature - just times, dollar values and correspondence between the real estate agent and the PGT.

In its reply representations, the Ministry takes issue with the appellant's statement in its representations, and submits:

A number of the Appellant's responses to the [Ministry's] representations rely on statements that appear to minimize the scope of the original request. For example, from page 1:

"We requested a list of the time and date that the bids (offers to purchase) were received by the real estate agent (...) We did not request any information about who submitted the bids (offers to purchase)(...)."

"We have not requested information of a personal nature- just times, dollar values and correspondence between the real estate agent and the PGT."

From page 3:

"By the same token, the identity of persons submitting bids for the property was never part of the request, nor does [the appellant] have any interest in obtaining this information pursuant to the appeal."

The [Ministry] provided representations on the actual request for information [as set out above].

The [Ministry] provided a full list of all the responsive records to this request, and made representations based on the content of the request and the responsive records.

The Appellant purports ... to have made a different request.... These unilateral changes in the statement of the request by the Appellant are fundamentally misleading and do not in fact form the actual request received by the [Ministry].

I agree with the position of the Ministry that the records at issue in this appeal comprised all of the records responsive to the appellant's initial request, and not only those that the appellant's representations focus on. The Ministry properly provided representations on all of the requested records, and how the exemptions may apply to them.

However, in its representations, the appellant specifically identifies that it is solely interested in records responsive to the following:

- a list of the time and date the bids (offers to purchase) were received by the real estate agent,
- the dollar amount of each bid, and
- communications with the Office of the PGT related to the dual agency by the real estate agent acting for the PGT.

The Ministry correctly identifies that this request is narrower than the original request. Instead of the 213 pages of records which remained at issue at the end of the mediation stage of this appeal, I find that the records responsive to this narrowed request are the following:

- the 13 pages of records which contain information about specific bids (pages 130, 136, 142, 150, 158, 164, 170, 177, 185, 194, 200, 206 and 211). These pages consist of 13 copies of faxes sent between the PGT and its Real Estate consultant, and contain information relating to specific bids, including the dates and amounts of the bids, as well as information about when these records were faxed between the PGT and its real estate agent; and
- a 2-page document responsive to the request for communications related to the "dual agency" (pages 125 -126).

Accordingly, in this order, I will review the application of the exemptions to these 15 pages of records which are responsive to the appellant's request, as narrowed in its representations. Furthermore, the sole exemption claimed by the Ministry for these 15 records is the exemption found in section 21(1) of the *Act*. Section 13(1) is, therefore, no longer at issue in this appeal.

RECORDS:

As identified in the discussion above, the records remaining at issue are the following:

- the 13 pages of records which contain information about specific bids (pages 130, 136, 142, 150, 158, 164, 170, 177, 185, 194, 200, 206 and 211). These pages consist of 13 copies of faxes sent between the PGT and its Real Estate consultant, and contain information relating to specific bids, including the dates and amounts of the bids, as well as information about when these records were faxed between the PGT and its real estate agent; and
- a 2-page document responsive to the request for communications related to the dual agency (pages 125 -126).

I note that some of the information contained in the pages of records remaining at issue is duplicated in other pages of the records; however, I will only be reviewing the pages set out above, and not the duplicates.

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information which qualifies as “personal information”, as defined in section 2(1) of the *Act*. “Personal information” is defined in that section as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The Ministry's representations were made on all of the records originally at issue in this appeal. The Ministry submits:

"Personal information" means recorded information about an identified individual. In this appeal, the request itself was for information about a specific individual who is deceased. Accordingly, all of the records at issue qualify as personal information under the definition in section 2(1)(h), since all of the records contain information about the deceased and each record is identified with the name of the deceased.

In addition, the records also fall under one of the subsections 2(1)(a) to (g) of the *Act*, thereby qualifying as personal information.

To the extent that a record is not identified with the deceased's name, it is submitted that the information should qualify as personal information, as the request itself identified the individual about whom records were requested. Therefore, any record responsive to the request necessarily relates to and identifies the deceased individual. "Personal information" is defined in section 2(1) of the *Act* as including any recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name, where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

It has been well established in a number of previous Orders under the *Act* that the information at issue in this appeal, would fall under the definition of "personal information" in section 2(1) of the *Act*. For example,

In Order PO-1736 (upheld by the Divisional Court), the Adjudicator held that the account or file number, date of death and total value of estate were personal information under section 2. Information "about" the deceased, which together reveals information about the deceased's finances, is also personal information.

Order 71 found that the names of the deceased constituted personal information.

Order PO-1717 found that information inferring whether or not the deceased's estate had been claimed by heirs and is or is not solvent, was information "about" the deceased person, and qualified as the deceased's personal information.

The information requested by the Appellant would in all cases, consist of "personal information" about either a living person, or about a deceased person who died less than 30 years ago. In many cases, the records also disclose information about third parties who have not consented to disclosure and who are not employees of organizations acting in their professional capacity.

Section 2(2) of the *Act* clearly provides that information regarding a person who has been deceased less than thirty years will remain "personal information" under the *Act*: Order P-568 and *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12 (Div. Ct.) at 19.

The Ministry then refers specifically to a number of the records, and identifies the reasons why it believes the records contain the personal information of identifiable individuals other than the deceased. The following reasons are the ones relating to the records remaining at issue:

- Various offers to purchase from a number of individual third parties acting in their personal capacity, including the person who ultimately purchased the property;
- The amounts offered by these offerors;
- The names of various real estate agents and property appraiser, and the fact that a particular real estate agent represented a particular offeror;

The appellant concedes that some of the information contained in the records would constitute the personal information of identifiable individuals. However, the appellant seems to suggest (in arguing that it is not interested in any personal information) that information about the sale of the property on behalf of the deceased individual is not the personal information of the deceased individual.

Analysis and Findings

In my view, the information contained in the records constitutes the personal information of the deceased, as identified by the Ministry. In addition, some information constitutes the personal information of other identifiable individuals.

First, I am satisfied that the information contained in these records, which are located in the estate file of the deceased, contain the personal information of the deceased. I accept the position of the Ministry that each record is identified with the name of the deceased, and that disclosure of the records would reveal the number and amounts of the bids received by the deceased's estate for the deceased's property, as well as the agreement entered into by the estate of the deceased. I find that because the name of the deceased is known, the disclosure of this information would disclose other personal information relating to the deceased within the meaning of paragraph (h) of the definition in section 2(1).

The records at issue include information about various offers to purchase, including the offer made by the eventual purchaser of the property. In Order PO-1964, Adjudicator Dawn Maruno examined the issue of whether information contained in an offer to purchase constituted "personal information". She stated:

Record 1 is the affected party's offer to purchase a parcel of land owned by the [Ontario Realty Corporation (the ORC)]. As such, all the information in this record is intrinsically linked to the financial transaction which is the sale of land. Therefore I find that the information in Record 1 qualifies as the personal information of the affected party within the meaning of paragraph (b) and (h) of the definition in section 2(1). Although the appellant is not seeking the name of the affected party, information in the record may disclose the personal information of the affected party since the appellant is aware of the individual's identity.

I agree with the analysis set out above, and apply it to the circumstances of this appeal. I am satisfied that the unsevered copies of the offers to purchase contain the personal information of the individuals making the offers, as well as the personal information of the deceased individual.

However, in this appeal, the appellant states that it is not seeking the names of the parties making the offers, only the amounts of the offers and the dates and times the offers were made. In these circumstances, if the names of the persons making the unsuccessful offers were severed from the records, I am satisfied that the other information contained on those pages would not disclose any personal information of individuals other than the deceased.

With respect to the successful offer, the appellant has confirmed that it is aware of the identity of the current owner of the property. Accordingly, the information contained on page 177 which relates to the amount and date of the successful offer would reveal the personal information of the successful offeror, since the appellant is aware of the individual's identity. However, other information contained on that page, which contains information about the facsimile correspondence between the PGT and its real estate agent, does not contain the personal information of the successful offeror.

With respect to the record responsive to the request for dual agency, on my review of that record I am satisfied that it contains the personal information of both the deceased and the purchaser of the property. The disclosure of this information would disclose the individuals' names where they appear with other personal information relating to them (paragraph (h)).

Finally, section 2(2) of the *Act* states:

Personal information does not include information about an individual who has been dead for more than thirty years.

The deceased died in the year 2001, so section 2(2) has no application in the circumstances.

In summary, I have found that all of the records remaining at issue contain the personal information of the deceased as well as the personal information of other identifiable individuals. Furthermore, I have found that if the names and identifiers of the unsuccessful offerors are removed from the unsuccessful offers, those records would no longer contain the personal information of the unsuccessful offerors.

INVASION OF PRIVACY

Where an appellant seeks the personal information of another individual, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

In this case, the Ministry claims that disclosing the records would constitute an unjustified invasion of the personal privacy of the deceased and the other individuals identified in the records, pursuant to section 21(1)(f). This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 21(3)

The Ministry relies on the presumption contained in section 21(3)(f) which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

In its initial representations, the Ministry identifies specific records which it argues fit within the presumption in 21(3)(f). The appellant's representations take issue with the Ministry's approach, and state:

The disclosure of the requested information would not constitute an unjustified invasion of privacy of the deceased owner of the property. The information requested includes the amounts and dates of the bids for a property formerly owned by a now deceased person. ... the bid transactions took place after death and the unsuccessful [bids] had no impact or effect on the value of the estate. It could plausibly be argued that the former owner's personal financial history ended with death and, on that basis, that the post-mortem amounts and timings of unsuccessful bids do not form a part of the financial history or activities, etc. of the person.

As regards the agents submitting bids for the property, such information is professional or business, rather than personal information. Its disclosure could in no way be considered to be an unjustified invasion of their privacy.

For any information that is deemed to be the personal information of the bidders, the [appellant] submits that the amounts and dates of receipt of the various bids could easily be severed from the records containing the names of the persons making the bids and released without revealing the identities of the bidders.

In its reply representations, the Ministry states:

A considerable number of responsive records fall under the 21(1)(3)(f) and release of these records from the deceased's estate file constitute a presumed invasion of personal privacy because the record "...describes an individual's finances, income, assets (...) financial history or activities (...)" as interpreted and applied by numerous IPC decisions, such as PO-1786-1 and PO-1964. Even if the identity of various bidders is severed, the records of the various offers and correspondence related thereto, nevertheless remain presumed personal information *about the deceased*. It would disclose that a particular individual offered to buy, or did buy, a specific property owned by the deceased, and how much was offered or paid. (Order M-536)

An offer to purchase was specifically recognized as "financial information" within the meaning of s. 21(3)(f) ... in Order PO-1964.

Analysis and findings

As set out above, with regards to the unsuccessful offers, I have found that by severing the names of the offerors from those offers, the only personal information remaining in those records would be the personal information of the deceased individual. Accordingly, I am only examining the records remaining at issue from the context of whether the disclosure of these records would constitute an unjustified invasion of the privacy of the deceased or the successful offeror.

The Ministry relies on Order PO-1964 in support of its position that offers to purchase fit within the meaning of the presumption in section 21(3)(f). In that Order, Adjudicator Dawn Maruno had to determine whether a bid for a parcel of land, submitted by an individual, contained information relating to that individual's "financial activity" such that its disclosure was presumed to constitute an unjustified invasion of his privacy. Adjudicator Maruno reviewed this issue in light of previous orders of this office (specifically, Order PO-1786-I), and found that disclosure of the personal information in bid, including the acreage and the purchase price, would reveal information that described the individual bidder's financial activity. Accordingly, she found that the presumption at section 21(3)(f) applied to the offer.

I agree with the approach taken by Adjudicator Maruno, and find that the disclosure of the details of the offer made by the successful offeror would be presumed to constitute an unjustified invasion of the personal information of the offeror. Accordingly, I find that the presumption at section 21(3)(f) applies to the details of the bid information contained on page 177 relating to that offer.

However, with respect to the unsuccessful offers made for the property, the appellant has stated that it is not pursuing access to the names, and I have found that these records, with the names severed, do not contain the personal information of the individuals making the offers. Accordingly, their disclosure would not constitute an unjustified invasion of the privacy of the offerors.

With respect to whether the disclosure of the records would describe the deceased's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness, I am not satisfied that the severed, unsuccessful bids contain this type of information about the deceased individual. In my view, these unsuccessful bids do not contain the type of information set out in section 21(3)(f).

In addition, I find that the record which contains information relating to the dual agency does not contain the type of information set out in section 21(3)(f), as it does not describe the deceased's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

In summary, I have found that the details of the successful offer fit within section 21(3)(f), and that the disclosure of that information is presumed to constitute an unjustified invasion of the personal privacy of the offeror. None of the requirements listed in section 21(4) apply to this information and, as stated above, a combination of factors under section 21(2) cannot outweigh a

presumption under section 21(3). Accordingly, the details of the successful offer contained on page 117, which include the name of the offeror, and the date and amount of the offer, qualify for exemption under section 21 of the *Act* and should not be disclosed.

Having found that the presumption applies to the details about the successful bid, I will not review the possible application the factors in section 21(2) to those details contained on page 177. I will, however, review the remaining information contained on that page (which includes information about the facsimile sent between the PGT and the real estate agent), and the other records remaining at issue, in light of the factors set out in section 21(2).

Section 21(2)

The remaining information consists of the unsuccessful bids (with the identities of the offerors removed), the remaining general fax information on page 177, and the two-page record relating to the dual agency. I have found that all of these records contain the personal information of the deceased, and that the dual agency agreement also contains the personal information of the successful offeror.

The Ministry takes the position that no factors favouring disclosure exist, and that the factor favouring non-disclosure in section 21(2)(h) applies to the records remaining at issue. The appellant refers the factors in sections 21(2)(a) and (b), as well as the unlisted factor of a “diminished privacy interest after death”, in support of its view that the disclosure of the records would not constitute an unjustified invasion of privacy. The referenced sections of 21(2) read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

I will review the possible application of each of these factors, as well as the unlisted factor of “diminished privacy interest after death”.

Section 21(2)(a) – public scrutiny

In its initial representations, the Ministry states as follows regarding the possible application of section 21(2)(a):

The [Ministry] respectfully submits that the appellant is not in a position to assess whether appropriate procedures have been implemented and respected by [the PGT] with respect to the sale of real estate belonging to the deceased. The activities of the Public Guardian and Trustee, including its procedures for the sale of real estate owned by its clients, are subject to annual scrutiny by the Auditor General for Ontario. A beneficiary of the estate could refer the matter to the Ombudsman or the Superior Court of Justice, for an accounting by the estate trustee. The appellant is not a beneficiary or an interested party in the estate. Allowing the appellant access to this information simply to satisfy their curiosity about a particular real estate transaction, would violate the spirit, intent and express provisions of the *Act*.

The appellant is a local community organization, and the appellant's representative states that section 21(2)(a) applies to favour disclosure in this appeal. She states:

... As outlined in the background, the circumstances surrounding the sale of the property were of concern to [the appellant]. In particular, the fact that the real estate agent for the PGT played a dual agency role in also representing the successful buyer. For that reason, [the appellant] believes that disclosure through the *Act* is a legitimate and appropriate mechanism for the scrutiny of the PGT's administration of estates, in particular those considered problematic from the community's perspective. Indeed, as indicated in the background to the request, the Report by the Provincial Auditor ... in December, 2004 did not inspire [the appellant] to have confidence in the administration of estates by the PGT.

Earlier in its representations, the appellant had stated:

We were concerned with the process that the PGT used to sell [the identified property] and with the lack of transparency in their procedures. Concerns escalated when we found out that the same real estate agent acted for the buyer and for the PGT (dual agency). We understand there should be documentation that the seller is aware that the agent is not acting solely in their interest and agrees to the agent acting for both parties. We are concerned that the practice of dual agency may not result in the best value for those under the care of [the PGT].

We became more concerned and determined to follow through on this process when we were told ... that the winning bid was received the day after all the other bids (except one). There was a deadline for the bid submission and from what we were told it appears this winning bid may have come after the deadline.

We were also concerned when the PGT used the same process to sell another house on this same street less than a year later - again the same agent, again dual agency. Concerns were heightened when the buyers of this second house put the house up for sale less than a month later for \$75,000 more than they bought it for. We asked ourselves whether the properties are being valued correctly and whether the PGT is getting the right value for those under their care.

We realize that the PGT is reviewed by the provincial auditor. We are also aware they were criticized for poor handling of clients' funds in December 2004. [The] Provincial Auditor ... harshly criticized the PGT for failing to ensure its clients' financial interests were better protected. The newspaper report says the PGT lost millions of dollars belonging to minors, seniors and other vulnerable clients. Their defense that, because they are audited; everything is beyond scrutiny does not provide comfort in light of this report.

The City of Ottawa offers property for sale by a sealed bid process. Bids are opened in a public view with complete transparency of process. The highest bid wins and no one is aware until the opening what those bids are.

This request is not idle curiosity or for speculative purpose. We want to ensure that appropriate procedures, that are above scrutiny are implemented by [the PGT] and their agents.

The appellant also identifies in its representations that it, as the community association for the neighbourhood in which the property is located, has been actively involved in identifying concerns about the property and informing various government officials about its concerns. The appellant provides details supporting its position, and attaches to its representations copies of correspondence the appellant community association has sent and received over the past number of years.

The Ministry responds to the appellant's position in the portion of its reply representations where it addresses whether a compelling public interest exists in the disclosure of the records. The Ministry states:

The appellant now states that its main purpose is to monitor the effectiveness of the real estate practice known as "dual agency" in transactions involving the [PGT]. This is a surprising new development as the appellant's main focus, as appears from the attachments to its representations, has always been on the sale of this property to a particular individual who also owns other properties in the area. Since the sale of the property and the removal of the former occupant, there has not been any public interest in the issue or the transaction except by the appellant.

"Dual agency" is a practice by which the parties to a transaction must be informed and must acknowledge, on the Offer to Purchase documents, that one real estate agent is acting for both the purchaser and the vendor of the property. It is a common practice in the industry which became regulated under changes to the *Real Estate and Business Brokers Act* introduced by the Government of Ontario in July 2001. New regulations under that amended Act now prescribe requirements that must be met for a salesperson or broker to represent more than one party in a trade, including determining what constitutes dual agency and what information must be disclosed to the parties to the trade. Both [the PGT] as vendor and the purchaser must sign a document which acknowledges this fact. Salespersons face sanctions if these requirements are not met. It is a business decision, exercisable

by [the PGT] as estate trustee, based on the circumstances of each transaction, whether or not dual agency will be permitted.

Findings

With respect to whether section 21(2)(a) is a factor in a given situation, and whether the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny, previous orders have stated as follows:

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in clause (a) [Order P-256].

I have carefully examined the representations of the parties and the records remaining at issue in this appeal. The appellant has raised a number of issues concerning the process used by the PGT in the sale of the property. I am satisfied that the factor in section 21(2)(a) is a relevant factor favouring disclosure of information relating to the amount and timing of the bids received by the PGT, as estate trustee of the deceased's estate. The appellant, which is a community association, has raised questions about the circumstances surrounding the sale of this property, and has provided evidence that it has raised these issues in various forums in the past. In my view, the disclosure of information in the unsuccessful bids describing the dates and the amounts of the unsuccessful bids, and the disclosure of the facsimile information contained on page 177, is desirable for the purpose of shedding some light on the process and circumstances surrounding the sale of the property. In my view, disclosing this information will assist the appellant in addressing the "public scrutiny" concerns it has identified regarding the sale of the property.

However, based on the representations received, I am not satisfied that section 21(2)(a) applies to the information regarding the dual agency issues raised by the appellant. The appellant states: "We are concerned that the practice of dual agency may not result in the best value for those under the care of [the PGT]." The concerns raised by the appellant regarding the dual agency process are general in nature, questioning the PGT's process generally. The PGT responds to this issue by reviewing its dual agency practices, and identifying the various legislative requirements when dual agency is used. It also states that it "is a business decision, exercisable by [the PGT] as estate trustee, based on the circumstances of each transaction, whether or not dual agency will be permitted".

On my review of the circumstances of this appeal, including the documentation provided by the appellant in support of its position, I am not satisfied that the disclosure of the two-page record relating to the dual agency is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

Section 21(2)(b) - promote public health and safety

The appellant states that section 21(2)(b) is a factor favouring disclosure. It states:

The property in question has been of concern to the community for a number of years by virtue of its status as a centre of illegal drug sale and use. Access to the requested information will assist the community in continuing to monitor the management of the property by the new owner in order to improve the uses of the property and return it to the community as an asset rather than a liability.

On my review of the information at issue in this appeal, I am not satisfied that its disclosure may promote public health and safety. I am not satisfied that its disclosure could in any way “assist the community in continuing to monitor the management of the property”, and I find that section 21(2)(b) is not a factor favouring disclosure in this appeal.

Section 21(2)(h) – supplied in confidence

The Ministry submits that the factor listed under 21(2)(h) is relevant to a decision not to disclose the requested information. It states:

Personal information about the deceased’s property, assets and liabilities, as well as information about individual offerors can be presumed to have been given in confidence to [the PGT] for the purposes of the administration of their estate or property. The information was given in the context of a sale of an estate’s property by an estate trustee. The information was not given in an informal context or any other context which could have implied that the information could be made public.

The Ministry then provides representations supporting its position that the offerors’ information was provided in confidence. It then 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 and MO-1389.)

Such a “disclosure to the world” is not regulated under [the *Act*]. Where the IPC has ordered the disclosure of this information to one requester, the IPC will consider that this information is now publicly available information for which no special protection is required, even though it is sensitive personal information. If disclosure is ordered to the appellant, neither the IPC nor [the PGT] will have any control over the use of the personal information after it has been disclosed.

In the circumstances, I accept the Ministry’s position that the offerors’ personal information was provided to the PGT in confidence; however, the offerors’ personal information is no longer at issue in this appeal. The names of the successful offerors are no longer at issue, and the only

information remaining at issue on page 177 is information about the facsimile sent between the PGT and the real estate agent. Except for the record relating to the dual agency, the only personal information remaining at issue is the deceased's personal information, contained in the unsuccessful bids. Section 21(2)(h) applies if "the personal information has been supplied *by the individual to whom the information relates* in confidence" [emphasis added]. I find that the information in these records was not provided in confidence *by the deceased* to the PGT and, consequently, I find that this factor is not a relevant factor applying to the information remaining at issue in the offers.

Unlisted Factor - diminished privacy interest after death

The factors listed in section 21(2) are not exhaustive. Unlisted factors may also be relevant, depending on the particular circumstances of an appeal. One such unlisted factor is the possible "diminished privacy interest after death".

The appellant submits that the information regarding the amount and the timing of the bids for the property is of such "minimal sensitivity" that "the privacy interest of the deceased owner would not be compromised by its disclosure, regardless of the fact that the individual has been deceased for less than 30 years". The appellant submits that this ought to be a factor, given that the deceased died in 2001.

The Ministry makes extensive representations in support of its position that the "diminished privacy interest after death" ought not to be considered a factor favouring disclosure in the circumstances of this appeal. The Ministry's arguments can be summarized as follows:

- certain orders of this office have held that persons who have been deceased for more than ten years but less than thirty years, enjoy less protection of personal information (Orders P-71; P-1187; PO-1717, PO-1923);
- in those cases, other specific, limited information (such as date of death, place of death, last known address and last occupation) has also been held by the Information and Privacy Commission to have lost its protection (Order PO-1790R);
- where the request contains a financial parameter on the value of the estate, minimal information has been ordered to be disclosed (Order PO-2012R);
- the unlisted factor of "diminished privacy interest after death" does not apply to the personal information of an individual who has been dead less than three years (Order P-945). To disclose personal information beyond what has been ordered by PO-1790-R will result in no protection of personal information of deceased persons, thereby violating the clear wording of section 2(2) of the *Act*;
- the application of the "unlisted factor of diminished privacy interest after death" renders meaningless section 66(a) of the *Act* which allows only the deceased's personal representative (in this case, the PGT) to consent to disclosure of a

deceased's personal information to a third party (and only if disclosure relates to the "administration of the estate"). (*Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12 (Div.Ct.);

- as family members are not permitted access to a deceased person's personal information, it is unreasonable for the Estate Trustee to grant access to an unrelated person who wants the information solely for speculative purposes;
- the unlisted factor of "diminished privacy interest after death" should be applied with care, given the wording of this section. Each case must be carefully considered on its particular facts and circumstances." (Order PO-1936);
- even if this unlisted factor is applied by the IPC, it does not apply to the deceased person in this case, which can be distinguished from the cases where the deceased has been dead for over 10 years and the estate has escheated to the Crown (Orders PO-1923, PO-1936);
- 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 406-407 (S.C.C.);
- it is reasonable for the Information and Privacy Commission to protect the interests of the deceased from disclosure to a third party, where disclosure is not for purposes of administration of the estate, and where the request appears to be for a speculative purpose;
- for any estate that has a private estate trustee, such as an individual and trust companies, the information about the deceased's personal life and relationships, finances and the actions taken in the administration of an estate, remain protected as personal information, subject only to *PIPEDA*. Estate lawyers and families of the deceased would consider access to such information to be an unjustified invasion of personal privacy of the deceased. No third party is entitled to such information outside the context of the normal administration of an estate. This entitlement to basic privacy should also apply to any estate administered by the Public Guardian and Trustee, and estates under its administration should not be in any different position than estates administered by a trust company, lawyer or any other member of the public.

Findings

I have carefully reviewed the representations of the parties on the issue of the possible application of the "diminished privacy interest after death". A number of the arguments set out above relate more to whether the factor ought to be given much weight, rather than whether it is a relevant factor in this appeal.

A number of the Ministry's arguments concerning when this factor may apply refer to orders issued prior to Order PO-2240, in which this factor was not considered a factor until "some time" after the death of the deceased. However, in Order P-2240, former Assistant Commissioner Mitchinson's discussed whether the "diminished privacy interest after death" factor applies where an individual had been dead for less than 12 months. In that order, he reviewed the findings from PO-1717 and PO-1936 that there existed a diminished privacy interest after death, and he then stated:

In the current appeal, the deceased died ... less than four months before the appellant submitted his request to the [PGT] under the *Act*. Although I accept that an individual's privacy interests begin to diminish at the time of death, four months is too short a period of time for any meaningful diminishment to have occurred. As identified in Order PO-1936, this unlisted factor must be applied with care, taking into account the fact that section 2(2) establishes some degree of privacy interest until 30 years following death. While each case must be assessed on its own facts, and the weight accorded to this unlisted factor will vary according to the length of time an individual has been dead, in my view, it would be inconsistent with the policy intent of section 2(2) to attribute any significant weight to this unlisted factor for at least the first year following death.

In Order PO-2260 I applied the approach taken by Assistant Commissioner Mitchinson to the unlisted factor of a "diminished privacy interest after death", and did not attribute any significant weight to this unlisted factor for at least the first year following death. I then stated:

However, after one year following the date of death, I find that this factor is to be attributed weight of some significance. In Order PO-1736 (upheld by the Divisional Court), Senior Adjudicator Goodis had to decide whether this factor applied where, at the time of the request, the deceased individual had been dead for approximately two years. He found that the factor of "diminished privacy interest after death" did apply, although he decided that the privacy interests of the deceased individuals were "moderately reduced" in those circumstances.

Based on the previous orders of this office, and on the representations of the parties, it is my view that the unlisted factor of a "diminished privacy interest after death" is a factor that applies upon the death of the individual to whom the information relates. However, I find that it is not to be attributed any significant weight for the first year following death, but that after that time, it should be accorded moderate weight.

I adopt the approach to this issue that I took in PO-2260 to the circumstances of this appeal. In this appeal, the deceased passed away in 2001, and I find that this unlisted factor is a relevant factor. Furthermore, as more than one year has passed since the date of death, in my view, this factor is to be attributed moderate weight.

With respect to the other arguments put forward by the Ministry, as identified above, a number of them are general in nature, or relate more to whether this factor, if applied, ought to be given

much weight. However, I wish to specifically address two of the positions taken by the Ministry as summarized above.

One of the arguments made by the Ministry is that the application of the “unlisted factor of diminished privacy interest after death” renders meaningless section 66(a) of the *Act*, which allows only the deceased’s personal representative (in this case, the PGT) to consent to disclosure of a deceased’s personal information to a third party (and only if disclosure relates to the “administration of the estate”). The Ministry refers to the *Adams* decision in support of its position.

I addressed a similar argument, made by the PGT, in my Order PO-2590-R. I stated:

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,

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;

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 adopt the above approach in circumstances of this appeal, and I reject the Ministry’s position that the application of the “unlisted factor of diminished privacy interest after death” renders meaningless section 66(a) of the *Act*.

Lastly, I reject the Ministry’s position that the requested information ought not to be disclosed because information of the type requested in this appeal would not be available to third parties for any estate that has a private estate trustee. The *Act* clearly applies to records in the custody or control of institutions as defined in the *Act*. Whether other records, not in the custody or control of institutions, are available or not, have no bearing on my responsibility to review the factors set out in the *Act* for records in the custody and control of institutions.

In summary, I find that the “unlisted factor of diminished privacy interest after death” is a relevant factor in this appeal, and this factor is to be attributed moderate weight.

Analysis of Factors

I have made a number of findings concerning the application of the factors (both those listed in section 21(2) and the unlisted factor referred to by the parties). Taking all representations and considerations into account, I have found that two factors favour disclosure of portions of the records. Those factors are that the disclosure of some of the information is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny under section 21(2)(a) (for some of the records), and the unlisted factor that there exists a diminished privacy interest after death.

In balancing the various factors present in this appeal, I find that the factors favouring disclosure outweigh the privacy protection of the deceased for certain specific information contained in the Records which contain the bids (pages 130, 136, 142, 150, 158, 164, 170, 177, 185, 194, 200, 206 and 211). I also find that the factors favouring disclosure do not outweigh the privacy protection of the deceased for the other parts of those records, and for the record relating to the dual agency (which also includes the personal information of another individual).

Specifically, I find that the factors favouring the disclosure of the fax information (date, time, sender and recipient of the fax) for all of the bids, as well as the date and amount of the offer for the unsuccessful bids, outweigh the privacy interests of the deceased in the circumstances. This information will be of value to the appellant in addressing some of the concerns raised under section 21(2)(a). Accordingly, I find that disclosure of this information would not constitute an unjustified invasion of the privacy of the deceased, and that this information is not exempt under section 21(1) and should be disclosed to the appellant.

With respect to the other information remaining on those pages, which I found would not address the issues raised by the appellant, or which contain the personal information of identifiable individuals other than the deceased, I find that the factors favouring disclosure do not outweigh the privacy interests of the deceased and/or the other identifiable individuals. Furthermore, as I have found that the factor in section 21(2)(a) does not apply to pages 125-126, I also find that the factors favouring disclosure do not outweigh the privacy interests of the deceased and/or the other identifiable individual for those pages. Accordingly, disclosure of this information would constitute an unjustified invasion of privacy.

I will provide the Ministry with a highlighted copy of Records 130, 136, 142, 150, 158, 164, 170, 177, 185, 194, 200, 206 and 211, identifying the portions that should be disclosed, as they contain information the disclosure of which would not constitute an unjustified invasion of privacy under section 21(1) of the *Act*.

PUBLIC INTEREST OVERRIDE

General principles

The appellant has taken the position that a public interest in the disclosure of the records exists. The public interest override found at section 23 of the *Act* reads as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act's* central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

Section 21 is the exemption at issue in this appeal, and it is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

The appellant's representations on this issue focus on its interest in obtaining access to the records to a) review the bidding process; and b) examine the records relating to the dual agency issue. Regarding its review of the bidding process, the appellant again identifies the concerns it has regarding the process. With respect to the dual agency issue, the appellant states that access to this record would place the appellant “in a better position to make representations to the Minister responsible for the PGT to propose changes to the legislation.”

I have carefully reviewed the appellant's representations and, in my view, there does not exist a compelling public interest in the disclosure of the information remaining at issue in this appeal. As identified above, some information relating to the amounts and timing of the bids is being disclosed, and the disclosure of that information pursuant to this order will, in my view, address a number of the concerns raised by the appellant. With respect to the information relating to the

dual agency issue, although this may be an area of interest to the appellant and others, I have not been provided with sufficient evidence to find that there exists a compelling public interest in this issue; nor that the information contained in the record at issue would “serve the purpose of informing the citizenry about the activities of their government”. Although the appellant has an interest in this issue, it has not provided me with persuasive evidence to demonstrate that there exists a public interest in this issue sufficient to override the exemption in section 21(1) in this appeal.

Accordingly, I find that the public interest override provision in section 23 does not apply to the personal information remaining at issue in this appeal.

ORDER:

1. I order the Ministry to provide the appellant with copies of those portions of Records 130, 136, 142, 150, 158, 164, 170, 177, 185, 194, 200, 206 and 211 which are highlighted in the copy of the records provided to the Ministry along with this order by **January 7, 2008** but not before **December 31, 2007**.
2. I uphold the Ministry’s decision to deny access to the remaining information.
3. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant.

Original Signed by: _____
Frank DeVries
Adjudicator

_____ November 26, 2007