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

ORDER PO-2876

Appeal PA-050026-2

Ministry of Government Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the OPGT or PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a commercial heir tracing company, which requested a copy of the entire estate file for a deceased individual.

The OPGT advised the requester that several records contained in the requested estate file had been transferred to the Ministry of Consumer and Business Services (now the Ministry of Government Services, referred to in this order as "the Ministry"). Accordingly, the Ministry would provide him with a decision with respect to disclosure of the transferred records.

Subsequently, the requester made a further request directly to the Ministry for access to the same records. In addition, the requester made a request for access to the death registration form for two other deceased individuals. In response to all of the requests, the Ministry identified five responsive records: three statements of death, one birth certificate and one registration of birth. The Ministry denied access to all of the records, in their entirety, pursuant to the mandatory exemption at section 21(1) (personal privacy) of the *Act*. The Ministry issued a separate decision for each of the three requests.

The requester, now the appellant, appealed all three decisions to this office. This office opened one appeal file for all three decisions.

During the processing of the appeal, the file was placed on hold because the issues on appeal were similar to those raised in the reconsideration of a separate order of this office. That file involved the appellant and the OPGT.

On June 12, 2007, Order PO-2590-R was issued. The conclusions of Order PO-2590-R do not prohibit the processing of the issues in this appeal. As a result, this file was reactivated. The appellant subsequently confirmed that he wished to continue with the appeal.

As no issues were resolved at mediation, Appeal PA-050026-2 was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues, to the Ministry. Upon receipt of the Notice of Inquiry, the Ministry contacted this office to advise that in lieu of preparing representations it was prepared to issue a revised decision in which it would be granting partial access to the records at issue, releasing approximately 80% of the records. The Ministry indicated that it believed the appellant might be satisfied with the disclosure and, if that were the case, the appeal would be closed.

The Ministry issued a revised decision letter to the appellant granting partial access to the records. The Ministry advised that it was prepared to grant access to the birth certificate in its entirety, partial access to the three statements of death severing only the place of birth and the occupation of the individuals to whom they relate, and partial access to the birth registration severing only the place of birth, occupation, citizenship and racial origin of the individual to

whom it relates. The Ministry advised that it was claiming section 21(1) (personal privacy) of the *Act* for all severances.

The Ministry provided me with a copy of the revised decision letter and I wrote to the appellant. I asked the appellant to indicate whether it was satisfied with the disclosure made by the Ministry. The appellant's representative responded that his client was not satisfied with the disclosure made to date and wished to proceed with the appeal.

Accordingly, I sent a revised Notice of Inquiry to the Ministry. The Ministry provided representations in response. In its representations, the Ministry advised that partial access to the birth registration was provided to the appellant in error and was retrieved from the appellant. The Ministry stated that its current position is that the record is not relevant as it is not the birth registration for the deceased individual to whom the access request relates and, in the alternative, the entire record should be withheld on the basis of section 21(1) of the *Act*.

I then sent a copy of the revised Notice of Inquiry and a copy of the Ministry's complete representations to the appellant. The appellant responded with representations. As the appellant's representations raised issues to which I believed the Ministry should be given an opportunity to reply, I provided the Ministry with a copy of the appellant's complete representations. The Ministry responded by way of reply.

RECORDS:

The records in this appeal are three statements of death and one registration of birth. The portions that have been withheld remain at issue and are described below:

Record	Description of Record	Withheld Information
1	Statement of Death	• Place of birth • Occupation of deceased
2	Statement of Death	• Place of birth • Occupation of deceased
3	Statement of Death	• Place of birth • Occupation of deceased
4	Birth Registration	Withheld in its entirety • County • City • Name of hospital • Name of child • Sex • Single, twin, triplet or other • Whether the child was born alive • Marital status of parents • Date of birth • Name, address, nationality, racial origin, age, and birthplace of Mother

		• Number of children born to the Mother, number still living, number of stillborn • Name, address, nationality, racial origin, age, and birthplace of Father • Occupation of Father (trade and employer) • Whether the birth was premature • Name of physician in attendance • Informant's signature and address (person giving information for the Registration)

DISCUSSION:

RESPONSIVENESS

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

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

The Ministry submits that the birth registration is not relevant to the appeal because it does not relate to the deceased individual to whom the access request relates but rather was contained in the file of the deceased individual to whom the access request relates.

The appellant's original request was for a copy of the entire estate file of a deceased individual. During mediation, the Ministry confirmed that although it did not know the relationship between the deceased and the individual to whom the birth registration relates, it formed part of the estate

file for the deceased. The Ministry has not provided me with evidence to demonstrate that the information does not form part of the estate file requested by the appellant. Accordingly, I find that the birth registration is responsive to the request.

As I have found that the birth registration is responsive to the appellant's request I will determine whether it should be withheld pursuant to the mandatory exemption at section 21(1) of the *Act* as submitted by the Ministry.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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,
>
> (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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Section 2(2) addresses information relating to a deceased individual. That section reads:

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

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity." Section 2(4) is not relevant to this appeal. However, as the request relating to this appeal was filed before April 1, 2007, these amendments do not apply.

Representations

The Ministry submits that information that has been severed from the statements of death, specifically, the places of birth and the occupations of the deceased individuals, constitutes personal information as defined in section 2(1) of the *Act*. The Ministry also submits that the birth registration contains the personal information of both the individual and the individual's parents.

With respect to the information on the statements of death the Ministry submits:

> [T]he place of birth relates to national or ethnic origin, the type of information enumerated in the definition of personal information in subsection 2(1)(a) and the occupation of the individual qualifies as employment history as enumerated in subsection 2(1)(b).
>
> The IPC has considered whether information in a statement of death constitutes personal information, and has found that the date of birth, address at the time of death, usual residence, place of birth, occupation, and information about burial arrangements constitutes "personal information" [Orders P-1232, PO-1923, PO-2198].
>
> As the records relate to individuals who died in 1979, 1982, and 1985, the Ministry submits that subsection 2(2) does not apply, as the individuals have not been deceased for 30 years.

With respect to the information contained in the birth registration, the Ministry submits that it contains the personal information of the individual:

> The Ministry submits that the aforementioned information contained in the birth registration … constitutes "personal information" of the individual. This information is recorded information about an identifiable individual, falling within the definition of personal information in section 2(1) of the *Act*.
>
> Order P-1232 held that the birth record contains the individual's date of birth, sex, names of parents, occupation of individual's father, name of attending physician and registration number. This information was held to relate to the individual and the individual's parents.
>
> The Ministry submits the same facts are true in the present appeal and the information contained in the birth registration relates to both the individual and the individual's parents.

The Ministry makes the same submissions with respect to the information relating to the individual's parent that appears listed on the birth registration.

The appellant submits that it "agrees that the information requested is 'personal information' within the meaning of the *Act*." It submits that "all information contained in the refused documents, with the exception of certain information regarding the Informant, is information pertaining to the deceased individual." The appellant also submits that "[e]ven where the information requested contains the names of other individuals it is in the context of the individuals' relation to the deceased and is therefore information about the deceased."

Analysis and findings

Having reviewed the information at issue, I find that the majority of it amounts to information which qualifies as the personal information of an identifiable individual.

First, I am satisfied that the information that is at issue in two of the statements of death, the birthplaces and occupations of the individuals to whom the statements relate, qualifies as personal information within the meaning of the definition outlined in section 2(1) of the *Act*. Specifically, I find that disclosure of the birthplace would reveal information relating to the deceased's national or ethnic origin (paragraph (a)) as well as other personal information about them (paragraph (h)).

Second, I am satisfied that the majority of the information contained in the birth registration also qualifies as personal information within the meaning of the definition outlined in section 2(1) of the *Act*. Specifically, it contains information about the individual to whom it relates listing her name, together with other personal information relating to her (paragraph (h)), including her place of birth (City, County and hospital), sex, date of birth, whether she is a single, twin, triplet or other, and whether she was born alive (paragraph (a)). It also contains information relating to

the individual who provided the information listed on the form, the "informant." Specifically, the individual's name and address (paragraphs (d) and (h)).

However, there is some information contained in the records that I find does not qualify as personal information because it is either professional information or because of the operation of the exception at section 2(2) of the *Act* as the individual to whom it relates has been deceased for more than 30 years.

One such item is the name of the physician in attendance at the birth, which is found in the birth registration. In my view, this information is related to the physician in their professional capacity and it does not reveal anything of a personal nature about them. Accordingly, I find that the name of the physician on the birth registration does not qualify as personal information and therefore, does not qualify for exemption under section 21(1) of the *Act*.

As well, the third statement of death relates to an individual who died on April 4, 1979. Although I acknowledge that at the time of the filing of this appeal the 30 year time period outlined in the exception at section 2(2) had not yet passed, as of the date of this order the individual to whom this information relates has been deceased for more than 30 years. Accordingly, I find that pursuant to the operation of the exception at section 2(2) of the *Act*, the information that remains at issue on that statement of death, the individual's birthplace and occupation, does not qualify as personal information and therefore, does not qualify for exemption under section 21(1) of the *Act*.

Finally, the birth registration contains information about the parents of the individual to whom it relates which, in my view, falls within the exception at section 2(2) of the *Act*. This information includes the parents' marital status, names, addresses, ages, nationality, racial origin, age, and birthplace. For the father, it also includes his trade or profession, and the business in which he was employed at that time. For the mother, it also includes the number of children born to her at that time, how many of those children were still alive and how many were stillborn. In keeping with previous orders issued by this office, I find that this information is about the parents only and I do not accept that this information qualifies as the personal information of the individual to whom the birth registration relates [Order PO-2198]. However, I must determine whether the information relating to the parents still qualifies as their "personal information" or whether it falls within the ambit of the exception in section 2(2) because it relates to individuals who have been dead for more than 30 years.

Previous orders of this office have made certain assumptions about life expectancy to assist in establishing dates of death for individuals where this fact could not be determined from the records [see for example, Orders PO-1886, PO-2198]. Most recently, in Order MO-2467, Adjudicator Colin Bhattacharjee followed the approach taken by former Assistant Commissioner Tom Mitchinson in Order PO-1886 to determine whether personal information contained in a public school's attendance registers from the years 1899 to 1964 fell within the exception in section 2(2) of the *Act*. In Order MO-2467, Adjudicator Bhattacharjee stated:

> The current year is 2009. Consequently, the information in the attendance registers relating to any students or teachers who died in 1979 or before would not

qualify as "personal information" because those individuals would have been dead for more than 30 years.

It is challenging, however, to determine whether the information relating to specific students and teachers might fall within section 2(2) of the *Act*, given the large number of individuals in the records and the varying ages of these individuals. The sample records for 1923 contain the birth dates of the students for a particular class, which is helpful in determining whether the information relating to specific students might fall within section 2(2) of the *Act*. However, I have no evidence with respect to the dates of death of any of these individuals, and particularly whether they died in 1979 or before.

…

In Order PO-1886, former Assistant Commissioner Tom Mitchinson found that if an individual's specific date of death is not known, a more reasonable approach to making an assumption about this date is to apply the average life expectancy for the year in which a particular individual was born, not modern-day life expectancy. He stated, in part:

> Although in the closing years of the 20th century it was not unusual … for someone still alive to live to the age of 95, the same cannot be said of people born in earlier times. The fact that life expectancy has increased over time would appear to me to be a commonly accepted fact, and applying current life expectancy assumptions to people born in the 1800's would, in my view, not be reasonable.
>
> …[I]n circumstances where the actual dates of death are not known, as it the case in these appeals, the figure available from Statistics Canada is a reasonable one to apply in making assumptions regarding the life expectancy of the parents.

The factual circumstances in Order PO-1886 were different than those in the appeal before me. However, I agree with former Assistant Commissioner Mitchinson's general reasoning and will apply it in the circumstances of this appeal.

According to Statistics Canada, a male born in the years 1920 to 1922 had a life expectancy of 59 years and a female born in the same time period had a life expectancy of 61 years (www40.statcan.gc.ca/101/cst01/health26-eng.htm). (I am unable to find any figures for earlier years.) Consequently, I will make the assumption that a person born in 1920 had an average life expectancy of 60 years.

In my view, it is reasonable, based on these statistics to assume that the average person born in 1919 would have died 60 years later, in 1979. I have already

> determined that the information in the attendance registers relating to any student or teacher who died in 1979 or before would not qualify as "personal information." Consequently, it would be reasonable to conclude that the information relating to any students or teachers in the attendance registers who were born in 1919 or before does not constitute their "personal information," in accordance with section 2(2) of the *Act*. In short, this information cannot qualify for exemption under the personal privacy exemption in section 14(1) of the *Act* and must be disclosed to the appellant.

I agree with Adjudicator Bhattacharjee's approach and will apply it in the current appeal.

In the circumstances of the current appeal, the birth registration identifies the age of both parents at the time of birth of the individual to whom the registration relates. The registration also reveals the year of birth of that individual. Based on this information, it is possible to calculate the approximate year of birth of both parents. Specifically, both parents would have been born during the first decade of the 20th century and be over 100 years old in 2010.

In Order MO-2467, based on figures from Statistics Canada Adjudicator Bhattacharjee established the average life expectancy of individuals born between the years 1920 and 1922 as 60 years. In this appeal, as the parents of the individual to whom the registration relates were all born in the early 1900's, twenty years earlier than the individuals in Order MO-2467, assuming a life expectancy of 60 years is a conservative approach. However, as Statistics Canada does not identify life expectancy for individuals born prior to 1920 and it is difficult to determine a more accurate figure I will make such an assumption for the purposes of this appeal.

Accordingly, taking into account the year of birth of both of the parents of the individual to whom the birth registration relates and assuming a life expectancy of 60 years, I find that it is reasonable to conclude that they have been dead for at least 30 years. On this basis, I find that pursuant to the exception at section 2(2), the parents' names, marital status, addresses, age, nationality, racial origin, and birthplace, the father's trade or profession, the business in which he was employed, the number of children born to the mother and whether they were born alive or stillborn is not personal information and therefore, does not qualify for exemption under section 21(1) of the *Act*.

In summary, I have found that the information relating to the physician listed on the registration of birth does not qualify as personal information as it is professional information. I have also found that all of the information relating to the parents listed on the registration of birth and all of the information at issue on the statement of death of the individual who died on April 4, 1979, does not qualify as personal information as a result of section 2(2) of the *Act*. Accordingly, I will order the Ministry to disclose this information to the appellant. However, I have found that all of the remaining information listed on the birth registration qualifies as personal information and all of the information that remains at issue in the two remaining statements of death (birthplace and occupation), qualifies as personal information. Therefore, I will go on to determine whether the information I found to qualify as "personal information" is exempt pursuant to the mandatory exemption under section 21(1).

PERSONAL PRIVACY

Where a requester seeks access to the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The appellant argues that section 21(1)(f) applies to the circumstances of this appeal.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. The Ministry claims that the presumptions at sections 21(3)(e), (f) and (h) apply to some of the information at issue.

Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. The appellant has not claimed that any of the exclusions in section 21(4) apply in the circumstances of this appeal. In my view, section 21(4) has no application to this appeal.

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, 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].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99]. Both of the parties claim that listed and unlisted factors apply in the circumstances of this appeal and refer to prior decisions from this office in support of their positions.

Section 21(3) presumptions

The Ministry claims that disclosure of the personal information in the statements of death relating to occupation and place of birth and all of the personal information in the birth registration record is presumed to constitute an unjustified invasion of personal privacy in accordance with sections 21(3)(d) and (h). These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;

> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Section 21(3)(d) – employment or educational history

The Ministry submits that statements of death list the occupation of the deceased individuals and the birth registration lists the occupation of the individual's father. The Ministry submits that this would reveal the employment history of these individuals and therefore, would amount to a presumed unjustified invasion of privacy as contemplated in section 21(3)(d). The Ministry also submits that in Order P-1232, the IPC "found that the occupations shown on the marriage record qualified as employment history, falling within the ambit of the presumption in subsection 21(3)(d)."

The appellant disagrees that the presumption at section 21(3)(d) applies in the circumstances of this appeal. It submits:

> [T]he occupation of an individual does not fall within this presumption. Occupation is distinct from employment history. Occupation denotes the field in which an individual works. Such information is clearly different from an individual's employment history, that is where one has worked and for what periods of time.
>
> The legislature could easily have included occupation in the presumed invasion of privacy grounds; however, they have failed to do so. Rather the legislature has chosen to limit the presumed invasion to the history of an individual's employment and not the field in which that individual works.
>
> Such an interpretation would appear to be consistent with the general perception of privacy in relation to employment matters. Providing information about one's particular place of employment would appear to be of a more private nature than merely the field in which one is employed.

Prior orders of this office have held that a person's name, occupation and employer do not, without more detail, attract the application of the presumption in section 21(3)(d) [Order P-219, P-235, MO-2103-I]. Additionally, in Order PO-2298, Adjudicator Frank DeVries found that information related to the previous occupation of a deceased individual and the location of that occupation did not amount to the type of detailed information about the "employment history" of the deceased to fit within the presumption in section 21(3)(d) because the information was of a general nature, without reference to specifics.

In the circumstances of this appeal, on the statement of death relating to the individual who died on July 19, 1982, and the birth registration, the information to which the presumption in section 21(3)(d) might apply is a one word description of the general type of work that the individual did during most of their working life, and in the case of the birth registration the general business in which he was employed. The statement of death relating to the individual who died on

November 16, 1985 lists the type of work done by that individual, the name of the organization where she was employed and the department in which she worked. In my view, the information, as it appears in these specific records, is very general in nature as it describes only the type of work done by these individuals, and, in the case of one individual, her employer. It does not contain specifics about their employment history such as length of time these individuals performed these occupations or the number of years of service. Accordingly, having considered the specific information contained in the two remaining statements of death and the birth registration, I am not satisfied that it falls within the ambit of the presumption listed at section 21(3)(d) of the *Act*.

Section 21(3)(h) – racial or ethnic origin, sexual orientation, religious or political beliefs or associations

The Ministry submits that the information about the birthplaces of the deceased individuals appearing on the statements of death and the information regarding the birthplace of the individual on the birth registration form is information about the individuals' ethnicities and falls within the ambit of the presumption at section 21(3)(h). The Ministry also submits that the IPC has found that "information concerning the deceased's birthplace and the birthplace of his parents indicates their 'ethnic origins' and therefore falls within the scope of section 21(3)(h) [Orders PO-1923, PO-2198]."Accordingly, the Ministry submits that disclosure of this information is presumed to constitute an unjustified invasion of the personal privacy of the individuals to whom it relates.

The appellant also disagrees that the presumption at section 21(3)(h) applies in the circumstances of this appeal. It submits:

> [P]lace of birth of the deceased and even the place of birth of the deceased's parents is not indicative of the individual's racial or ethnic origin. Individuals and families frequently move homes, countries and even continents. In fact, many Canadian families have lived in Canada for generations, while their racial or ethnic origins stem from across the globe.
>
> Birthplace information about the deceased is important and helpful in recreating the family history and settling the estate however it is hardly indicative of the racial or ethnic origins of an individual.

I agree with the Ministry's submission that previous orders issued by this office have found that information concerning an individual's birthplace and the birthplace of his parents can indicate their "ethnic origins" and falls within the scope of section 21(3)(h) [Orders PO-1923, PO-1936]. I have carefully reviewed the information at issue and, in keeping with prior orders issued by this office, I am satisfied that information describing the birthplace and ethnic origin of the deceased in the two statements of death that remain at issue, and the birthplace of the individual to whom the birth registration relates, falls within the section 21(3)(h) presumption. I find therefore that disclosure of this information is presumed to be an unjustified invasion of personal privacy of the individuals to whom it relates. As none of the factors in section 21(4) apply to this information, it qualifies for exemption under section 21(1) of the *Act*.

I will now go on to determine whether the following personal information, which I have found does not fall within the ambit of a presumption, qualifies for exemption under section 21(2). Specifically:

> In the statements of death relating to the individual who died on July 19, 1982 and the individual who died on November 16, 1985:
>
> - The individuals' occupations.
>
> In the registration of birth, information about the individual to whom it relates:
>
> - full name,
> - sex,
> - single, twin, triplet or other,
> - whether the child was born alive,
> - date of birth,
> - whether the birth was premature
>
> Also on the registration of birth, information about the informant:
> - name and address.

Section 21(2)

As noted above, section 21(2) of the *Act* provides factors to be considered in determining whether the disclosure of personal information constitutes an unjustified invasion of personal privacy.

The Ministry claims that the factors favouring non-disclosure at sections 21(2)(f) and (h) apply and the appellant claims that the factors favouring disclosure at sections 21(2)(a), (c), and (d) apply. The appellant also takes the position that the factor favouring non-disclosure at section 21(2)(e) does not apply. These sections state:

> 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;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Also as noted above, the list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99]. Both parties also claim that other circumstances weighing for and against disclosure apply in this appeal. In particular, both parties address the following circumstances:

- reasonable expectation of confidentiality;
- identity theft;
- diminished privacy interest after death, and;
- benefit to unknown heirs.

Section 21(2)(a) – public scrutiny

The appellant submits that the disclosure of the information at issue is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny. In support of its position, the appellant states:

> The disclosure of information with respect to estates under the OPGT's administration permits the public to monitor its efficiency in dealing with these important matters. More specifically, it permits the public to judge whether government resources (tax dollars) are being used efficiently and effectively. The criticism of the OPGT's performance contained in the 1999 Report of the Provincial Auditor provides ample evidence that such public scrutiny is necessary and desirable. Beneficiaries are assisted when the prompt, efficient distribution of estates is promoted. The public interest is served when the OPGT is motivated by public scrutiny to minimize the inefficient use of public resources.

The Ministry submits that prior orders of this office have held that a private interest is not sufficient to meet the requirements of section 21(1)(a) [Orders P-828, PO-2420]. The Ministry submits:

> [T]he appellant's interest in the personal information at issue in this appeal constitutes a private interest. Specifically, the appellant is requesting personal information from the Ministry for its own commercial interest.
>
> In Order PO-2260, the IPC considered the application of subsection 21(2)(a) in relation to personal information about clients of the OPGT (name, address, last occupation, place of death, and date of death). The appellant argued that subsection 21(2)(a) favoured disclosure, as the disclosure of the information

> would permit the public to monitor the efficiency of the OPGT administration of estates. The IPC found section 21(2)(a) was not a relevant factor. The IPC was not persuaded that disclosure of the records at issue was desirable for the purpose of subjecting the activities of the OPGT to public scrutiny, particularly in light of the nature of the information requested as this information would not, in fact, achieve that purpose.
>
> The Ministry submits that the reasoning in [Order] PO-2260 is applicable to the present situation. The appellant has not submitted any justification for a finding that public scrutiny is desirable in the matters at issue and how disclosure of the information sought may achieve the objective of subjecting the activities of the OPGT to public scrutiny.

Analysis and finding

Prior decisions from this office have found that the factor at section 21(2)(a) did not apply to information the OPGT gathered for the purposes of tracing the heirs of unclaimed estates [see for example Orders PO-1717, PO-1736 [upheld on judicial review in *Ontario (Public Guardian and Trustee) v. Goodis* (December 13, 2001), Toronto Doc. 490/00 (Ont. Div. Ct.), leave to appeal refused (March 21, 2002), Doc. M28110(C.A.)] and Order PO-2260]. In Orders PO-1717 and PO-2260, this office specifically rejected the appellant's argument that the 1999 Report of the Provincial Auditor supports a position that section 21(2)(a) is a relevant factor weighing in favour of disclosure of information in the OPGT's custody gathered for heir tracing purposes. In Order PO-1717, former Assistant Commissioner Mitchinson stated:

> The appellant carries on the business of heir tracing, and has made this request in the ordinary course of his business activity. The appellant's representations on this issue do not persuade me that a public scrutiny concern exists, nor how disclosure of the particular record at issue in this appeal is desirable for the purpose of subjecting the Office of the Public Guardian and Trustee to public scrutiny. Accordingly, I find that section 21(2)(a) is not a relevant consideration.

In my view, the findings in Orders PO-1717, PO-1736 and PO-2260 are applicable in the circumstances of this case. I have carefully considered the circumstances of this appeal along with the appellant's representations, and am not satisfied that disclosure of the remaining personal information at issue is desirable for the purpose of subjecting either the Ministry, or the OPGT, to public scrutiny. As a result, I find that the factor favouring disclosure at section 21(2)(a) has no application in this appeal.

Section 21(2)(c) – promote informed choice in purchase of goods and services

The appellant argues that section 21(2)(c) is a relevant factor favouring disclosure as the existence of its business creates competition to the services of the OPGT and "can serve to motivate the OPGT to achieve greater levels of efficiency and accountability." In support of this position, the appellant states:

> It may be suggested that there is something inherently less desirable about a private, for-profit organization assisting beneficiaries of estates than a government agency. What [the appellant] provides, however, is a choice for beneficiaries. Beneficiaries contacted by [the appellant] are free to engage the services of [the appellant], and pay a mutually acceptable fee for such services, or to decline the offer of assistance. Those who accept the offer of assistance benefit from the prompt, tailored and expert services [the appellant] provides. Those beneficiaries who decline the offer of assistance have nonetheless benefited from [the appellant's] efforts, as they have been notified of a potential entitlement and may be able to make their own arrangements to claim their inheritance.
>
> At present, [the appellant] represents competition to the services of the OPGT, at no cost to taxpayers and no cost to beneficiaries unless they choose to engage [the appellant]. The very existence of this competition – and the necessary disclosure of information that is involved – can serve to motivate the OPGT to achieve greater levels of efficiency and accountability.
>
> As Senior Adjudicator David Goodis concludes in Order PO-1790-R (reconsideration of Order PO-1763):
>
> > Although the OPGT has indicated that in recent years it has achieved a higher level of success in locating potential heirs, I am satisfied that there is still a benefit to having additional resources, outside the OPGT, directed towards locating these individuals, particularly in the more difficult cases. The 1999 Report of the Provincial Auditor indicated a need for the OPGT to improve its searches for files set up prior to 1996, **and that even in the more recent cases, despite improvements, heirs are not located in over 30% of cases** [emphasis added].
>
> [The appellant] further submits that this atmosphere of "competition" could be developed into a more complementary, cooperative approach, which would see each organization lending its strengths to the process of the orderly and efficient distribution of estates. A more full and free exchange of the requested information would also decrease the strain on public resources by re-allocating costs from tax revenues to the ultimate beneficiaries (a "user pays" approach).

The Ministry disagrees with the appellant's position that providing it with personal information to seek out potential heirs will promote an informed choice in the purchase of goods and services as contemplated by section 21(2)(c). The Ministry submits:

> This argument was considered and rejected by the IPC in [Order] PO-2298 in relation to a request to the OPGT for a copy of the files for 14 named deceased individuals. In [Order] PO-2298, the IPC held that this factor did not apply to allow access to otherwise protected personal information for commercial purposes, merely to market the appellant's services.

> This argument was also considered and rejected by the IPC in [Order] PO-2260 in the context of an heir tracer appeal. The IPC held in this case that the appellant was referring to a "viable choice" provided to beneficiaries if the personal information were to be disclosed, the appellant's arguments in support of the position concerned the "benefits" of identifying, locating, and notifying unknown heirs. The IPC found this was not a relevant consideration because the very same considerations were addressed under the unlisted factor of "benefit to unknown heirs."
>
> In [Order] PO-2298, the IPC also held that the appellant's only reliance on section 21(2)(c) was based on the position that it could use the information at issue to offer its services to beneficiaries. Accordingly, the IPC held that section 21(2)(c) did not apply in the circumstances. The Ministry submits that the appellant is seeking the information to offer services to beneficiaries and this is clearly not the intention of section 21(2)(c) [See also Order P-309].
>
> Further, the Ministry submits that the appellant has not demonstrated that disclosure of personal information will promote choice. The Ministry understands that the appellant will be contacting potential beneficiaries and advising them of their entitlement to estate funds. However, the Ministry has no indication that the appellant will be disclosing to the beneficiaries that they could access the funds directly from the OPGT should they choose not to accept the appellant's services. Consequently, it is not clear that the provision of the appellant's services will promote informed choice.

Analysis and finding

Having considered the representations of the appellant and the prior orders referenced by the Ministry, I am not satisfied that the appellant's evidence demonstrates that disclosure will promote an informed choice in the purchase of heir tracing services and that a different approach than that taken in Orders PO-2260 and PO-2298 should be considered.

The appellant made a very similar argument in Orders PO-2260 and PO-2298. In those Orders, Adjudicator DeVries found that section 21(2)(c) had no application. In Order PO-2260 he stated:

> Based on the representations of the appellant, I am not persuaded that this factor is relevant in this appeal. Although the appellant's representations refer to the "viable choice" provided to beneficiaries if the personal information is disclosed, the appellant's arguments in support of this position concern the "benefits" of identifying, locating and notifying unknown heirs. These considerations are addressed under the unlisted factor of "benefits to unknown heirs" set out below.
>
> With respect to the appellant's position that providing him with the information would allow him to approach the beneficiaries and provide his services, [former] 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 agree with the position taken in P-309. 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(1)(c) does not apply in these circumstances.

In Order PO-2298, Adjudicator DeVries followed the same approach as he did in PO-2260 and found that the factor at section 21(2)(c) did not apply.

In the current appeal, I agree with and adopt the same approach to this issue as was taken in Orders PO-2260 and PO-2298. Based on the evidence provided by the appellant, I am not satisfied that the evidence supports a finding that disclosure of the specific information remaining at issue will promote an informed choice in the purchase of heir tracing services. Accordingly, I find that the factor listed in section 21(2)(c) does not apply in the circumstances of this appeal.

Section 21(2)(d) – relevant to a fair determination of rights affecting the person who made the request

The appellant submits that it "locates and assists individuals who are beneficiaries of the estates under administration by the [OPGT]" and that it "effectively stands in the stead of the beneficiaries, acts for them, and assists them in asserting their heirship rights." The appellant submits, therefore, that the disclosure of the personal information at issue is directly relevant to a determination of the rights of inheritance affecting those who it represents.

The Ministry submits that previous orders issued by this office have set out a test for the application of section 21(2)(d). The Ministry submits that Orders MO-1179, P-312 (upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)), PO-1764 and PO-2488 have set out that the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The Ministry submits:

> The test adopted by the IPC indicates that for section 21(2)(d) to apply, proceedings or contemplated proceedings must exist. In Order PO-1764, the IPC did not apply this section because it had not been provided with information of existing or contemplated proceedings.

Accordingly, the Ministry takes the position that the appellant has not demonstrated any existing or contemplated proceedings, and therefore, section 21(2)(d) does not apply in the circumstances of this appeal.

Analysis and finding

I have not been provided with evidence to indicate that there are existing or contemplated proceedings with respect to which the disclosure of the personal information has any bearing, given that the individuals are unknown. Additionally, I do not accept that the appellant stands in the place of the heirs and I find that the appellant has not demonstrated that it has a legal right drawn from the concepts of common law or statute law. Further, I find that the personal information contained in the record has only tangential relevance to the determination of any right that might exist. As a result, I find that section 21(2)(d) does not apply in the present appeal.

Section 21(2)(e) – pecuniary or other harm

The appellant submits that in previous appeals, the Ministry has taken the position that disclosure of similar information would unfairly expose the individuals to whom the information relates to pecuniary or other harm. The appellant also submits that the Ministry has previously submitted that the application of this section extends to the beneficiaries of the deceased. The appellant disagrees with the positions previously taken by the Ministry and submits that section 21(2)(e) has been found not to be a relevant factor in the determination of whether the disclosure of the information at issue would amount to an unjustified invasion of privacy. He points to Order PO-1790-R where Senior Adjudicator David Goodis stated:

> [The OPGT] has not satisfied me that the circumstances of an heir tracer locating and seeking a contractual arrangement with a potential heir would constitute

> pecuniary or other harm. I accept the appellant's submission that potential heirs are free to either reach an agreement with the heir tracer, or not.

The appellant submits that providing beneficiaries with a free choice as to whether to engage its services, even for a fee, cannot reasonably be described as causing pecuniary or other harm to the estate of the beneficiaries. To support his position, the appellant points to Order PO-1936 in which former Assistant Commissioner Mitchinson stated:

> As far as the heirs or potential heirs are concerned, I accept that in the circumstances where an estate has not escheated to the Crown, that heirs or potential heirs could be contacted by the OPGT, private heir tracers and/or a consulate, and that different fees could be involved, depending on the circumstances. However, based on the appellant's representations in this case, I am not persuaded that any fees charged by his client in this regard would expose any heirs or potential heirs to pecuniary or other harm or, more particularly, that any such exposure would be unfair. Accordingly, I find that section 21(2)(e) is not a relevant consideration in this appeal.

Although the Ministry did not initially rely on section 21(2)(e), its reply representations state that, based on the wording of section 21(2)(e), its application is not limited to the deceased because it applies to "the individual to whom the information relates." The Ministry submits that section 21(2)(e) also applies to potential beneficiaries of an estate. The Ministry therefore states:

> The Ministry is not at all certain that potential beneficiaries are provided with the information necessary to make an informed choice. In this regard, the Ministry submits that a potential beneficiary should be presented with information regarding the fact that estate funds can be accessed directly from the OPGT.
>
> Without this information, a beneficiary cannot make an informed choice. In fact, without being offered this choice, a potential beneficiary could face significant financial consequences. The appellant has submitted that a potential beneficiary must agree to pay a fee in the amount of 35 – 39% of the value of the estate to access his or her share. The appellant has provided no evidence to demonstrate the fees it charges are proportionate or fair in the circumstances. Rather, on their face, the Ministry submits that the fees charged by the appellant are unreasonable.

The Ministry submits that the costs charged by the OPGT are regulated by legislation and are significantly lower that those charged by the appellant; therefore, an heir would pay higher fees by engaging the services of the appellant. The Ministry also submits that if an heir signed a contract with the appellant when the OPGT is actively searching for an heir and the OPGT contacts him shortly thereafter, given that the OPGT's fees are charged to the estate, the heir may be exposed unfairly to pecuniary or other harm.

Analysis and finding

Previous decisions from this office have addressed the issue of whether section 21(2)(e) applies to information about potential beneficiaries [Orders PO-1736, PO-1936, PO-1790-R, PO-2260 and PO-2298]. These orders found that the factor favouring disclosure at section 21(2)(e) did not apply to the information the OPGT collected about potential beneficiaries. In Order PO-1936 former Assistant Commissioner Mitchinson stated:

> The parties have submitted conflicting representations on this factor. Based on the material before me, I do not accept that this factor is applicable to the remaining information that relates to the deceased individual. As far as the heirs or potential heirs are concerned, I accept that in circumstances where an estate has not escheated to the Crown, that heirs or potential heirs could be contacted by the [OPGT], private heir tracers and/or a consulate, and that different fees could be involved, depending on circumstances. However, based on the appellant's representations in this case, I am not persuaded that any fees charged by his client in this regard would expose any heirs or potential heirs to pecuniary or other harm or, more particularly, that any such exposure would be unfair. Accordingly, I find that section 21(2)(e) is not a relevant consideration in this appeal.

In the circumstances of this appeal, the Ministry has provided similar representations to those provided in the orders that have previously dealt with this factor. In my view, it has not provided sufficient evidence to satisfy me that the disclosure of the personal information at issue would unfairly expose either the individual to whom the information relates or potential beneficiaries of the estate to pecuniary or other harm. Additionally, I accept the appellant's submission that the potential heirs are free to either reach an agreement with an heir tracer, or not. Accordingly, I find that section 21(2)(e) has no application in this appeal.

Section 21(2)(f) – highly sensitive

The Ministry submits that the factor at section 21(2)(f) is relevant in the circumstances of this appeal. It submits:

> The IPC has held that if disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual then it will be considered highly sensitive [Orders M-1053, PO-1681, PO-1736].
>
> This factor has been found to apply in circumstances involving the identity of an individual with respect to a specific birth registration [Order PO-1681], and to a request for the names and addresses of deceased persons and names of possible inheritors [Order PO-1736]. The Ministry submits that the information contained in the birth registration must be considered to be highly sensitive given that it is detailed personal information … about an individual, who must still be presumed to be alive, as well as the individual's parents, where there is also no proof of death.

> The birth registration record contains detailed information including, but not limited to, whether the parents of the individual were married at the time of the child's birth, the parents age at the time the child was born, how many children the mother had and whether or not the mother gave birth to stillborn children. These kinds of details are highly sensitive and reveal details of lifestyle and personal choices. The Ministry further submits that disclosure of the information contained in the birth registration could cause excessive personal distress if it were to be disclosed. For instance, it is not unreasonable to suggest that a mother would find the disclosure of information on the number of stillbirths she had experienced to be an invasion of her personal privacy. The protection of such information goes to the core of human dignity, a foundational purpose of the privacy protections found in the *Act*.
>
> The Ministry submits that the information contained within the birth registration record has been disclosed in confidence [as will be discussed in further detail under section 21(2)(h)]. As a result, a person would not expect that details provided on a birth registration record would be disclosed to anyone.
>
> The Ministry further submits that the fact that the individual who is the subject of the birth registration must be presumed to be alive is a significant factor in the present appeal.
>
> Furthermore, the Ministry submits that there is no evidence that the individual's parents are deceased, much less any evidence that they have been deceased for over 30 years and consequently, the information contained within the birth registration should be considered highly sensitive for the aforementioned reasons.

The appellant disagrees with the Ministry that section 21(2)(f) is a relevant factor in the circumstances of this appeal. It submits:

> The Ministry submits that the information contained in the birth registration must be considered highly sensitive as it pertains to an individual "who must still be presumed to be alive, as well as the individual's parents, where there is also not proof of death."
>
> [The appellant] submits that regardless of the date of the birth registration, that the individual cannot be presumed to be alive. However, the reverse is true. The presumption of whether or not the individual is deceased can be made based on the age of the birth registration. Similarly, there cannot be a presumption that the individual's parents are alive, but the older the registration, the more likely they are deceased.
>
> As the birth registration may be related to the deceased, it must be seen in context as information relevant to the deceased. If the individual listed in the birth registration is alive, that information may be relevant to finding a living heir and to protecting the heir's rights.

Analysis and finding

The IPC has held that if disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual then it will be considered highly sensitive [Orders PO-2518, PO-2617, MO-2262 and MO-2344]. This factor has been found to apply, for example, to information about professional misconduct [Order M-1053] and in circumstances involving allegations of workplace harassment [Order P-685].

Although the Ministry submits that in Order PO-1681, the factor at section 21(2)(f) has been found to apply in circumstances involving the identity of an individual with respect to a specific birth registration, in my view, this is not entirely accurate. Order PO-1681 related to a request for all records about a specific birth registration subject to a proceeding under the *Vital Statistics Act* (VSA). The records at issue included correspondence, communications, emails and notes. The relevance of the factor at section 21(2)(f) was considered for two records, found relevant and given significant weight. With respect to the first record, Adjudicator Laurel Cropley stated:

> I find that the disclosure of this person's identity would reveal that this person had dealings with the [Office of the Registrar General]. Taking into consideration the very acrimonious nature of this matter and the intensity with which the appellant, in particular, has approached the issues and the parties involved, I am of the view that disclosure of this person's identity, simply because it found its way onto a piece of paper which contained counsel's notes regarding the appellant, could reasonably be expected to cause extreme distress to the individual.

With respect to the second record, Adjudicator Cropley stated:

> The severed portion of [the record] contains a number at which the affected person can be reached. The Ministry indicates that this person has endeavoured to keep this information confidential. Her representations generally confirm the Ministry's submission in this regard. I am satisfied that this information was provided to the Ministry in confidence and that, in the circumstances of this appeal, its disclosure would cause the affected person extreme distress. Therefore, I find that it is also highly sensitive.

In my view, the information that was considered in Order PO-1681, to which the factor at section 21(2)(f) was applied and given significant weight, can be distinguished from the information at issue in this appeal as the information considered in Order PO-1681 was not contained in a birth registration form itself, as in this case. Rather, in Order PO-1681, the information was found in records about a *proceeding* related to a birth registration and was different in nature from the information that is at issue in this appeal.

Additionally, I disagree with the Ministry's position that section 21(2)(f) was found to apply in Order PO-1736. In Order PO-1736, the information at issue related to estates administered by the OPGT and the specific information that was considered in the determination of the application of the factor at section 21(2)(f) was: client name, client account number, client address, last

occupation, place of death, date of death, inheritors and setup date. In that order, Senior Adjudicator Goodis stated:

> In my view, based on the material before me, it cannot be said that disclosure of the information remaining at issue could reasonably be expected to cause excessive personal distress to the subject individuals. While there may be some degree of sensitivity to this information it is not comparable in sensitivity to the types of information that have been found to meet the section 21(2)(f) threshold. As a result, I find this factor does not apply here.

The only information that remains at issue on the birth registration relates to the individual and the informant. Having reviewed it, I do not accept that it is the type of information that, were it disclosed, could reasonably be expected to cause them significant personal distress. As with the information at issue in Order PO-1736, in my view, this information is not comparable in sensitivity to the type of information that has been found to meet the section 21(2)(f) threshold.

The Ministry's representations on the possible application of this factor are specifically directed at the information on the birth registration. However, as section 21(1) is a mandatory exemption I will consider the application of this factor to the information contained in two statements of death where the only information remaining at issue is the occupation of those individuals. In my view, the disclosure of the generalized description of these individuals' occupations could not reasonably be expected to cause significant personal distress to these individuals within the meaning of the factor at section 21(2)(f) of the *Act*.

In sum, I do not accept that disclosure of the personal information on the birth registration or the statement of death could reasonably be expected to cause significant personal distress to the individuals to whom it relates. Accordingly, I find that the factor at section 21(2)(f) is not relevant and does not apply in the circumstances of this appeal.

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

The Ministry submits that the factor at section 21(2)(h) applies to the informant, the person who supplied the information on the registration of birth. The Ministry submits:

> The VSA has historically been a confidentiality statute, predating the [*Act*]. The current VSA contains the following confidentiality provision:
>
> > 53. (1) No division registrar, sub-registrar, funeral director, person employed in the service of Her Majesty, or other prescribed person shall communicate or allow to be communicated to any person not entitled thereto any information obtained under this Act, or allow any such person to inspect or have access to any records containing information obtained under this *Act*.

Further, section 45(1) of the VSA states:

> Who may obtain copy of registrations
>
> 45. (1) No certified copy of a registration of birth, change of name, death or still-birth shall be issued except to a person authorized by the Registrar General or the order of a court and upon payment of the required fee.

Order P-309 held that section 21(2)(h) was a relevant consideration in an appeal relating to names, dates of birth and addresses of babies born in Ontario that weighed against disclosure. The IPC held that due to section 45(1) of the VSA, individuals registering the required notice would reasonably expect that the information would remain confidential.

Therefore, given the statutory framework of the VSA, and the corresponding expectation of privacy of the individuals identified in the records, the Ministry submits that the individuals supplying information do so in confidence.

In response to the Ministry's position on the application of the factor at section 21(2)(h) in the circumstances of this appeal, the appellant submits:

> As acknowledged by the Ministry, this factor can only be of relevance to the information provided by the informant that pertains directly to the informant himself. Order P-309 held that section 21(2)(h) was relevant to a disclosure of the dates of birth and addresses of babies born in Ontario, and that the informants would reasonably expect that such information would remain confidential. Order P-309 can be distinguished from the present appeal as the birth information is being sought only insofar as it relates to the estate record of the deceased.
>
> In Order PO-1923, the IPC gave little weight to section 21(2)(h) because of the "nature of the information and the needs to use it in ways which would require disclosure in order to effectively administer estates." [The appellant] submits that the information provided by the informant is still similar in nature to the information considered in Order PO-1923 and therefore this factor ought still to be given little weight in this appeal.

Analysis and finding

In Order P-309, former Assistant Commissioner Mitchinson found that section 21(2)(h) was a relevant consideration weighing against the disclosure of information contained on statement of live birth forms filed with the Ministry under the VSA. Order P-309 dealt with a request by a baby goods manufacturer for access to information provided by parents regarding their children born in the previous year. The live birth form included a statement outlining the authority for collecting the information, and listed the purposes for which the registration information would be used. Former Assistant Commissioner Mitchinson 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."

In the circumstances of this appeal, the Ministry claims that the factor at section 21(2)(h) is a relevant consideration with respect to the disclosure of the name and address of the informant, the individual who supplied the information on the registration. Although, from my review of the record, it does not appear that a statement or indication regarding the intended use of the information is contained on the form, given the nature of the information and the provisions of the VSA I accept the Ministry's position that the informant would have a reasonably held expectation that the information provided, including their own information, would be kept confidential. Accordingly, I accept that the factor at section 21(2)(h) is a relevant factor that weighs in favour of non-disclosure of the information.

However, unlike the information that was at issue in Order P-309, the information at issue in this appeal is over 70 years old and is limited to the informant's name and an address, which is unlikely to be current. In light of the age of the information, I do not accept that the factor at section 21(2)(h) should be afforded significant weight. Accordingly, in my view, in the circumstances of this appeal the factor at section 21(2)(h) is a factor that carries low weight in favour of non-disclosure of the information relating to the informant on the registration of birth.

Reasonable expectation of confidentiality

The Ministry submits that a "reasonable expectation of confidentiality" is a relevant consideration in the circumstances of this appeal because the records at issue are governed by the VSA, which is a confidentiality statute. The Ministry submits that section 53(1) of the VSA (as cited above) provides that information and records obtained under the VSA must not be disclosed, and that section 2 of that statute states that such information and records must be safeguarded. The Ministry takes the position that "given the strong confidentiality protection given to the information at issue in this appeal, it is submitted that the individuals identified in the records have a reasonable expectation of privacy."

The Ministry further submits:

> [T]he fact that the Legislature afforded a high level of privacy protection to the information governed by the VSA and at issue in this appeal is a significant factor indicating that disclosure of the information would constitute an unjustified invasion of personal privacy.
>
> Jurisprudence on the "reasonable expectation of privacy" has indicated that the statutory framework upon which records exist is an important factor (*Cheskes v. Ontario (Attorney General),* [2007] O.J. No. 3515). The Supreme Court of Canada has further found that the place where the information was obtained and whether the information constitutes a "biographical core of personal information" that would reveal intimate details of the lifestyle and personal choices of the individual is also determinative of a reasonable expectation of privacy (*Schreiber v. Canada (Attorney General)* [1998] S.C.J. No. 42; *R. v. O'Connor* [1995] 4

> S.C.R. 411). It is respectfully submitted that the statutory framework of the VSA, combined with the nature of the information in the records at issue, gives rise to a reasonable expectation of confidentiality.
>
> Given the statutory framework of the VSA, and the corresponding expectation of privacy of the individuals identified in the records, it is submitted that the factor of expectation of confidentiality must be considered as an important factor against disclosure of the information at issue.

The appellant submits:

> [T]here is no reasonable expectation of privacy in regards to the information requested. It would be reasonably expected that information provided in a death registration would be used in relation to the death of that individual. One such activity relating to the death of an individual is the settling of the deceased's estate. This is the precise reason for [the appellant's] request, that the unknown heirs be found and the estate settled.
>
> [The appellant] further submits that in relation to the information provided in the marriage registration, there too is no reasonable expectation of privacy. Marriage by nature is a public institution. Marriage is a public declaration of the relationship between two parties. It is publicly recognized and publicly supported. Spouses are afforded special status and public funds aid spouses, through pension plan benefits and other programs. In light of the public nature of marriage, there can be no reasonable expectation of privacy in regards to the information relating to the marriage as outlined in the marriage registration.

In its reply representations, the Ministry submits:

> With respect to the information on the statement of death, the Ministry further submits that although there may be a reasonable expectation that the information would be released in the administration of the estate, that expectation would be that the information would be released to the estate trustee, or with the consent of the estate trustee, only.
>
> With respect to the information on the statement of marriage, the Ministry respectfully submits there is no marriage registration at issue in the present appeal.

Analysis and finding

In the circumstances of this appeal, I accept the Ministry's position that based on the provisions of the VSA, there is a reasonable expectation that personal information provided on a birth registration and a statement of death, would be kept confidential. Accordingly, I accept that the unlisted factor, reasonable expectation of confidentiality, is a relevant factor that weighs in favour of non-disclosure of the information.

However, the only personal information that remains at issue in the two statements of death are the generalized description of the individuals' occupations. At issue on the birth registration is the personal information about the individual to whom the registration relates (their full name, sex, whether they were born a single, twin, triplet or other, whether they were born alive, and their birth date), as well as the information relating to the informant (name and address). I do not agree with the Ministry's suggestion that any of this information constitutes a "biographical core of personal information" that would reveal intimate details of the individual's lifestyle and personal choices as considered by the Supreme Court of Canada in *Schreiber*. In my view, given the nature of this information, the unlisted factor of reasonable expectation of confidentiality carries low weight in favour of non-disclosure.

Identity theft

The Ministry submits that a relevant circumstance in determining whether the disclosure of the personal information at issue would constitute an unjustified invasion of privacy is "the risk of the personal information being used by members of the public to perpetrate the crime of identity theft." The Ministry submits that "[a] person's name, combined with their date of birth, gender, last known address and parents' name, is data that is particularly sensitive to being used for identity theft." The Ministry also submits that the disclosure of a person's residential address poses a particular risk of identity theft, as it can be used to steal that person's mail or have it redirected in an effort to collect credit cards, bank statements, tax information or other personal data. The Ministry further submits that the issue of identity theft raises concerns relating to the factor listed in section 21(2)(i) (damage to reputation) as an identity thief could engage in fraudulent or other criminal acts while using the individual's information. The Ministry points to the publications *Identity Theft: Who's Using Your Name,* issued by this office in June 1997, and *Identity Theft Revisited: Security is Not Enough*, issued by this office in September, 2005 in support of its arguments.

The Ministry also addresses a prior order that discussed the relevance of identity theft:

> The IPC has considered the potential misuse of personal information for identity theft as a factor in [Order] PO-2198, according it little weight, given the sparse amount of personal information at issue in the appeal. In this decision, the IPC noted that in different circumstances, the consideration of identity theft may have greater relevance and be afforded greater weight. The Ministry submits that given the large amount of personal information at issue in this appeal, and the fact that it relates to a number of parties, including 2 parties that could still possibly be alive, this factor should be accorded greater weight. Moreover, given the increased presence of this crime in society today, the risk of identity theft resulting from disclosure must be strongly weighed in favour of privacy protection and against disclosure.

The appellant disagrees with the Ministry's position with respect to identity theft because, it submits, were the information disclosed to it, the provisions of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) would apply and the disclosure of the information would not be equivalent to disclosure to the world at large. The appellant also

submits that "there is no evidence to suggest that it is unwilling or incapable of reasonably protecting the information received which ought to raise concerns of potential identity theft problems."

Responding to the Ministry's reference to Order PO-2198, the appellant submits:

> In Order PO-2198, the IPC discussed the issue of identity theft in regard to 14 requests for death registrations. The IPC noted that the "personal information contained in [the] records relating to the deceased persons and their parents is, to say the least, sparse." The IPC continued that the records at issue could not "reasonably be used to assist in perpetrating 'identity theft' or some other fraudulent activity." While the IPC noted that the issue could be afforded greater weight in regards to different types of information, the information in the case before us is largely similar to that being considered in Order PO-2198.

Analysis and findings

As noted by the Ministry, the relevance of "identity theft" was previously addressed by Adjudicator Donald Hale in Order PO-2198, which dealt with access to information contained on the death registrations (statements of death) of fourteen named individuals. I agree with the appellant that, for the most part, the information that has been disclosed and remains at issue in the current appeal is very similar to that being considered in Order PO-2198. In Order PO-2198 the specific information at issue consisted of the day and month of birth of the deceased, their place of birth, their usual or last known address, and their parents' names or birthplaces. Additionally, in that appeal, the Ministry had previously agreed to disclose the deceased individuals' years of birth, dates of death, town and municipality of death, marital status, sex, age at death and the names and information of parents who were born in 1910 or earlier. In my view, the information at issue in Order PO-2198, together with the information that the Ministry had already disclosed to the appellant, is very similar to the information at issue in the current appeal.

As previously stated, the only information that remains at issue is the occupation of the deceased on two of the three statements of death, the information relating to the individual to whom the registration of birth relates, and the name and address of the informant who provided the information on the birth registration. In my view, considering the nature of this information, including the fact that the information relating to the informant is over 70 years old, I do not accept that disclosure of this information could reasonably be expected to give rise to identity theft any more than the information that has already been disclosed by the Ministry. Moreover, I do not accept, nor do I find that the Ministry has demonstrated, that the disclosure of this specific information could reasonably be expected to be used to assist in some other fraudulent activity within the meaning of the factor at section 21(2)(i).

Accordingly, I find that identity theft does not apply in the circumstances in this appeal.

Diminished privacy interest after death

The Ministry submits that "diminished privacy interest after death," a circumstance which has been found to be relevant in previous orders, should be applied with caution. The Ministry points to Order P-945 where Senior Adjudicator John Higgins stated that section 2(2) of the *Act:*

> … makes it abundantly clear that the legislature intended to extend the *Act*'s privacy protection provisions to deceased individuals, unless they have been deceased for more than thirty years… In view of the fact that the *Act* makes explicit provision for the protection of the privacy of deceased individuals, it is my view that the [circumstance] identified in Order M-50 should only apply in exceptional circumstances.

Regarding the birth registration, the Ministry submits:

> In Order P-1232, the IPC found that where there is no evidence indicating that the individual is in fact dead, the [circumstance] of diminishing privacy interest after death is not relevant. As a result, it is the Ministry's submission that this [circumstance] should not be applied to the individuals identified in the birth registration record.
>
> …
>
> With respect to the birth registration there is no evidence indicating that the individuals identified within have in fact died. Given this, the Ministry submits that the [circumstance] of diminished privacy interest after death should be given no weight when applied to the personal information of the individuals identified in the birth registration.

Regarding the information at issue on the statements of death, the Ministry submits:

> On the facts of this appeal, the deceased individuals in the statements of death have been dead for 29 years, 26 years and 23 years.
>
> The intent of the *Act* is that these individuals continue to have a degree of privacy until the 30-year mark. The Ministry submits that the degree of privacy applied to the personal information of these individuals is still sufficient, given the presumed invasion of privacy criteria set out in the *Act*, where a disclosure will be an unjustified invasion of personal privacy.

In response, the appellant submits:

> In the present case, [the appellant] is requesting the disclosure of information that is not highly sensitive and in circumstances, where it has been consistently held there is a reduction in the privacy interests of the deceased individual. Section 2(2) of the *Act* specifically provides that after an individual has been deceased for

> 30 years they no longer have personal information. In the cases before us, the individuals have been deceased since 1979, 1982 and 1985, meaning that they have been deceased for approximately 23 to 29 years.
>
> [The appellant] does not submit that the privacy rights are eliminated but rather that the privacy rights are reduced. Such a reduction is not contrary to section 2(2) of the *Act* which provides that after 30 years, the privacy rights are eliminated altogether. As the *Act* clearly provides for the elimination of privacy rights after 30 years, it is reasonable to assume that the longer an individual has been deceased, their privacy rights become similarly increasingly diminished, to the point that after 30 years of death, the individual has no privacy rights whatsoever. The unlisted factor of diminished privacy after death is merely a factor to be weighed in the determination as to whether disclosure would constitute an unjustified invasion of personal privacy.

Analysis and findings

The information that remains at issue on the birth registration is information relating to the individual and the informant. I agree that there is no evidence indicating that these individuals are in fact dead. Therefore, in keeping with Order P-1232, referred to by the Ministry, I find that the circumstance of "diminished privacy interest after death" does not apply to this information.

With respect to the occupations listed on the two statements of death that remain at issue, in keeping with prior orders of this office, I find that "diminished privacy interest after death" is a relevant circumstance favouring the disclosure of the information at issue on the birth registration and the statements of death. However, I must now determine the weight that must be attributed to this relevant circumstance.

Previous orders issued by this office have considered "diminished privacy" interest after death as a relevant circumstance weighing in favour of disclosure. Where more than one year has passed since the date of death, they have found that this circumstance should be attributed moderate weight [See for example: PO-1736 (upheld on judicial review in *Ontario (Public Guardian and Trustee) v. Goodis* (December 13, 2001), Toronto Doc. 490/00 (Ont. Div. Ct.), leave to appeal refused (March 21, 2002), Doc. M28110 (C.A.)), PO-1936, PO-2240, PO-2260, PO-2298 and PO-2623]. In Order PO-2260, Adjudicator DeVries stated:

> [Former] Assistant Commissioner Mitchinson recently considered whether the "diminished privacy interest after death" factor applies where an individual had been dead for less than 12 months. In Order PO-2240, he first reviewed his findings that there existed a diminished privacy interest after death in PO-1717 and PO-1936. He then stated:
>
> > In the current appeal, the deceased died on December 3, 2002, less than four months before the appellant submitted his request to the OPGT 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 [circumstance] 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 [circumstance] for at least the first year following death.

> I accept the approach taken by Assistant Commissioner Mitchinson in applying the [circumstance] of a "diminished privacy interest after death." As established in Order PO-2240, I do not attribute any significant weight to this [circumstance] for at least the first year following death.
>
> However, after one year following the date of death, I find that this [circumstance] 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 [circumstance] applied where, at the time of the request, the deceased individual had been dead for approximately two years. He found that … "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 … a "diminished privacy interest after death" … 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 agree with Adjudicator DeVries' approach and adopt it for the purpose of the current appeal.

The individuals for whom their occupation listed on their statement of death remains at issue died in 1982 and 1985. Because both of these individuals have not been dead for 30 years, their occupations do not fall within the scope of the exception at section 2(2) and qualify as personal information. Given the wording of section 2(2), I accept the Ministry's submission that "diminished privacy interest" should be applied with careful consideration to the particular facts and circumstances of each case. However, as of the date of this order, the dates of death are only within several years of the 30 year deadline where an individual's privacy rights are eliminated pursuant to section 2(2) of the *Act*, I find that the circumstance of diminished privacy interest after death should be attributed significant weight with respect the disclosure of the information relating to the deceased's occupation.

Benefit to unknown heirs

Threshold issue – application of PIPEDA

The Ministry submits that given that private heir tracers like the appellant are unregulated, before the circumstance referred to in previous orders as "benefit to unknown heirs" can be considered, it must be established that the appellant's collection and use of the personal information at issue in the appeal is in accordance with *PIPEDA*. The Ministry submits that the appellant's ability to use and collect personal information under *PIPEDA* is a relevant consideration when determining whether there is a benefit to unknown heirs because there can be no benefit if the appellant cannot collect and use the information it seeks. The Ministry explains:

> [S]ubsection 7(1) of *PIPEDA* provides limitations on the collection of personal information. The Ministry has reviewed this section, and respectfully submits that it is uncertain of the authority the appellant is relying on to collect personal information relating to the deceased individual and the other individuals identified in the records. Furthermore, it is unclear that the individuals identified in these records will be informed of the collection and given the ability to consent to the collection and use.
>
> Moreover, the Ministry submits that there can be no benefit to unknown heirs from the disclosure of the personal information if the commercial heir tracers are not authorized to use the personal information. Subsection 7(2) of *PIPEDA* provides that personal information may only be used without the knowledge or consent of the individual, in limited circumstances. It is respectfully submitted that it is not clear if the use of personal information by the appellant fits into one of the permitted circumstances outlined in subsection 7(2) of *PIPEDA*. The Ministry submits that the onus lies with the appellant to demonstrate to the Ministry how it is authorized to collect, use and disclose the personal information for the commercial purpose of locating unknown heirs and charging those heirs a finder's fee. If the Ministry and the appellant disagree as to the appellant's authority to collect, use and disclose personal information for this commercial purpose under *PIPEDA*, the matter can be referred to the Federal Privacy Commissioner for determination pursuant to section 11 of *PIPEDA*.
>
> In sum, the Ministry respectfully submits that the factor "benefit to unknown heirs" cannot be considered until such time as the lawful authority of the appellant to make commercial use of the information sought is established.
>
> In the circumstances of this appeal, as any benefit to unknown heirs depends on the commercial use of personal information that may be restricted by privacy legislation, it is submitted that the unlisted factor of benefit to unknown heirs be accorded no weight.

The appellant takes the position that *PIPEDA* does not apply for two reasons. First, the appellant submits that *PIPEDA* does not apply to the Ministry, "as it is not engaged in a commercial

activity" as required by section 4(1)(a) of that act. Additionally, the appellant submits that based on a comparison of the definitions of "personal information" and "personal health information" the collection, use and disclosure of personal information of a deceased individual is not governed by *PIPEDA* unless the information qualifies as personal health information. The appellant submits:

> Section 1 of *PIPEDA* includes the following definitions:
>
> > "*personal information"* means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.
> >
> > *"personal health information"*, with respect to an individual, ***whether living or deceased,*** means … [emphasis added].
>
> [The appellant] submits that if the legislature intended information related to deceased individuals to be governed by *PIPEDA*, it would have included the phrase "whether living or deceased" in the definition of "personal information" as it did in the definition of "personal health information."

In the alternative, the appellant submits that if the collection of personal information of deceased individuals is governed by *PIPEDA*, the collection of the information at issue in this appeal is exempt from the need for consent pursuant to section 7(1) of that act. The appellant submits:

> Section 7 of *PIPEDA* lists certain exceptions to the general rule that personal information may be collected, used or disclosed by an organization in the course of commercial activities only with the individual's knowledge and consent. Section 7(1) states:
>
> > [A]n organization may collect personal information without the knowledge or consent of the individual only if
> >
> > > (a) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way.
>
> The individuals with respect to whom the information at issue relates are deceased. They obviously cannot consent, except through their personal representative or Estate Trustee, which is the OPGT. The OPGT has a statutory and trust obligation to act in the interest of the deceased individuals it represents. It is in the interest of the deceased (and of course in the interest of the deceased's heirs at law) to locate the heirs of the deceased's estate and enable the heirs to prove their entitlements.

The appellant further submits that if the exception at section 7(1)(a) does not apply, the appellant is permitted to collect the information with the consent of the person authorized to give consent,

the OPGT. The appellant submits that providing such consent in the circumstances of this case furthers the legislative mandate of the OPGT and its duties as personal representative and/or estate trustee of the estate of the deceased individuals.

The appellant also takes the position that disclosure of information without knowledge or consent is governed by section 7(3) of *PIPEDA* and submits:

> Section 7(3)(h) states that disclosure without knowledge or consent of the individual may be made after the earlier of
>
> (i) one hundred years after the record containing the information was created, and
>
> (ii) twenty years after the death of the individual whom the information is about.
>
> [The appellant] submits that the records in the estate files are records about the deceased, and since all three deceased who are the subjects of this appeal have been deceased for more than 20 years, the information contained in their files is covered by section 7(3)(h)(ii) of *PIPEDA*.

The appellant explains that the purpose of the relevant part of *PIPEDA* set out in section 3 should be considered. That section states:

> The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information **and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances** [emphasis added by appellant].

In its reply representations, the Ministry restates that the threshold question relating to the application of *PIPEDA* must be determined before considering the relevance of any "benefit to unknown heirs" in the circumstances of this case.

The Ministry submits that the appropriate forum to determine the question of the application of *PIPEDA* to the appellant is the federal privacy commissioner and that the IPC should direct the parties to the federal commissioner before making a final determination on the issues in the appeal:

> The IPC has held that where the application of *PIPEDA* is at issue, this question is properly addressed by the Office of the Privacy Commissioner of Canada. In Reconsideration Order PO-2590-R, the IPC concluded that it was neither necessary nor desirable for the Ontario IPC to adjudicate an issue under *PIPEDA*, "a function, which the Parliament of Canada, has expressly assigned to the

> Privacy Commissioner of Canada." Previously where the application of *PIPEDA* had been raised on appeal, it had been in the context of a potential conflict between *PIPEDA* and [the *Act*]. In the present case, the Ministry submits that there is no issue of conflict. Rather, the issue in this appeal is the application and compliance with *PIPEDA*. This is a question of law that ought to be addressed in the federal forum.
>
> Accordingly, in the circumstances, it would be appropriate for the IPC to direct the parties to the Privacy Commissioner of Canada for a determination of the threshold question, and then require the parties to return the matter to the IPC for a final determination on the issues in the appeal.

Responding to the appellant's representations, the Ministry submits:

- The definition of "personal information" includes the personal information of deceased individuals as deceased individuals are still identifiable individuals. Also, *PIPEDA* does not expressly exclude deceased individuals from its definition of "personal information." Also section 7(3)(h)(ii) of *PIPEDA* refers to disclosure twenty years after the death of the individual to whom the information is about.

- Section 7(1)(a) of *PIPEDA* cannot operate to authorize the appellant to collect the personal information without consent as consent can, in fact, be obtained in a timely way. The appellant can obtain consent from the authorized representative of the deceased individual, which is the OPGT as estate trustee.

- Section 7(1)(a) can only apply if collection is clearly in the interests of the individuals. Given the large fees charged by the appellant and the uncertainty over the potential heirs' opportunity to make an informed choice in dealing with the appellant, the Ministry submits that the collection of personal information by the appellant would not clearly be in the interests of the individuals.

- OPGT should be added as an affected party to make submissions on whether it is obligated to consent to the disclosure of the personal information at issue in the appeal.

Analysis and finding with respect to the threshold question of the application of PIPEDA

For a number of reasons, I disagree with the Ministry's position that the appellant's ability to collect and use the information at issue in accordance with *PIPEDA* is a threshold question that must be established before determining whether "benefit to unknown heirs" is a relevant consideration in the circumstances of this appeal.

Under the *Act*, the public has a right to request access to recorded information held by provincial government institutions subject to limited and specific exemptions. *PIPEDA* is a separate scheme that governs the collection, use and disclosure of personal information by commercial businesses. As *PIPEDA* does not apply to government institutions, the disclosure of information held by the Ministry is entirely governed by the *Act*. In the current appeal, the issue before me is

whether, pursuant to the *Act*, the Ministry is required to disclose the requested information or whether any of the discretionary or mandatory exemptions apply. The *Act* does not require that a requester explain the purpose of the access request or what use would be made of the requested information if access is granted.

As acknowledged by the Ministry, it has been previously established that there is no conflict between *PIPEDA* and the *Act* and therefore, that the doctrine of paramountcy does not apply. In Order PO-2590-R, Adjudicator DeVries found that the existence of *PIPEDA* was not a relevant unlisted circumstance favouring non-disclosure, in and of itself. In the current appeal, the Ministry submits that it is making a different argument: that "benefit to unknown heirs" cannot be considered before it can be determined whether the appellant can collect, use and disclose the information in accordance with *PIPEDA*. As a result, the Ministry submits that this office must refer the matter to the Privacy Commissioner of Canada for a determination on the application of *PIPEDA* before it can make a final determination on the issues in this appeal. The Ministry specifically states in its representations that it is not alleging that there is a conflict between *PIPEDA* and the *Act*; it argues that the application and compliance with *PIPEDA* is a question of law that must be determined in the federal forum before this appeal can be decided under the *Act*.

In my view, despite the Ministry's express statement that the doctrine of paramountcy does not apply, its position amounts to a paramountcy argument. If the application of federal legislation must be determined prior to the application of provincial legislation, no matter how it is characterized this is essentially an argument that the federal legislation is paramount and excludes the application of the *Act*.

In Canadian constitutional law, the doctrine of paramountcy dictates that where there is a conflict between valid provincial and federal laws, the federal law will prevail and the provincial law will be inoperative to the extent that it conflicts with the federal law. The fundamental test for establishing paramountcy was articulated by the Supreme Court of Canada in *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161 and was recently followed in *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. 3. In *Multiple Access* it was established that paramountcy can only be invoked when the compliance with one law means the breach of another. In my view, if the doctrine of paramountcy does not apply and there is no conflict between the two acts, it cannot be said that one matter must be established before the other as both statutes operate concurrently.

In Order PO-2590-R, Adjudicator DeVries considered the issue of whether *PIPEDA* impacts requests made by commercial heir tracers. In that reconsideration order, the OPGT took the position that *PIPEDA* applied in the circumstances of that appeal, and that the doctrine of paramountcy applied to prohibit this office from ordering disclosure of any personal information. As the Ministry was questioning the validity or applicability of certain sections of the *Act*, pursuant to section 109 of the *Courts of Justice Act*, Adjudicator DeVries sent a Notice of Constitutional Question to the parties and to the Attorneys General of Canada and Ontario inviting them to provide written representations on the identified Constitutional Question. Representations were received from the Attorney General of Ontario (the Attorney General) who took the position that the doctrine of paramountcy did not apply in the circumstances. In Order PO-2590-R, Adjudicator DeVries quoted from the representations submitted by the Attorney General:

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 restriction 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(1)(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.

Prior to the issuance of Order PO-2590-R, the OPGT revised its representations, withdrew its position regarding the paramountcy of *PIPEDA*, and deferred to the Attorney General on the issue. Nevertheless, in my view, the Attorney General's position on the lack of overlap between the federal and provincial laws is relevant. I agree with the position taken by the Attorney General in the submissions I have just quoted, and I find that the doctrine of paramountcy has no application in the current appeal.

I now turn to the specific argument made by the Ministry, to the effect that the relevance of "benefit to unknown heirs" cannot be considered before it can be determined whether the appellant can collect, use and disclose the information in accordance with *PIPEDA* and that this

office must refer the matter to the Privacy Commissioner of Canada before it can make a final determination on the issues in this appeal. For the reasons that follow, I disagree.

In Order PO-2590-R Adjudicator DeVries also addressed the issue of whether the existence of *PIPEDA* should be considered, in and of itself, a relevant circumstance under section 21(2). In that order he stated:

> 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 [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.

I agree with the approach taken by Adjudicator DeVries in Order PO-2590-R. I find that even though the Ministry has characterized its argument differently, arguing that the application of *PIPEDA* is a threshold question to be established prior to a determination of the relevance of "benefit to unknown heirs" rather than *PIPEDA* being a relevant circumstance under section 21(2), in and of itself, Adjudicator DeVries' reasoning is equally applicable to the Ministry's current argument.

As explained by Adjudicator DeVries, *PIPEDA* and the *Act* are separate legislative schemes that apply to different bodies. The *Act* provides a public right of access to information held by provincial government institutions unless a legislated exemption or exclusion applies. The processes under the *Act* have been found to be distinct from other processes, including the application of *PIPEDA*. The provisions of *PIPEDA* provide a comprehensive procedure to determine the application of that legislation in particular instances, and also provide remedies for breaches of that legislation.

For the same reasons, I do not agree that the application of *PIPEDA* to the appellant is a threshold question that must be established prior to a determination of the relevance of "benefit to unknown heirs." The *Act* and *PIPEDA* are distinct pieces of legislation that operate concurrently, independently from one another. Accordingly, I reject the Ministry's argument that the matter must be referred to the Privacy Commissioner of Canada before the issues on appeal can be determined.

Although I have found that it is not necessary for the determination of this appeal that this office refer the matter to the Privacy Commissioner of Canada, I am not suggesting that I have made a determination as to whether or not the appellant is entitled to collect, use or disclose the personal information at issue in accordance with *PIPEDA*. Such finding would be in excess of my jurisdiction and is a matter to be determined through the separate process established by that statute. The Ministry's argument suggests that it is the obligation of this office to refer the matter to the Privacy Commissioner of Canada. I disagree. The Ministry acknowledges that, as

estate trustee, the OPGT is the authorized representative of the deceased individual and, therefore, under section 7(1)(a) is the body that is authorized to consent to the collection of the deceased's personal information. In my view, as the estate trustee, it is also the OPGT and not this office that has the authority to apply to the Privacy Commissioner of Canada to request a review of the collection of the deceased's personal information by the appellant to determine whether or not it is in accordance with *PIPEDA*. To the best of my knowledge, the OPGT has not done so.

As an aside, I note that in the Ministry's reply representations it submits that the OPGT should have been added as an affected party to make submissions on whether it is obligated to consent to the disclosure of the personal information at issue. In the circumstances of this appeal, it was the Ministry and not the OPGT that processed the request. If the Ministry had required the input or assistance of the OPGT in the preparation of its representations it would have been entitled to obtain that assistance and incorporate the concerns or positions expressed by that office at the adjudication stage of the appeal. In fact, in portions of the Ministry's representations, it does reference positions taken by the OPGT suggesting that it did indeed consult it on this appeal. Accordingly, if the Ministry felt that the input of the OPGT, as estate trustee, was required to address the issue of consent to the disclosure of the personal information at issue it was not precluded from seeking submissions from or consulting with the OPGT. It is well established that for the purpose of making representations in the course of an appeal under the *Act*, the Government of Ontario is indivisible and "speaks with one voice." Accordingly, where a ministry has assumed the responsibility of processing an access request, it is that ministry which should speak for and represent the interest of the provincial government as a whole. This approach has been applied in many previous decisions of this office [See Orders P-270, P-395, P-902, P-965, P-902, PO-1846-F and PO-2126].

Benefit to unknown heirs – representations of the parties

As I have found that the application of *PIPEDA* to the appellant is not a threshold question that must be determined prior to establishing whether "benefit to unknown heirs" is relevant in the circumstances of this appeal, I will now consider whether this is a relevant circumstance, and, if so, what weight it should be afforded.

Previous orders issued by this office have found that "benefit to unknown heirs" is a consideration weighing in favour of disclosure. [See for example: Orders P-1493, PO-1717, PO-1736, PO-2012-R, PO-2240, PO-2260 and PO-2298]. However, these orders have established that this factor is fact-specific and highly dependent on the particular circumstances of each appeal [PO-2240].

In Order PO-1717, former Assistant Commissioner Mitchinson discussed the rationale for considering "benefit to unknown heirs" as a relevant circumstance under section 21(2) favouring disclosure:

> The appellant … submits that disclosure of the requested information pertaining to the deceased's estate will help unknown heirs recover funds that they would otherwise be unlikely to receive. I considered this [circumstance] in Order P-

> 1493, involving a request by an heir tracer to the Ministry of Consumer and Commercial relations for access to marriage and death records. In Order P-1493, I stated:
>
> > In the appellant's view, disclosure of the records would serve to benefit individuals who would otherwise never know and never be able to prove their entitlement under an estate. Although not directly related to any of the section 21(2) considerations, I find that this is an [circumstance] favouring disclosure.
>
> Similarly, I find that this [circumstance] is a relevant consideration in the present appeal.

This approach was followed in subsequent orders, including Orders PO-1736, PO-1923, PO-2240 and PO-2260. In the current appeal I accept the possibility that disclosure of personal information contained in a statement of death and a birth registration could reasonably be expected to result in individuals successfully proving their entitlement to assets of a deceased's estate and that this amounts to a "benefit to unknown heirs." Accordingly, I find that "benefit to unknown heirs" is a relevant circumstance weighing in favour of disclosure.

With respect to the weight that should be attributed to this relevant circumstance, the Ministry takes the position that it should be afforded low weight given that it is not clear that there will be a benefit to unknown heirs. The Ministry submits:

> Commercial heir tracers remain unregulated, and accordingly the fees and contractual arrangement through which they provide their services are unknown. The Ministry therefore submits that before any benefit to unknown heirs may properly be considered, the appellant should be required to provide evidence surrounding its fees and practices that demonstrate that there will be a benefit to unknown heirs. Accordingly, without further information, the Ministry must give low weight to the unlisted factor of benefit to unknown heirs.

Addressing the application of "benefit to unknown heirs" to the information at issue, the Ministry submits:

> In [Order] PO-2260, the IPC found that the weight attributed to the unlisted factor of benefit to unknown heirs is significantly reduced within the first year following the date of death.
>
> While the unlisted factor of benefit to unknown heirs was found to be relevant upon the date of death, the IPC found that "the likelihood that the disclosure of information will result in individuals proving their entitlement to assets of estates which they may not have been able to otherwise increases as the time since the date of death elapses." Given that access to the personal information is being sought by an unregulated commercial entity for a commercial purpose, the

> Ministry submits that the unlisted factor of benefit to unknown heirs should be given no significant weight [Order PO-2260].
>
> The Ministry submits that disclosure of the information contained in a birth registration whereby the individual cannot even be presumed dead does not trump the privacy interests of the individual to whom the information relates. Further, there cannot be a benefit to unknown heirs if there is no evidence that the individuals identified in the record are even dead.

The appellant submits that disclosure of the personal information at issue increases the possibility of locating rightful heirs who might otherwise remain unknown. The appellant states that even though the estates have escheated to the Crown as the OPGT has been unable to locate the rightful heirs, the appellant has been successful on numerous occasions in locating a rightful heir when the OPGT has been unable to do so. The appellant supports its position with an affidavit sworn by its president which cites a number of examples where it has been successful in locating unknown heirs and the OPGT has not.

Addressing the Ministry's concern regarding the fees associated with commercial heir tracers such as the appellant, the appellant submits that their services are offered to potential heirs who are under no obligation to retain the appellant and are free to make informed decisions as to how they wish to proceed. The appellant further submits that a reasonable person who died intestate would want his or her heirs to be determined and receive their inheritance as quickly and as efficiently as possible. The appellant also submits that a reasonable person would want his or her heirs to be able to choose whether to use the services of a commercial service provider or a government agency to receive such inheritance. Accordingly, the appellant submits that although there is no express obligation on the OPGT to consent to the disclosure it should be implied because it has a statutory and trust obligation to act in the best interest of the deceased and his or her heirs.

In sum, the appellant takes the position that "benefit to unknown heirs" is a relevant circumstance that weighs in favour of the requested disclosure.

In its reply representations, the Ministry submits that the facts of the current appeal can be distinguished from those in Orders PO-1717, PO-1736, and PO-1923. The Ministry submits that in the present case there is now evidence of the quantum of fees charged by the appellant which the Ministry submits are "disproportionate to the services provided and accordingly, unfair and unreasonable."

The Ministry submits that the costs charged by the OPGT are substantially less as they are regulated by legislation and they can be "challenged in a passing of accounts proceeding before the court." The Ministry submits:

> [A]bsent compelling evidence to justifying the quantum of the fee charged by the appellant, the IPC must conclude that the potential reduction on an heir's entitlement to the estate outweighs the benefit to the heir in circumstances where that heir is located by an heir tracer in advance of the OPGT.

> In addition, the Ministry submits that the quantum of fees charged by the appellant is itself an unlisted factor that must be weighed in determining whether the disclosure of information is of benefit to the heir. In the present case, the Ministry submits that the fees are disproportionate to the services provided and unreasonable. These factors weigh in favour of non-disclosure of the information.

Responding to the affidavit evidence submitted by the appellant identifying situations where it was successful in locating unknown heirs the Ministry submits:

> [T]he evidence of the success of the appellant ought to be assessed against a full evidentiary record. Notably, the appellant has not advanced evidence of cases where people where unhappy with the services and the fees charged by the appellant. Therefore, it is not possible to evaluate the success of the appellant.

Analysis and finding – Benefit to unknown heirs

Both parties agree that, in keeping with previous orders issued by this office, "benefit to unknown heirs" is a relevant consideration weighing in favour of the disclosure of information that would help unknown heirs recover funds that they would otherwise be unlikely to receive. However, based on the facts and circumstances of the current appeal, as well as the information that remains at issue, the Ministry takes the position that "benefit to unknown heirs" should be attributed low weight because it is not clear that there will, in fact, be a benefit to unknown heirs.

Specifically, the Ministry argues that the heir tracing business is an unregulated commercial business and the fees charged by the appellant are not only higher than those charged by the OPGT but are also "unreasonably high" and therefore, that low weight should be given to "benefit to unknown heirs." Previously in this order I dismissed an argument that the fees charged by the appellant would expose potential heirs to pecuniary or other harm or that any such exposure would be unfair because they are free to either reach an agreement with a commercial heir tracer or not. In my view, similar reasoning applies to this argument. I find that there is a "benefit to unknown heirs" in the mere knowledge that there exists an estate to which they may be entitled and it is their decision as to whether they will engage the services of a commercial heir tracer or contact the OPGT. Accordingly, I do not accept the Ministry's argument that the fees charged by the appellant negate the potential "benefit to unknown heirs" to the extent that it should be attributed no significant weight.

With respect to the information on the birth registration, the record itself formed part of the estate file of one of the deceased individuals but during mediation the Ministry advised that it did not know the individual's connection to the deceased. The Ministry argues that disclosure cannot benefit unknown heirs if there is no evidence that the individual identified in the record is even dead. I accept the Ministry's argument in this respect. Accordingly, I find that "benefit to unknown heirs" carries no weight with respect to the disclosure of the information about the individual and the informant that remains at issue on the birth registration.

The general approach of this office with respect to the application of "benefit to unknown heirs" was set out by Senior Adjudicator Goodis in Order PO-1736:

> I agree with the approach taken by the Assistant Commissioner in [Order PO-1717], and similarly find that the potential for disclosure of the information at issue *to lead to individuals proving their entitlement to assets of estates which they may not have been able to otherwise* is a significant [circumstance] favouring disclosure. (emphasis added)

Subsequent orders have adopted this approach to assist in the determination of the weight to be attributed to "benefit to unknown heirs" by establishing that the weight varies according to the extent to which a particular item of personal information assists in the identification of potential heirs. For example, in Order PO-2298, Adjudicator DeVries stated:

> In the circumstances of this appeal, the date of death, place of death, age, date of birth, place of birth, marital status, occupation and place of occupation of the deceased, addresses, and name of the deceased's father could reasonably be expected to assist in the identification of potential heirs. Applying similar reasoning to that followed by Senior Adjudicator Goodis in Order PO-1736 and Assistant Commissioner Mitchinson in Order PO-1923 and PO-1936, I find that this [circumstance] applies to a high degree as it relates to the date of death; to a moderate to high degree to the place of death, date of birth, place of birth, age, marital status, address, and occupation information of the deceased, and to the name of the deceased's father; and not at all to the deceased's social insurance number, health number or other identifying numbers of the deceased.

I agree with the approach taken by Adjudicator DeVries in Order PO-2298 and adopt it for the purposes of the current appeal.

The particular information that remains at issue in this appeal is the occupation of the deceased listed on the statement of death for the individuals who died on July 19, 1982 and November 16, 1985. Although I accept that, in some circumstances, the disclosure of information about the occupation of the deceased could reasonably be expected to assist the appellant to locate individuals who are entitled to the assets of the deceased's estate, the particular information in this appeal is a one word, very generalized description of the type of work done by the deceased, which is unlikely to assist the appellant in locating the deceased's next of kin. Accordingly, I find that "benefit to unknown heirs" carries low weight for the specific information on the statements of death relating to the deceased's occupations.

Summary of findings and balancing of the section 21(2) factors

I have found that the listed factors at sections 21(2)(a), (c), and (d) favouring disclosure and the factors at sections 21(2)(e) and (f) favouring non-disclosure do not apply in the circumstances of this appeal. However, I have found that the factor weighing in favour of non-disclosure at section 21(2)(h) is a relevant factor to be considered with respect to the information on the birth registration relating to the informant but that it should carry little weight.

With respect to the other circumstances raised by the parties, with the exception of "identity theft" which I have found does not apply, I have found that three of them are relevant in the

circumstances of the current appeal. Having considered the representations of the parties and previous decisions issued by this office, I have attributed the following weight to the three "relevant circumstances" that have been identified in this appeal:

- *Reasonable expectation of confidentiality* – favours non-disclosure – low weight for all of the personal information at issue.

- *Diminished privacy interest after death* – favours disclosure – does not apply to the information relating to the individual and the informant on the birth registration; significant weight for the occupation listed on the statement of death.

- *Benefit to unknown heirs* – favours disclosure – low weight for the occupation listed on the statement of death; no weight for the information relating to the individual and the informant on the birth registration.

Balancing the weight attributed to the factors listed above for the deceased's occupation on the statements of death, I find that disclosure of that information would not constitute an unjustified invasion of the privacy of the individuals to whom it relates. Accordingly, I find that this information is not exempt from disclosure under section 21(1) and I will order that it be disclosed to the appellant.

However, balancing the weight attributed to the factors listed above for the personal information on the birth registration relating to the individual and the informant, I find that disclosure of this information would constitute an unjustified invasion of the personal privacy of these individuals. As section 21(4) does not apply to this information, subject to my discussion below on the application of the public interest override provision, I find that this information qualifies for exemption under section 21(1) of the *Act* and should not be disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

Although the appellant did not raise the issue of the possible application of the compelling public interest during mediation, the Ministry addressed this issue in its representations and the appellant responded. Accordingly, I have included it as an issue in this order.

Section 23 states:

> 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 be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773 and M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is important to note that section 21 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].

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as

particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that as the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure." [Order MO-1254]

Representations

The Ministry takes the position that there is no compelling public interest in the disclosure of the information at issue. It submits:

> In Order PO-1923, the IPC considered the application of section 23 to an access request for similar records that were sought by a public body for the purpose of locating potential heirs to an estate. Despite the fact that the requester in that particular circumstance represented a public institution, the IPC found that the interest the requester represented was a private rather than a public interest. The IPC reached this determination considering the fact that if heirs of the deceased's estate were identified, any proceeds would flow to the heir, not the public institution. Therefore, the interest was found to be the private interest of the potential heirs, and not a public interest. The Ministry submits that this reasoning is applicable to the case at hand, where the interest disclosure serves is the private interest of the heirs. Moreover, unlike [Order] PO-1923, the appellant is not a public institution, but rather a private enterprise, which will receive proceeds from the location of heirs to the estate.

The appellant submits:

> The Ministry has stated that there is no compelling public interest in disclosure of the personal information that is the subject of this appeal, and that the disclosure would not benefit the public, but may benefit private parties such as unknown heirs. [The appellant] submits that the public interest is served by disclosure for the reasons stated above, namely it ensures the public has a competitive alternative to the assertion of personal rights such as entitlements to estates of deceased persons. [The appellant's] competitive services are further to the benefit of heirs as they do not require the payment of disbursements prior to obtaining the proceeds of the estate. [The appellant] makes all disbursements prior to obtaining compensation from the claimed estate. Some heirs may be impecunious and unable to obtain the required vital statistics and legal documents to prove their entitlement. By having [the appellant] complete the research and obtain the needed documents prior to receiving any compensation from the estate, [the appellant] is providing a useful service to the public.
>
> Furthermore, the disclosure of personal information to [the appellant] serves the public interest by ensuring that persons whose estates may fall under the administration of the OPGT are assured that when the OPGT has been unable to locate their heirs, there is another organization prepared to take on this research and work to establish entitlement, namely [the appellant]. Thus, the public

> interest is served both on behalf of deceased persons and on behalf of their living heirs.

The Ministry responds that even if it were to be found that the appellant is offering an alternative service, thereby fulfilling a compelling public interest, the appellant has not demonstrated that offering a choice of service clearly outweighs the privacy protection purpose of the exemption at section 21(1) of the *Act*.

Analysis and finding

Having reviewed the information for which I have found the exemption at section 21(1) applies, and, having considered the representations of the parties, I find that the compelling public override provision at section 23 has no application in the circumstances of this appeal.

The appellant's submissions focus on how its business and services benefit members of the public but do not address the question of how the disclosure of the specific information at issue is in the public interest. Although I accept that the expedited location of unknown heirs is generally in the public interest, I do not accept that any such interest is addressed by the disclosure of the small amount of information that remains at issue in this appeal. Additionally, in my view, I have not been provided with evidence to demonstrate that the disclosure of the particular information that remains at issue rouses "strong interest or attention" or that its disclosure would serve the purpose of informing the citizenry about the activities of government. In short, I find that the appellant's submissions do not make the requisite evidentiary link between the disclosure of the specific information to which this override provision might apply and a public interest, compelling or otherwise.

Even if a compelling public interest in the disclosure of the information were to exist, in my view, the appellant has not established that such interest clearly outweighs the privacy protection purpose of the exemption at section 21(1) of the *Act* with respect to the information that I have found exempt under section 21(1).

Accordingly, I am of the view, that I have not been provided with sufficient evidence to warrant a finding that there exists a compelling public interest in the disclosure of the records at issue which clearly outweighs the purpose of the section 21(1) exemption and I find that section 23 of the *Act* has no application in the current appeal.

ORDER:

1. I order the Ministry to disclose the portions of the records that are not exempt under the *Act* by **April 9, 2010**.

2. I uphold the Ministry's decision to withhold the remaining portions of the records. For the sake of clarity, I will provide the Ministry with a highlighted copy of the records identifying the portions that should **not** be disclosed to the appellant.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original signed by: March 19, 2010
Catherine Corban
Adjudicator