

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3196

Appeal PA11-10

Office of the Public Guardian and Trustee

April 30, 2013

Summary: The appellant sought access to records relating to the Office of the Public Guardian and Trustee's (PGT) file for a named individual. This individual is now deceased and the appellant is the individual's niece. The PGT provided partial access to responsive records, denying access to portions of the records pursuant to sections 13(1) (advice or recommendations), 18(1)(a) (economic and other interests), 19(a) and (b) (solicitor-client privilege), 21(1) (personal privacy) and 22(a) (information available to the public). The PGT also took the position that the information withheld under section 21(1) should not be disclosed on compassionate grounds under section 21(4)(d). The appellant appealed. During the mediation stage of the appeal, the PGT confirmed that it was no longer relying on section 18(1)(a). The adjudicator upheld the PGT's application of section 22(a). He also upheld the application of section 21(1) and concluded that the section 21(4)(d) compassionate grounds exception did not apply to this information. Sections 19(a) and 13(1) were also found to apply in part.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 13(1), 19(a), 21(1), 21(3)(a) and (f), 21(4)(d), 22(a).

Orders and Investigation Reports Considered: M-315, MO-1338, MO-2237, MO-2245, PO-2802-I, PO-3183.

OVERVIEW:

[1] The Office of the Public Guardian and Trustee (PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the entire file of a named individual (the affected party). The requester (now the appellant) is the niece of the affected party.

[2] By way of background, in April 2001 an application was brought to have the affected party found incapable of managing his property under the *Substitute Decisions Act*. Pursuant to that application, the affected party's nephew (the nephew or the guardian) sought to become appointed the guardian of the affected party's property. The nephew was appointed guardian by court order on May 18, 2001. The affected party, subsequently, passed away on June 22, 2007. It is not in dispute that the appellant is not the Estate Trustee of the affected party's estate.

[3] The PGT issued a decision letter in response to the appellant's access to information request, pursuant to which it granted partial access to responsive records. The PGT withheld the undisclosed information pursuant to sections 13(1) (advice or recommendations), 18(1)(a) (economic and other interests), 19(a) and (b) (solicitor-client privilege) and 21(1) (personal privacy). In support of its section 21(1) exemption claim, the PGT cited the application of the presumptions in sections 21(3)(a) (medical history) and 21(3)(f) (finances) of the *Act*. In its decision, the PGT also indicated that it was denying access to a significant number of pages pursuant to section 22(a) (information available to the public) of the *Act*. The PGT advised the appellant that it was not satisfied that the records should be released on compassionate grounds under section 21(4)(d) of the *Act*. Finally, the PGT took the position that some of the pages were not relevant as they represented the final page of each court record and are blank. The PGT attached a "Requester Report" to its decision that set out the records at issue, along with the applicable exemptions claimed for each record.

[4] The appellant appealed the PGT's decision.

[5] During the course of the mediation stage of the appeal process, the PGT confirmed that it would not disclose any of the withheld records. In a letter dated March 25, 2011 to the appellant, the PGT clarified that the withheld records consist of a combination of court screening files and files relating to its passing of accounts.

[6] The appellant advised the mediator that she seeks access to all of the withheld records including the ones withheld pursuant to section 22(a) of the *Act*. The appellant also confirmed that she is pursuing access to the records at issue on compassionate grounds pursuant to section 21(4)(d) of the *Act*.

[7] The appellant further clarified that she is not pursuing access to the blank pages that have been identified as "not relevant." Accordingly, the following pages of records

are no longer at issue in this appeal: 115, 119, 138, 141, 144, 146, 148, 159, 161, 164, 171, 173, 175, 181, 185, 202, 204, 210, 212, 214, 220, 227, 230, 236, 238, 241, 248, 250, 254, 267, 286, 288, 290, 293, 295, 316, 319, 322, 327, 332, 463, 465, 468, 470, 484, 549, 552, 570, 572, 577 and 578.

[8] The PGT subsequently advised the mediator that it is no longer relying on section 18(1)(a) of the *Act* to withhold some of the records. Accordingly, section 18(1)(a) is no longer at issue in this appeal.

[9] The parties were unable to resolve the appeal through mediation and the file was transferred to the adjudication stage of the appeal process for an inquiry, in which an adjudicator is assigned and the parties are invited to make written representations on the issues under appeal.

[10] I was assigned to adjudicate this appeal. During the course of my inquiry, I sought and received representations from the PGT and the appellant.

[11] In this order I find as follows:

- many of the records at issue contain publicly available information that is exempt under section 22(a)
- many of the records contain personal information that is exempt under the mandatory section 21(1) personal privacy exemption and disclosure of this information is not desirable for compassionate reasons under the section 21(4)(d)
- a small number of records are exempt under the section 19(a) solicitor-client exemption
- a portion of one record is exempt under the advice or recommendations exemption in section 13(1)

[12] I order disclosure of several records in their entirety and one record in part.

RECORDS:

[13] There are more than 500 pages of records at issue in this appeal, including administration forms, e-mails, correspondence, memos and legal records. These records along with the applicable exemptions are itemized in the Requester Report that was shared by the PGT with the appellant. The PGT clarified during the mediation stage that there was an omission in the Requester Report with regard to its application of section 19 of the *Act* to various records. The PGT clarified that for those records, to

which it claims the application of section 19(a), it also claims the application of section 19(b).

ISSUES:

- A. Do any of the records at issue contain publicly available information that is exempt under section 22(a)?
- B. Do any of the records at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. If the records do contain personal information, would disclosure of any of this information constitute an unjustified invasion of personal privacy pursuant to the mandatory exemption in section 21?
- D. Do any of the records at issue contain information that is solicitor-client privileged under section 19?
- E. Do any of the records at issue contain information that qualifies as advice or recommendations under section 13(1)?
- F. Did the PGT properly exercise its discretion in applying sections 22(a), 19 and 13(1)?

DISCUSSION:

A. Do any of the records at issue contain publicly available information that is exempt under section 22(a)?

[14] The PGT has claimed the application of section 22(a) to approximately 260 pages of records. These records include court orders, judge's endorsements, court applications and supporting materials, and correspondence related to the court applications. They are comprised of pages 13-17, 19-28, 40, 80, 84-90, 95-99, 106-108, 110, 114, 116-118, 139-140, 145, 150-158, 160, 172, 174, 176-180, 182-184, 203, 205-209, 211, 213, 215-219, 228-229, 231-235, 239-240, 242-247, 252-253, 272-277, 280-282, 284-285, 287, 289, 291-292, 294, 296-315, 317-318, 320-321, 323-326, 328-331, 352-361, 364-371, 414-419, 422-444, 454-456, 459-462, 464, 466-467, 469, 471-472, 475, 478-483, 485-488, 493-495, 531-548, 550-551, 553-569 and 573-576.

[15] Section 22(a) states:

A head may refuse to disclose a record where,

the record or the information contained in the record has been published or is currently available to the public;

[16] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.¹

[17] To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information²

[18] Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.³

[19] In order to rely on the section 22(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request.⁴

[20] Section 22(a) does not permit an institution to sever a small amount of information from a larger record, particularly where the entire record is otherwise subject to disclosure under the *Act*. A requester should not be required to compile small pieces of information from a variety of sources in order to obtain a complete version of a record that could be disclosed.⁵

[21] Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include:

- unreported court decisions [Order P-159]
- transcript from court proceedings [Order M-315]

[22] The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act*.⁶ However, the cost

¹ Orders P-327, P-1387.

² Order P-1316.

³ Orders P-327, P-1114 and MO-2280.

⁴ Order MO-2263.

⁵ Order PO-2641.

⁶ Orders P-159, PO-1655, MO-1411 and MO-1573.

of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply.⁷

Parties' representations

[23] The PGT states that many of the records sought by the appellant "form part of the court file which is accessible to the public." The PGT submits that these records include the "application and the motion relating to the appointment as guardian, the application to pass accounts, the letters from the PGT, and the orders signed by the judge hearing the matters."

[24] The PGT states that a "regularized system of access exists which would allow the [appellant] to access the file" upon payment of a copying fee. The PGT adds that it has provided the appellant with the information she needs to access the court file including the location of the courthouse, applicable court file numbers and the process to follow to obtain copies of the relevant documents. The PGT states that the appellant could obtain the court file by making a request in writing. The PGT adds that the appellant could obtain the contents of the file without visiting the courthouse.

[25] The appellant acknowledges that the affected party's "personal information including financial and medical are already in the public domain through various court cases..." However, the appellant submits that obtaining this information would be "prohibitively expensive" and would require her to go to Pembroke, Ontario and Hull, Quebec, which she states would be "impossible" for her to accomplish. The appellant suggests that it would be most convenient for all concerned for her to attend at the PGT's office to pick up the entire file.

[26] In reply, the PGT states that it advised the appellant to write to the courthouse in Pembroke to request the contents of the court file. The PGT reiterates that the appellant need not attend in-person to obtain the court file. The PGT also notes that it is only aware of the courthouse in Pembroke at which the relevant records are held. The PGT states that it does not have jurisdiction outside of Ontario and is not aware of any court documentation held in the courthouse in Hull, Quebec.

Analysis and findings

[27] Having carefully reviewed the parties' representations and the records at issue, I am satisfied that the records for which the PGT has claimed the application of section 22(a) are exempt under that section of the *Act*.

[28] As stated above, in order to rely on section 22(a), an institution must demonstrate the following:

⁷ Order MO-1573.

- a “regularized system of access” exists
- the records are available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[29] I am satisfied that all three criteria have been met in this case. The records at issue are documents directly related to the nephew’s application to become appointed as the guardian of the affected party’s property. It is clear on the face of the records at issue that this application was heard at the Pembroke courthouse and I conclude, therefore, that the records at issue form part of the court file related to this application and would be accessible through that courthouse to anyone upon payment of a fee.

[30] Further, I accept that the PGT has attempted to facilitate the appellant’s ability to gain access to these records by providing her with the court address and the relevant court file numbers as well as suggesting that she write to the court to obtain access without the necessity of attending in person at the courthouse to obtain copies of the records.

[31] I did not receive representations from the parties on the cost to obtain the records at issue through the court office. The guardian application was heard before the Superior Court of Justice in Pembroke. Ontario Regulation 293/92⁸ governs the payment of fees at the Superior Court of Justice. Due to the age of the file I suspect it would have to be retrieved from off-site storage. The regulation provides for a \$61.00 file retrieval fee. In addition, there would be a \$1.00 per page copying charge. As there are an estimated 260 pages at issue the copying cost would be approximately \$260.00. I acknowledge that the pricing structure under the *Act*⁹ is somewhat different, with the institution having the right to charge for manual search time, preparation of the records for disclosure and copying. I note that under the *Act* copying fees are significantly less at 20 cents per page as compared to \$1.00 per page at the court. However, I reiterate that a regularized system of access exists through the court and that the cost of obtaining the records through the court is not so prohibitive that it amounts to an effective denial of access.

[32] The circumstances in this case are not unlike those in Order M-315 where the requester in that case sought access to a transcript of court proceedings. In that case, former Inquiry Officer John Higgins found that the transcript in question was publicly available and he found the record exempt under section 15(a), which is the municipal *Act* equivalent of section 22(a). As in Order M-315, the records in question in this case

⁸ See http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_920293_e.htm

⁹ See R.R.O. 1990, Regulation 460

(http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900460_e.htm)

form part of a court proceeding and are publicly available through the Pembroke courthouse upon payment of a fee.

[33] While the records in question may be available under the *Act*, I am satisfied that the "balance of convenience" favours access through the courts where the appellant will have access to the complete court file rather than bits and pieces of it that could be subject to exemption under the *Act*.

[34] Finally, I have found several pages of records for which the section 22(a) exemption was not claimed that should be found exempt under that section. These records consist of pages 121-129, 249, 251, 255-266 and 333-344 and they fall into two categories:

- exhibits to affidavits to which the PGT has claimed the application of section 22(a) (pages 249, 251, 255-266 and 333-344)
- records that are substantively the same as records claimed to be exempt under section 22(a) (pages 121-129)

[35] In the former category, the exhibits form part of the affidavits that I have found exempt under section 22(a). I am satisfied that these exhibits would also be attached to the versions of these affidavits stored with the court. In the latter category, pages 121-128 comprise a Management Plan submitted by the nephew in support of his guardianship application. Pages 121-128 are identical to pages 151-158, which I have found exempt under section 22(a), with the sole exception that the two management plans were signed on different dates. Page 129 is identical to page 160. Under the circumstances, I find that section 22(a) also applies to pages 121-129, 249, 251, 255-266 and 333-344.

[36] To summarize, I find that section 22(a) applies to pages 13-17, 19-28, 40, 80, 84-90, 95-99, 106-108, 110, 114, 116-118, 121-129, 139-140, 145, 150-158, 160, 172, 174, 176-180, 182-184, 203, 205-209, 211, 213, 215-219, 228-229, 231-235, 239-240, 242-247, 249, 251, 252-253, 255-266, 272-277, 280-282, 284-285, 287, 289, 291-292, 294, 296-315, 317-318, 320-321, 323-326, 328-331, 333-344, 352-361, 364-371, 414-419, 422-444, 454-456, 459-462, 464, 466-467, 469, 471-472, 475, 478-483, 485-488, 493-495, 531-548, 550-551, 553-569 and 573-576.

B. Do any of the records at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[37] The PGT has claimed the application of the mandatory personal privacy exemption in section 21(1) to information on the following pages of records: 1, 4-5, 6-7, 8-9, 29-35, 36, 37-38, 44-45, 46, 48-49, 53, 56-68, 70-75, 76-78, 82, 83, 91, 92, 104-105, 121-137, 147, 162-163, 165-170, 186-201, 237, 268-270, 278-279, 283, 345-

350, 375-381, 382-383, 384, 385, 386-388, 389-391, 392-412, 420-421, 445-449, 453, 473, 489, 490, 491, 492, 496-519, 521-524, 526-530 and 579-581.

[38] In order to determine whether section 21 of the *Act* may apply to the information claimed to be exempt under that section, I must determine whether the records contain "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,
- ...
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[39] 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.¹⁰

[40] Section 2(2) provides an exclusion from the definition of personal information. It states:

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

[41] 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.¹¹

[42] 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.¹²

Parties' representations

[43] The PGT states that the records claimed to be exempt under section 21(1) contain the personal information of the affected party and other identifiable individuals. The PGT describes the information about the affected party as his "medical" information, including information about his medical, psychiatric and psychological condition, within the meaning of paragraph (b) of the definition of personal information in section 2(1), as well as information about his "finances", also within paragraph (b) of the personal information definition. With regard to the affected party's financial information, the PGT states that the records at issue "outline [his] assets and liabilities and provide information relating to bank accounts and other vehicles of investments."

[44] The PGT notes that as the affected party has been deceased for less than 30 years, the section 2(2) exclusion does not apply in this case.

[45] The appellant's representations do not directly address the issue to be determined. The appellant seems to suggest that any personal information about the affected party is already in the public domain and therefore no longer confidential.

¹⁰ Order 11.

¹¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹² Orders P-1409, R-980015, PO-2225 and MO-2344.

Analysis and findings

[46] I have carefully reviewed the parties' representations and the records at issue. I find that the records claimed to be exempt under section 21(1) contain the personal information of the affected party and other identifiable individuals, including the nephew. I note that the affected party and the nephew share first and last names and, as a result, their personal information is not always easily distinguishable. The personal information about the affected party includes his name, address, date of birth, medical, psychiatric and psychological history and information relating to his finances and property holdings. The personal information about the nephew includes his name, address, telephone number, date of birth and information relating to legal processes and financial transactions in which he was involved. The personal information about the other identifiable individuals includes their names, place of residence and/or personal opinions or views.

[47] With regard to personal information about the affected party, I acknowledge that some of this information may be known to the appellant and/or in the public domain. However, the issue for me to decide is whether the records contain the affected party's personal information and the extent to which some of the affected party's personal information may be known to the appellant and/or in the public domain is irrelevant to a determination of that issue.

[48] With regard to the nephew, there are instances throughout the records where his name clearly appears in the context of his official capacity as the affected party's guardian. In my view, in those instances, the nephew's name alone does not qualify as his personal information. Accordingly, the section 21(1) exemption cannot apply to it. I will order the PGT to disclose this information subject to the application of any other exemptions to it.

[49] In addition, in another instance (at page 383), the information at issue is a business card for an individual who had been providing service to the affected party. The business card provides this individual's name and professional contact information. In my view, the information contained on this business card does not reveal something of a personal nature about this individual; accordingly, I find that this information does not qualify as this individual's personal information. The PGT had claimed the application of section 21(1) to this information. However, having concluded that this information does not qualify as personal information, section 21(1) cannot apply to it. As the PGT has not claimed the application of any other exemptions to this information, and as no other mandatory exemptions apply to it, I will order page 383 disclosed.

[50] To conclude, I find that pages 1, 4-5, 6-7, 29-35, 36, 37-38, 44-45, 46, 48-49, 53, 56-68, 70-75, 76-78, 82, 83, 91, 92, 104-105, 130-137, 147, 162-163, 165-170, 186-201, 237, 268-270, 278-279, 283, 345-350, 375-381, 382, 384, 385, 386-388, 389-391, 392-412, 420-421, 445-449, 453, 473, 489, 490, 491, 492, 496-519, 521-524,

526-530 and 579-581 contain the personal information of the affected party and/or other identifiable individuals within the meaning of that term in section 2(1).

[51] I also find that there are additional pages of records that contain the personal information of the affected party and other identifiable individuals for which the PGT has not claimed the section 21(1) exemption. These records are found at pages 372, 457-458, 474 and 477. Since section 21(1) is a mandatory exemption I am required to consider the application of this exemption to this personal information.

[52] I will now consider the application of section 21 to the information I have found qualifies as personal information.

C. If the records do contain personal information, would disclosure of any of this information constitute an unjustified invasion of personal privacy pursuant to the mandatory exemption in section 21?

[53] I will now examine the application of the section 21(1) exemption to the personal information on pages 1, 4-5, 6-7, 29-35, 36, 37-38, 44-45, 46, 48-49, 53, 56-68, 70-75, 76-78, 82, 83, 91, 92, 104-105, 121-137, 147, 162-163, 165-170, 186-201, 237, 249, 251, 255-266, 268-270, 278-279, 283, 333-344, 345-350, 372, 375-381, 382, 384, 385, 386-388, 389-391, 392-412, 420-421, 445-449, 453, 457-458, 473-474, 477, 489, 490, 491, 492, 496-519, 521-524, 526-530 and 579-581.

[54] Where a requester seeks 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.

[55] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

[56] The section 21(1)(a) to (e) exceptions are relatively straightforward. The exceptions in section 21(1)(a) to (e) do not apply in this appeal.

[57] The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21. This section reads:

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

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

[58] 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).

[59] 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. 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.¹³

[60] In this case, the PGT relies on the presumptions in sections 21(3)(a) and (f) in support of its section 21(1) exemption claim. These sections state:

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

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

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

Parties' representations

[61] The PGT's representations on the section 21(1) exemption are brief. The PGT reiterates that the information at issue relates to the "medical and psychiatric treatment" of the affected party as well as to his financial affairs. The PGT states that disclosing this information would constitute an unjustified invasion of the affected party's personal privacy.

[62] In response, the appellant states that she seeks the information at issue for "compassionate reasons," citing the limitation in section 21(4)(d), which states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[63] The appellant indicates that she is the niece of the affected party. She submits that she is seeking the requested information to "find out the truth of what occurred

¹³ John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div.Ct.).

regarding [the affected party].” She perceives that the affected party was “treated badly or that his human rights may have been violated” during the course of and after the processing of the guardianship application. She states that she “cannot fathom that disclosure of the requested [information] would be an invasion of [the affected party’s personal] privacy” in light of her relationship with him. The appellant asserts the affected party would want her to “know exactly what happened to him with the PGT.” She submits that she is simply interested in determining that the affected party was “treated fairly and with dignity.” She adds that she wants to know that the PGT “did what was in [the affected party’s] best interests, and they should be held to the necessary public scrutiny to determine this.”

[64] With regard to the application of the limitation in section 21(1)(4)(d), the PGT states that, in processing the appellant’s access request, it considered whether section 21(4)(d) applied in this case. The PGT concluded that the circumstances did not justify the application of the limitation. The PGT states that while it was clear that the personal information at issue related to a deceased individual, it was “not clear whether the person requesting the information was a close relative and for what purpose the information was being requested.” It is the PGT’s understanding that the appellant had not seen the affected party for several years and that they were not close. The PGT notes that the affidavits submitted with the guardianship application indicate that the affected party had been residing in Ontario since 1986 and it did not appear that the appellant was aware of this fact. In the PGT’s view, this lack of awareness raises questions about the closeness of the relationship between the appellant and the affected party.

[65] The PGT is not satisfied that the appellant requires disclosure to achieve “closure” and to assist her through the grieving process due to the loss of the affected party. The PGT infers instead that the appellant’s motivations are financial in nature. The PGT raises Order PO-2802-I as a comparable case in which the section 21(4)(d) limitation was found not to apply. The PGT notes that the requester in Order PO-2802-I was a close relative of the deceased who was seeking financial information regarding the administration of the deceased’s estate. The PGT notes that the adjudicator rejected the claim that the information sought was desired for compassionate reasons, concluding that the request was “not motivated by a desire to resolve issues relating to the death of the relative, but was instead sought for the purposes of an accounting.”

[66] The appellant was given an opportunity to respond to the PGT’s views on the application of section 21(4)(d) and she provided substantial representations that focussed on a number of concerns, including

- the guardianship application process, including the failure to notify the affected party and his family about the application process

- the PGT's lack of knowledge regarding the affected party's place of residence (the appellant states that at all times the affected party resided in Quebec and only visited Ontario to bank)
- the guardian's passing of accounts
- the PGT's oversight role in the guardianship process

Analysis and findings

[67] On my review of the parties' representations and the records at issue, I am satisfied that the personal information at issue is exempt under section 21(1). The records at issue contain the personal information of the affected party and other identifiable individuals regarding the nephew's guardianship application and related matters. The personal information in question relates to the affected party's medical and psychiatric history and describes his finances, assets, net worth and financial history. Accordingly, disclosure of the information at issue is presumed to constitute an unjustified invasion of personal privacy within the meaning of sections 21(3)(a) and (f). Having determined that these presumptions apply, this information is exempt from disclosure under section 21(1) subject only to the application of section 21(4) or the "public interest override" at section 23.¹⁴

[68] While I acknowledge the appellant's view that she seeks the information at issue in order to place the PGT's activities and actions in this case under "public scrutiny", I find that her interest is essentially private in nature, and that she seeks the information requested for personal reasons arising out of her relationship with the affected party. Accordingly, I am not satisfied that the public interest is triggered in this case.

[69] With regard to the application of the exceptions in section 21(4), the only paragraph that might apply in this case is paragraph (d), which despite the application of the exemption in section 21(1) permits the disclosure of the personal information of the affected party for "compassionate reasons."

[70] In Orders MO-2237 and MO-2245, Assistant Commissioner Brian Beamish determined that the application of the municipal equivalent of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?

¹⁴ John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div.Ct.).

2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

[71] I agree with and adopt these three steps in determining the application of section 21(4)(d) in this appeal.

Step 1 – Personal Information of the Deceased

[72] I find that the majority of the information at issue constitutes the personal information of the affected party. I find that this requirement for the application of section 21(4)(d) is satisfied.

Step 2 – Spouse or "Close Relative"

[73] "Close Relative" is defined in section 2(1) of the *Act*:

[74] "close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption.

[75] I accept that the appellant is a niece of the affected party whose personal information is contained in the records at issue, and that she qualifies as a "close relative." I find that this requirement for the application of section 21(4)(d) is also satisfied.

Step 3– Desirable for Compassionate Reasons

[76] As stated above, the PGT does not accept that the appellant requires the information at issue for "compassionate reasons" in order to achieve "closure" and to assist her through the grieving process. It is the PGT's view that the appellant's motivations are financial in nature. In response, the appellant has raised several concerns regarding the guardianship application process and the administration of the affected party's estate by the PGT.

[77] In Order MO-2237, Assistant Commissioner Beamish wrote:

... by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to

information legislation and increase the amount of information being provided to bereaved family members. It is recognition that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

[78] I agree with the Assistant Commissioner's reasoning and apply it here.

[79] I have carefully considered this issue and find that the reasons provided by the appellant for requesting the information at issue do not qualify as compassionate reasons.

[80] In reaching this decision, I have considered the outcome in Order PO-2802-I, which was raised by the PGT in its representations. In that case, the PGT had received a request for the file related to the estate of a deceased individual. The request was filed by an individual on behalf of his grandmother, the sister of the deceased individual. Adjudicator Steven Faughan found that the bulk of the withheld information constituted the personal information of the deceased and that the requester qualified as a close relative. Accordingly, the first two requirements under section 21(4)(d) were met. However, with regard to the third requirement, that disclosure be desirable for compassionate reasons, Adjudicator Faughan concluded that the requester was not motivated by a desire to seek greater knowledge of the circumstances surrounding the deceased's death, but rather by an interest in conducting an accounting of the administration of the estate. Adjudicator Faughan states:

This request is not motivated by a desire to resolve what the appellant's grandmother believes is a lack of clarity in the information she has received about her brother's death or to assist her in the grieving process, but is instead sought essentially for the purposes of an accounting. In my view, this is not the kind of reason that meets the threshold of compassionate. Accordingly, I find that, in the circumstances, disclosure of the withheld personal information of the deceased in the records is not desirable for compassionate reasons. As a result, I find that the exception in section 21(4)(d) does not apply.

[81] In my view, the circumstances in this case are very similar to those in Order PO-2802-I. As was the case in Order PO-2802-1, I find that the appellant is not motivated by a desire to gain insight into the circumstances surrounding the affected party's death or to assist her in the grieving process, but is instead concerned with issues relating to the guardianship application process and the administration of the affected party's estate. I do not doubt that the appellant has a genuine desire to obtain access to the withheld information. However, in my view, the appellant's reasons do not meet the threshold of "compassionate." I find that, in the circumstances, disclosure of the withheld personal information about the affected party is not desirable for

compassionate reasons. Accordingly, I find that the exception in section 21(4)(d) does not apply in this case.

[82] To conclude, I find that the personal information on the following pages of records is exempt from disclosure under section 21(1): 1, 4-5, 6-7, 29-35, 36, 37-38, 44-45, 46, 48-49, 53, 56-68, 70-75, 76-78, 82, 83, 91, 92, 104-105, 112-113, 121-137, 147, 162-163, 165-170, 186-201, 237, 249, 251, 255-266, 268-270, 278-279, 283, 333-344, 345-350, 372, 375-381, 382, 384, 385, 386-388, 389-391, 392-412, 420-421, 445-449, 453, 457-458, 473-474, 477, 489, 490, 491, 492, 496-519, 521-524, 526-530 and 579-581.

4. Do any of the records at issue contain information that is solicitor-client privileged under section 19?

[83] Of the records that remain at issue, the PGT claimed the application of section 19(a) or (b) to pages 10, 12, 42-43, 51, 54-55, 93-94, 100, 103, 112-113, 120, 142-143, 362-363, 413, 474 and 571.

Those portions of section 19 state as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[84] Section 19 contains two branches. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies in order for the exemption to apply.

[85] Despite having raised both section 19(a) and (b) earlier in the appeal process, I note that the PGT confirms in its representations that it is only relying on section 19(a) (branch 1).

Solicitor-client communication privilege

[86] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must

establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹⁵

[87] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹⁶

[88] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.¹⁷

[89] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.¹⁸

[90] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁹

[91] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.²⁰

Litigation privilege

[92] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.²¹

[93] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

¹⁵ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

¹⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁷ Orders PO-2441, MO-2166 and MO-1925.

¹⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

²⁰ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

²¹ Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

.

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Loss of privilege through waiver

[94] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[95] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.²²

[96] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²³

Waiver has been found to apply where, for example:

- the record is disclosed to another outside party²⁴
- the communication is made to an opposing party in litigation²⁵

²² S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), 45 B.C.L.R. 218 (S.C.).

²³ J. Sopinka et al., The Law of Evidence in Canada at p. 669; see also Wellman v. General Crane Industries Ltd. (1986), 20 O.A.C. 384 (C.A.); R. v. Kotapski (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

²⁴ Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.).

²⁵ Orders MO-1514 and MO-2396-F.

- the document records a communication made in open court.²⁶

[97] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example:

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties²⁷
- a law firm gives legal opinions to a group of companies in connection with shared tax advice²⁸
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others.²⁹

Parties' representations

[98] The PGT submits that there is a solicitor-client relationship between the PGT as client and one of its lawyers employed as counsel for the PGT. The PGT submits that the records at issue are exempt as they relate to solicitor-client communication between the PGT and its lawyer.

[99] The PGT places the information remaining at issue into the following categories:

- correspondence between lawyers and staff members within the PGT that is confidential in nature and for the purpose of obtaining or giving legal advice
- correspondence between PGT counsel and outside counsel which forms part of the PGT's "legal sub file"
- Memos to file prepared by PGT counsel relating to issues in the guardianship application

[100] With respect to all "correspondence" and "memos" the PGT views these records as forming part of the "continuum of communications" between solicitor and client. The PGT adds that at no time did it waive privilege.

[101] With regard to the records that form part of its "legal sub file", the PGT states that these records were "prepared in order to provide legal advice to the Head [of the

²⁶ Orders P-1551 and MO-2006-F.

²⁷ General Accident Assurance Co. v. Chrusz (above); Order MO-1678.

²⁸ Archean Energy Ltd. v. Canada (Minister of National Revenue) (1997), 202 A.R. 198 (Q.B.).

²⁹ Pitney Bowes of Canada Ltd. v. Canada (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).

institution].” The PGT adds that these documents were “prepared by counsel in contemplation of litigation.” On that point, the PGT submits that if it was not satisfied that objections it had raised during the course of the passing of accounts process had been adequately addressed, PGT counsel would be required to attend court to address these issues and would rely on the documents in the legal sub file to pursue the PGT’s interests.

[102] The appellant’s representations focus on the possible existence of a solicitor-client privilege relationship between the PGT and the affected party and the rights, responsibilities and duties that would flow from it. The appellant’s representations are not of any assistance to me in determining whether the records at issue are exempt under section 19(a).

Analysis and findings

[103] Having carefully reviewed the parties’ representations and the information at issue, I find that the records that remain at issue do not qualify for exemption under section 19(a).

[104] The solicitor-client privilege exemption is designed to protect communications between an institution and its legal counsel. The genesis of this long standing view is articulated in the following passage from Order MO-1338, issued by former Senior Adjudicator David Goodis:

In my view, the solicitor-client privilege exemption is designed to protect the interests of a *government* institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside *government*. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*’s provincial counterpart:

Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the government either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.

.

If you do things to discourage the client from telling the lawyer the true story, then the *government* does not get

good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the *government*, which is spending taxpayers' money, should be able to be certain that public servants tell our lawyers the truth. We do not want to discourage public servants from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added by the Senior Adjudicator]

[Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter . . .

[105] I concur with and apply the analysis set out in the above passage.

[106] While I understand that the PGT takes the view that much of the communication at issue is between it and its counsel, I find the majority of the communication to be between counsel for the PGT and outside counsel for the nephew in respect of his application to pass accounts in his capacity as guardian of the affected party. These are not communications between the PGT and its counsel designed to protect the interests of the PGT in obtaining legal advice and having legal representation in the context of litigation. Rather, these are discussions between counsel for the nephew and the PGT (through its counsel) focused on the nephew's appointment as guardian of the affected party and the passing of accounts process.

[107] As stated above by former Senior Adjudicator Goodis, the only exception to this rule would be where a non-institution client and an institution have a "joint interest". In this case, the nephew and the PGT did not have a "joint interest". Through the passing of accounts process, the PGT played an oversight role in ensuring that the process was completed in accordance with the law. In this role, the PGT was required to raise objections regarding the nephew's application to pass accounts and to ensure that the nephew satisfactorily addressed any objections raised. The PGT has acknowledged this adversarial relationship in its representations, noting that if objections it raised were not adequately addressed by the nephew, the PGT would be required to go to court to seek relief. Under the circumstances, I find that a joint interest does not exist in this case.

[108] In my view, any privilege that might have existed in these records would have existed between the nephew and his legal counsel. However, any such privilege is not protected under section 19(a) for the reasons provided above and any privilege that might have existed was waived when these records were shared with the PGT.

[109] I will comment briefly on page 571, which the PGT has claimed is exempt under section 19(a). This page can be generally described as a blank court form template for use by the PGT in setting out its grounds for objection on applications to pass accounts. The document contains no substantive content and the PGT has provided no evidence in its representations on why it should qualify for exemption under section 19(a). On my review of this record, I see no basis for applying section 19(a) to it.

[110] The only information that I find exempt under section 19(a) is some limited communication between PGT counsel and staff within the PGT regarding the nephew's application to pass accounts. I am prepared to accept that this information comprises either part of a continuum of communications between PGT counsel and staff aimed at keeping both informed (pages 103 and 413) or forms part of the PGT counsel's working papers directly related to giving legal advice (pages 93 and 112-113).

[111] Of the records remaining at issue under section 19(a), I find that the information on pages 10, 12, 42-43, 51, 54-55, 94, 100, 120, 142-143, 362-363, 474 and 571 does not qualify for exemption under that section. As no other exemptions have been raised for this information, and no mandatory exemptions apply to it, I will order it disclosed.

E. Do any of the records at issue contain information that qualifies as advice or recommendations under section 13(1)?

[112] There is one record at issue that the PGT claims to be exempt under section 13(1), a two-page memorandum prepared by a PGT paralegal, which is found at pages 373-374.

[113] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[114] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption

also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.³⁰

[115] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

[116] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.³¹

[117] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations³²

[118] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.³³

[119] There is no requirement under section 13(1) that the ministry be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.³⁴

[120] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

³⁰ Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

³¹ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

³² Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

³³ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

³⁴ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- a supervisor's direction to staff on how to conduct an investigation³⁵

[121] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13. The relevant portions sections 13(2) and (3) state:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

Parties' representations

[122] The PGT states that the records at pages 373-374 "refer to a recommendation made by a paralegal reviewing the accounts provided by the guardian." The PGT adds that the paralegal had raised several issues and the guardian provided a response to those issues. The PGT states that the paralegal is making a "recommendation to PGT counsel as to how to proceed with respect to these accounts."

[123] In response, the appellant generally questions the PGT's ability to "[hide] behind the rules to avoid any scrutiny of their actions." The appellant adds that this information should be made publicly available to ensure that public servants are held accountable and that the government decision making process is transparent.

Analysis and findings

[124] Having reviewed the representations of the appellant and the PGT, as well as the contents of the record at issue, I find portions of this record exempt from disclosure pursuant to the discretionary exemption in section 13(1).

³⁵ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

[125] I acknowledge the appellant's desire for accountability and transparency in the deliberative process of government decision-making. The Commissioner's office has long recognized the importance of these principles under the *Act*. In Order PO-3183, Assistant Commissioner Beamish addressed the importance of considering transparency and public accountability when evaluating the application of the exemptions contained in the *Act*. He states, in part:

[I]t is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the Act identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific."

[126] However, as stated above, the section 13(1) exemption exists to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.

[127] The record at issue can be divided into two parts: "Recommendations" and "Background." The "Recommendations" section provides three express recommendations. In my view, the author has set out a clear course of action that he recommends the PGT should take with respect to three issues relating to the guardian's application to pass accounts. I am satisfied that section 13(1) applies to this information. I also find that none of the relevant exceptions in section 13(2) and (3) apply to this portion of the record. The information at issue is neither factual material nor more than twenty years old.

[128] With two exceptions, the second part of the record titled "Background" does not qualify for exemption under section 13(1). For the most part, it consists of the objections raised by the PGT to the guardian's application to pass accounts and the guardian's responses to those objections. I view this information as factual or background information, as contemplated by the exception to the section 13(1) exemption set out in section 13(2)(a). Other than the two exceptions, discussed below, this information does not set out the advice or recommendations of the author or reveal a preferred course of action; nor does it permit the drawing of inferences with respect to a suggested course of action.

[129] The two exceptions are:

- a handwritten note at the bottom of page 373 that alludes to one of the three recommendations set out in the "Recommendations" section of the record, and

- a sentence that appears in one part of the guardian's reply to a PGT objection that reveals one of the recommendations made by the author of the record.

[130] In my view, these additional portions of the record are clearly exempt from disclosure under section 13(1). I will sever this information, along with the "Recommendations" section discussed above, from the record to be disclosed to the appellant.

F. Did the PGT properly exercise its discretion in applying sections 22(a), 19(a) and 13(1)?

[131] The section 22(a), 19(a) and 13(1) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[132] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[133] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[134] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[135] The PGT states that it took the following factors into consideration in exercising its discretion to not release portions of the records to the appellant:

1. most of the information in the records is comprised of highly sensitive and confidential personal information about the affected party, including financial, medical and psychiatric information
2. the records in question do not relate to the appellant
3. a portion of the records is publicly available through other institutions
4. there is no compelling reason for the appellant to have access to the information at issue
5. the PGT's historic view that the personal information it retains is confidential and should not be released unless mandated to do so by legislation

[136] The appellant states in response that the PGT has not properly exercised its discretion since much of the information at issue is already in the public domain. She believes that the PGT is acting in bad faith by denying her access to this information.

She suggests that if the PGT treated the affected party with dignity and respect, it should have nothing to hide and should fully disclose the information at issue.

[137] While I acknowledge the appellant's frustration, I am satisfied that the PGT has demonstrated that it has properly exercised its discretion in this case. In my view, the PGT has exercised its discretion in good faith and has taken into account relevant considerations and no irrelevant ones.

[138] Accordingly, I uphold the ministry's exercise of discretion in applying the exemptions in sections 22(a), 19(a) and 13(1) to portions of the information at issue.

ORDER:

1. I uphold the PGT's application of the section 22(a) exemption to the following pages of records: 13-17, 19-28, 40, 80, 84-90, 95-99, 106-108, 110, 114, 116-118, 121-129, 139-140, 145, 150-158, 160, 172, 174, 176-180, 182-184, 203, 205-209, 211, 213, 215-219, 228-229, 231-235, 239-240, 242-247, 249, 251, 252-253, 255-266, 272-277, 280-282, 284-285, 287, 289, 291-292, 294, 296-315, 317-318, 320-321, 323-326, 328-331, 333-344, 352-361, 364-371, 414-419, 422-444, 454-456, 459-462, 464, 466-467, 469, 471-472, 475, 478-483, 485-488, 493-495, 531-548, 550-551, 553-569 and 573-576.
2. I conclude that the personal information on the following pages of records is exempt from disclosure under section 21(1): 1, 4-5, 6-7, 29-35, 36, 37-38, 44-45, 46, 48-49, 53, 56-68, 70-75, 76-78, 82, 83, 91, 92, 104-105, 112-113, 121-137, 147, 162-163, 165-170, 186-201, 237, 249, 251, 255-266, 268-270, 278-279, 283, 333-344, 345-350, 372, 375-381, 382, 384, 385, 386-388, 389-391, 392-412, 420-421, 445-449, 453, 457-458, 473-474, 477, 489, 490, 491, 492, 496-519, 521-524, 526-530 and 579-581.
3. I uphold the application of section 19(a) to pages 93, 103, 112-113 and 413.
4. I order the disclosure of pages 10, 12, 42-43, 51, 54-55, 94, 100, 120, 142-143, 362-363, 383, 474 and 571 in their entirety by **June 5, 2013** but not before **May 30, 2013**.
5. I order the disclosure of pages 373 and 374 in part to the appellant, in accordance with the highlighted versions of these pages provided to the PGT with its copy of this order, by **June 5, 2013** but not before **May 30, 2013**. To be clear, the PGT is not to disclose to the appellant the portions of these records that have been highlighted in yellow.

6. I remain seized of this matter in order to verify compliance with order provisions 4, 5 and 6.

Original Signed By: _____

Bernard Morrow
Adjudicator

_____ April 30, 2013