

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3704

Appeal PA15-179-2

Office of the Public Guardian and Trustee

February 28, 2017

Summary: The appellant made an access request to the Office of the Public Guardian and Trustee (the PGT) for information from the PGT's estate file regarding a deceased individual. The PGT stated that it had identified and contacted the beneficiaries of the estate, and denied access under section 21(1) (personal privacy) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). During mediation, the PGT disclosed a redacted extract of a ledger statement showing a zero balance to demonstrate that the estate had been paid out. The appellant believes that additional records relating to the account balance exist. The appellant also requested an unredacted copy of the ledger extract, and an order requiring that the PGT must use language specified by the appellant in its access decisions. In this order, the adjudicator determines that the request does not seek access to a financial ledger or records relating to the account balance, which are therefore not at issue; the records are exempt under section 21(1); the PGT conducted a reasonable search for records; and the PGT is required to comply with section 29(1)(b) in decisions denying access, rather than using the language specified by the appellant. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information"), 21(1), 21(2), 24, 29(1)(b) and 54(3).

Orders and Investigation Reports Considered: P-880, M-50 and P-945.

Cases Considered: *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3d) 197.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Office of the Public Guardian and Trustee (the PGT) for the following information from the estate file of a named deceased individual:

- Marital status of the deceased
- The name of the deceased's spouse
- The names of the deceased's parents
- Occupation of the deceased
- Date of birth of the deceased
- Place of Birth of the deceased
- Age of the deceased at the date of death
- Last known address of the deceased

[2] On behalf of the PGT, the Ministry of the Attorney General (the ministry) issued a decision denying access to the responsive records pursuant to section 21(1) of the *Act*.

[3] The decision letter stated that "the PGT has conducted a search for the records requested and has identified and contacted the beneficiaries of this estate; accordingly, there is no benefit to unknown heirs and access to the record is denied. . . ."

[4] The appellant filed an appeal of this decision. The appeal was assigned to a mediator pursuant to section 51 of the *Act*. During mediation, the ministry provided the mediator with a partially-redacted extract of a ledger for the account of the deceased individual (the ledger extract) to assist in facilitating the appeal. The ledger extract shows a balance of zero dollars.

[5] The ministry subsequently sent a copy of the ledger extract to the appellant by way of letter dated April 15, 2016 stating that "[p]artial access is granted to the enclosed record advising that the above noted estate has been paid out."

[6] Also during mediation, the appellant indicated that he continues to seek access to the records, and believes that additional records relating to the account balance exist.

[7] As mediation did not resolve the appeal, it moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began the inquiry by providing a Notice of Inquiry to the PGT, inviting it to provide representations, which it did. I then provided a Notice of Inquiry to the appellant, along

with the representations of the PGT, and invited him to provide representations, which he did.

[8] In the appellant's representations, he did not address the question of whether the records contain personal information, and with respect to the application of section 21(1), he argues that the PGT provided him with incorrect information about the administration of the estate in question. He also notes inconsistency in the way the PGT responds to requests of this nature. He goes on to ask for the following additional relief:

1. a copy of the document enclosed with the PGT's letter of April 15, 2016, as documentary evidence of the date of distribution and the amount distributed; and
2. an order under section 54(3) requiring the PGT to "accurately and clearly indicate in a response to a Freedom of Information request whether the beneficiaries of an estate have been 'identified', 'located' 'contacted', and whether the estate has been fully administered and the proceeds of the estate have been fully distributed."

[9] In item 1, the appellant is evidently seeking access to an unredacted copy of the ledger extract that accompanied the PGT's letter of April 15, 2016. It is clearly an extract of a ledger showing amounts received and paid, as well as the dates and the names of individuals to whom payments were made. As such, it is clearly a record about financial matters. There is no reference to any kind of financial record or information in the appellant's request. His claim during mediation – that additional records relating to the account balance must exist – is also problematic in view of the fact that there is no reference to this type of information in the request. Accordingly, I will address, as a preliminary issue, whether the ledger extract or other records about the account balance that may exist are at issue in this appeal.

[10] I have also added item 2, relating to the language to be used in decision letters, as an issue, below.

[11] The appellant did not provide submissions on the issue of reasonable search, but also did not indicate that he is abandoning that aspect of the appeal, and accordingly, I will consider that issue below.

[12] In this order, I determine that:

- the ledger extract is not responsive and therefore not at issue in this appeal, and would be exempt under section 21(1) in any event;
- additional records relating to the account balance, if they exist, would not be responsive;

- the records consist of the personal information of individuals other than the appellant;
- the records are exempt under section 21(1);
- the PGT conducted a reasonable search for records; and
- the appellant is not entitled to an order directing the PGT to use the language requested by the appellant in its access decisions.

RECORDS:

[13] Six pages of records are potentially at issue, including five pages that clearly respond to the request, and the ledger extract, whose responsiveness is considered below.

ISSUES:

[14] The issues to be decided in this case are:

Preliminary Issue: Is the ledger extract responsive to the request? Would other records relating to the account balance be responsive?

- Do the records contain personal information within the meaning of section 2(1) of the *Act*, and if so, to whom does it relate?
- Does the mandatory personal privacy exemption in section 21(1) of the *Act* apply?
- Did the PGT conduct a reasonable search for records?
- Should the additional relief requested by the appellant in his representations be granted?

DISCUSSION:

Preliminary Issue: Is the ledger extract responsive to the request? Would other records relating to the account balance be responsive?

[15] In Order P-880, Adjudicator Anita Fineberg discussed the approach to determining “responsiveness” under the *Act*:

As I have previously noted, the Divisional Court¹ used the term "relevancy" to characterize the matter which I must decide on this re-determination.

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. *The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness".* That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

[16] I agree with this analysis and will apply it here. In my view, not even the broadest interpretation of the request would encompass a financial ledger or records relating to the account balance. Minor components of these records might contain responsive information, but it has already been compiled by the PGT in the records it has identified.

[17] I find that the ledger extract is not responsive, and is therefore not at issue in this appeal. If it were at issue, I would find that it consists of personal information of individuals other than the appellant and is exempt under section 21(1) for the reasons given in my analysis of Issues A and B, below. I also find that additional records relating to the account balance, if they exist, would not be responsive.

Issue A. Do the records contain personal information within the meaning of section 2(1) of the *Act* and, if so, to whom does it relate?

[18] 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,

¹ in *Ontario (Attorney-General) v. Fineberg* (1994), 19 O.R. (3d) 197.

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[19] 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.²

[20] Section 2(2) also relates to the definition of personal information. It states:

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

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

² Order 11.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Analysis

[22] In its representations, the PGT reviews the information to which access has been requested, and notes that the responsive records contain the personal information of the deceased, his next-of-kin, and other individuals.

[23] All of this constitutes information about identifiable individuals. The exception at section 2(2) for individuals who have been dead for more than thirty years does not apply as the deceased died more recently than 30 years ago.

[24] I find that the records, in their entirety, consist of information about individuals other than the appellant. I would make the same finding about the ledger extract if it were at issue.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[25] 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.

[26] In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy. This section states:

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

. . .

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

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

[28] 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.⁴

⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[29] 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.⁵ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present.

[30] Section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

Analysis

[31] As already discussed, section 21(1) prohibits disclosure of personal information unless one of the exceptions in sections 21(1)(a) through (f) applies, and in this case, section 21(1)(f) is the only possible exception. In this situation, unless there is a basis for concluding that disclosure is not an unjustified invasion of personal privacy, the exemption applies.⁶

[32] In this appeal, the appellant has not specifically addressed the terms of section 21 in his representations. Nor does he cite or rely on any factors favouring disclosure.

[33] Rather, he claims that the PGT provided “incorrect information” in its correspondence, and requests the two items of relief referred to in the Overview section, above. I will refer to this assertion in more detail below. However, because this argument relates to the type of language the appellant would like to see in the PGT’s decision letters, it is not a factor favouring disclosure of the records at issue under section 21(2). I have reviewed the records at issue, and their contents have nothing to do with whether the PGT provided incorrect information to the appellant as he alleges. As well, this argument does not establish a factor favouring disclosure of the undisclosed portions of the ledger extract (which I have already found not to be at issue, above) in the circumstances of his appeal, because the PGT has already provided the appellant with information to demonstrate that the estate is fully administered.

[34] The PGT submits that the exceptions to section 21(1) in section 21(4) do not apply. I agree.

[35] The PGT also submits that the birthplace of the deceased individual would trigger the application of the presumed unjustified invasion of privacy in section 21(3)(h), which applies to information that “indicates the individual’s racial or ethnic origin, sexual orientation or religious or political beliefs or associations.” The PGT does not specify how the information referred to in the presumption would be revealed by disclosing the

⁵ Order P-239.

⁶ Orders PO-2267 and PO-2733.

birthplace. I am skeptical of this claim, given that a birthplace, in and of itself, might suggest a racial or ethnic origin but falls far short of confirming that a person born in that place actually has that racial or ethnic origin. As Senior Adjudicator Frank DeVries noted in Order PO-3125, “. . . knowing a person’s place of birth is not necessarily indicative of racial or ethnic origin.” In the circumstances of this appeal, however, it is not necessary for me to decide whether this section applies, because of the considerations outlined below.

[36] The ministry also submits that the unlisted section 21(2) factor of “benefit to unknown heirs”⁷ does not apply “. . . because the heirs have been identified and the estate has been distributed to the heirs of the deceased.” I agree.

[37] The ministry refers as well to another unlisted factor favouring disclosure, that of “diminished privacy interest after death,”⁸ and submits that it does not apply, or should receive little weight. In Order M-50, former Commissioner Tom Wright described this factor as follows:

In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

[38] The PGT also refers to Order P-945, which discusses the unlisted factor established in Order M-50:

. . . [S]ection 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 dead for more than thirty years.

Similarly, while section 66(a) of the Act permits a personal representative to exercise the rights or powers of a deceased individual under the Act (which would include access to the deceased individual's personal

⁷ This factor, which favours disclosure, was established in Order P-1493. See also Orders PO-1717 and PO-2012-R.

⁸ This factor was established in Order M-50. See also orders PO-1717, PO-1923, PO-1936 and PO-2012-R.

information), the personal representative is only able to exercise such a right or power if it "... relates to the administration of the individual's estate". In my view, this restriction is another clear indication of the legislature's intention to protect the privacy rights of deceased individuals.

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 unlisted factor identified in Order M-50 should only apply in exceptional circumstances. Nothing in the appellant's representations persuades me that the circumstances of this case would warrant the application of this unlisted factor. [Emphasis added.]

[39] Here, the appellant makes no reference to this factor in his representations, and the evidence indicates that the estate has been fully distributed. Given that disclosure is not required in connection with the administration of the estate, and no other evidence supports the application of this factor, I am unable to conclude that this is one of the "exceptional circumstances" where it would apply, and I find that it does not.

[40] Accordingly, I find that no factors favouring disclosure in section 21(2) are established.

[41] In summary, as section 21(4) does not apply and no factors favouring disclosure are established under section 21(2), I find that the exception in section 21(1)(f) is not established and the records are exempt under section 21(1). If the ledger extract were at issue I would make this same finding regarding it, for the reasons given above.

Issue C. Did the PGT conduct a reasonable search for records?

[42] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[43] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁰

[44] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which

⁹ Orders P-85, P-221 and PO-1954-I.

¹⁰ Orders P-624 and PO-2559.

are reasonably related to the request.¹¹

[45] As noted in the Overview section, above, the appellant claimed, during mediation, that additional records relating to the account balance exist. In my consideration of the preliminary issue of responsiveness, I found that additional records relating to the account balance would not be responsive.

[46] The PGT explains that the staff member with carriage of the estate file reviewed the heirship file and compiled the responsive records. The PGT submits that the records it has identified “. . . contain all the information responsive to the appellant’s request. There are no additional or ‘missing’ records.”

[47] The appellant provides no representations on this issue.

[48] Given my finding that additional records relating to the account balance would not be responsive, the PGT was not required to search for them.

[49] Based on its representations, I find that the PGT conducted a reasonable search.

Issue D. Should the additional relief requested by the appellant in his representations be granted?

[50] As already noted, the appellant requests an order under section 54(3) requiring the PGT to “accurately and clearly indicate in a response to a Freedom of Information request whether the beneficiaries of an estate have been ‘identified’, ‘located’ ‘contacted’, and whether the estate has been fully administered and the proceeds of the estate have been fully distributed.”

[51] He bases this on allegedly incorrect information provided to him by the PGT in this appeal. He notes that, in response to his request, the PGT initially stated that it “has conducted a search for records requested and has identified and contacted the beneficiaries of this estate; accordingly, there is no benefit to unknown heirs and access to the records is denied. . . .” He cites the PGT’s correspondence, during the mediation of this appeal, advising that the estate has been fully paid out, accompanied by the ledger extract, as evidence that the PGT’s initial statement was incorrect.

[52] In my view of this sequence of events, the PGT provided additional information at mediation that supplemented what it said in its decision letter. I see no contradiction in the two statements, and I disagree with the appellant that the initial statement by the PGT was incorrect simply because it did not mention that the estate had been paid out.

¹¹ Orders M-909, PO-2469 and PO-2592.

[53] In any event, the required contents of decisions denying access to records are stipulated in section 29(1)(b) of the *Act*. This section states:

Notice of refusal to give access to a record or a part thereof under section 26 shall set out,

where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

[54] The PGT's decision contains all of these elements. The appellant's requested relief would be, in effect, an order requiring the PGT to provide additional pre-determined information about the status of an estate in circumstances where the appellant knows the identity of the deceased, and where access is being denied because the PGT concludes that there would be no benefit to unknown heirs.

[55] In my view, as long as the PGT provides the information required by section 29(1)(b), there is no basis, in the arguments advanced by the appellant, to require the PGT to adopt the phraseology requested by the appellant in its decision letters. Nor is it necessary for all descriptions of similar circumstances to be identical to each other. The PGT has multiple staff and deals with multiple access requests. In the circumstances, such a requirement would not be reasonable.

[56] The appellant's request for an order requiring the PGT to provide the information described by the appellant, above, in the PGT's decision letters, is denied.

ORDER:

This appeal is dismissed.

Original Signed by: _____

John Higgins
Adjudicator

February 28, 2017 _____